

Security Council Powers and the Exigencies of Justice after War

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I. Introduction

The discharge of the Chapter VII powers of the UN Security Council is currently questioned by different developments. The debate about the crisis of international law refers in particular to the UN collective security system. This debate was provoked by concerns about increasing unilateralism by military and/or economic powerful states (“new wave of unilateralism”)¹ and raised doubts about the capacity of international law to counter the challenges posed by states that try to attain their aims irrespective of international law and the international system, in particular in case such unilateralism was somehow caused by the paralysis of the Security Council to take effective measures. If the UN Charter is the nucleus of a constitutionalisation of the international community² with respect to basic values like human rights and the prohibition of the use of force, unilateralism shakes the very basis of the UN collective security system and of the role of its Security Council to be the principal executive of the collective will of the international community of states.

The second development challenging the Security Council powers is an emerging, closely related discussion about the demands of post-war/post-conflict justice caused by the experiences in multilateral peace restoration since the 1990s. The requirements for establishing a stable society after armed conflicts considerably influence the way the Security Council may exercise its responsibilities. This discussion calls for an identification of exigencies of post-war governance which must be considered by the Security Council when exercising its powers. The exigencies of justice after war could form peculiar constraints to the Chapter VII powers. From this perspective, it is the very aim of the UN to maintain and restore peace and security which poses some questions

¹ P.M. Dupuy, “The Place and Role of Unilateralism in Contemporary International Law”, *EJIL* 11 (2000), 19 et seq. (25).

² J. Crawford, “The Charter of the UN as a Constitution”, in: H. Fox (ed.), *The Changing Constitution of the United Nations*, 1997, 1; B. Faßbender, *UN Security Council Reform and the Right to Veto*, 1998, 129 et seq.; Id., “The United Nations Charter as Constitution of the International Community”, *Colum. J. Transnat’l L.* 36 (1998), 529 et seq.; W. Graf Vitzthum, in: B. Simma et al. (eds), *The Charter of the United Nations. A Commentary. Vol. I*, 2nd edition 2002, Article 2 (6) Mn. 20; M. Herdegen, “The Constitutionalization of the UN Security System”, *Vand. J. Transnat’l L.* 27 (1994), 135 et seq.

about the way the Security Council handles its enforcement powers in new contexts like international territorial administrations.

These issues appear to be increasingly relevant. The number of Chapter VII resolutions remarkably increased in the 1990s.³ An interpretation of the Security Council powers under Chapter VII which would limit them in a way so that the Security Council could only condemn the unlawful use of force, command the restoration of the *status quo ante* (which usually is seen to be the *status iuris*) and exercise its powers accordingly, would sharply contrast to the experiences gained in the years since 1990 which should result in formulating better strategies of peace building.

Against the backdrop of these challenges to the exercise of the Security Council powers, the present article tries to analyse the character and the legal constraints of the powers *de lege lata*⁴ with a particular focus on the exigencies of creating durable post-conflict scenarios. In order to identify the general constraints for the exercise of Security Council powers and to assign the peculiar limits by the demands of establishing post-war justice, the article initially will characterise, from a general perspective, the Security Council powers under Chapter VII. This also requires shedding some light on the functions and role of the Security Council in the contemporary collective security system. Its role can be highlighted in particular when considering situations in which the Security Council is challenged by unilateral use of force.

Therefore, Section II. will first develop – as the core premise of this article – a constitutive understanding of the Security Council powers under Chapter VII, considering also the changing functions of the Council reflecting the changing conceptions of peace. The constitutive understanding of these powers implies a flexible and purposive interpretation. Second, the decisive role of the Council in countering challenges to peace and security will be exemplified against the backdrop of unilateral use of force. Arguments will be developed hostile to the lawfulness of unilateral recourse to force stressing the peculiar role of the UN Security Council for the enforcement of the common will. Section

³ P. Wallenstein/ P. Johansson, “Security Council Decisions in Perspective”, in: D.M. Malone (ed.), *The UN Security Council*, 2004, 17 et seq. (27).

⁴ A reform of the UN system does not seem to be in reach irrespective of the ongoing debate. Regarding the attempts to reform the UN Security Council see B. Faßbender, “All Illusions Shattered? Looking Back on a Decade of Failed Attempts to Reform the UN Security Council”, *Max Planck UNYB* 7 (2003), 183 et seq.

III. will survey the different limits to the powers of the Security Council. Finally, Section IV. will develop the limiting effects of the demands of justice after war to the Security Council powers of peace restoration. A final conclusion will assemble the core results of this study to a – hopefully – congruent picture of the character and the confines of the Security Council powers.

II. The UN Security Council – its Powers, Functions, and Role within Collective Security

1. The Powers and Functions of the Security Council

a. Constitutive Powers of the Security Council under Chapter VII

From among the many examples that raised concerns about the scope of the UN Security Council powers, two recent incidents shall briefly be mentioned here: the NATO air campaign in Kosovo and the latest Iraq war.

The NATO campaign Operation Allied Force in 1999 ignited a debate about the power of the Security Council under Chapter VII of the UN Charter to retroactively validate previous non-authorized use of force. Security Council Resolution 1244 on Kosovo was seen by some writers at least to present some form of implicit retroactive validation because the Security Council did not question the way armed hostilities had been terminated in Yugoslavia. Instead, the Security Council supported the situation attained by NATO's unilateral use of force by establishing the Kosovo Force (KFOR) and the UN Interim Administration in Kosovo.⁵ Other scholars, however, did not accept interpreting

⁵ C. Stahn, "Enforcement of the Collective Will After Iraq", in: ASIL (ed.), *Future Implications of the Iraq Conflict*, 2004, 92 et seq. (100) [= *AJIL* 97 (2003), 804 et seq.]; see also A. Pellet, "Brief Remarks on the Unilateral Use of Force", *EJIL* 11 (2000), 386 et seq. (387, 389); R. Wedgwood, "Unilateral Action in the UN System", *EJIL* 11 (2000), 349 et seq. (359). Stahn mentions some more examples of an alleged retroactive endorsement of unilateral actions by the Security Council; this evaluation nevertheless is dubitable, to say the least, cf. the contrasting views of V. Gowlland-Debbas, "The Limits of Unilateral Enforcement of Community Objectives in the Framework of UN Peace Maintenance", *EJIL* 11 (2000), 361 et seq. (375) and E. de Wet, *The Chapter VII Powers of the United Nations Security Council*, 2004, 298-304.

Resolution 1244 to be a justification *ex post facto*.⁶ In contrast, the view was presented that acts and resolutions taken by the Security Council subsequent to the illegal use of force were themselves illegal as well, because (and insofar as) they were based on the previous unilateral breach of international law by the NATO and on the endorsement of, for example the Military Agreement concluded between KFOR and Yugoslavia, and obtained through the illegal use of force contrary to article 52 Vienna Convention on the Law of Treaties (hereinafter VCLT).⁷ In this view the Security Council cannot validate agreements obtained through previous illegal military threats that are void under article 52 VCLT since this was a peremptory norm of international law.⁸ Others proclaim that as soon as the UN takes action after an unauthorised use of force in order to restore peace and security the Security Council is then obliged to *ex post facto* to authorise the previous unilateral intervention in conformity with the requirements of good faith. The UN would act in bad faith if it profited from illegally gained advantages and by that perpetuated the illegally created situation.⁹

The United States and the United Kingdom led invasion in Iraq in 2003 and the steps taken thereafter reinforced a discussion about the legal limits of the powers of the Security Council and the ways how to lawfully restore peace after a unilateral use of force. It was debated how the Security Council could deal with an international *status quo* resulting from previous illegal force, in particular whether the Council could take a situation resulting from illegal force as a starting point for an international crisis solution mandated (or contributed to) by the UN. For, this could mean building peace on prior unlawful force thus endorsing the consequences of illegal intervention. The Security Council resolutions on Iraq are subject to very critical consideration.¹⁰ This time at least there seems to be consent that the Security Council did not retro-

⁶ Gowlland-Debbas, see note 5; E. Milano, "Security Council Action in the Balkans: Reviewing the Legality of Kosovo's Territorial Status", *EJIL* 14 (2003), 999 et seq. (1013); A. Orakhelashvili, "The Impact of Peremptory Norms on the Interpretation and Application of UN Security Council Resolutions", *EJIL* 16 (2005), 59 et seq. (75).

⁷ Milano, see note 6, 1015-1018.; see also Gowlland-Debbas, see note 5, 376.

⁸ Orakhelashvili, see note 6, 74.

⁹ C. Walter, *Vereinte Nationen und Regionalorganisationen*, 1996, 308.

¹⁰ See e.g. A. Constantinides, *An Overview of Legal Restraints on Security Council Chapter VII Action with a Focus on Post-Conflict Iraq* <<http://www.esil-sedi.eu/english/pdf/Constantinides.PDF>>.

actively validate the use of force by the United States and its allies.¹¹ But beyond that, everything appears to be contested as regards the treatment of the crisis by the Security Council.

The starting point for any attempt to analyse the Security Council powers is the quite general type of wording of the articles contained in Chapter VII of the UN Charter equipping the Security Council with extensive and comprehensive powers and bestowing it with apparently unlimited discretion. According to Article 39, the Security Council shall *determine*, shall make recommendations, or *decide* the measures to be taken. The Security Council may *decide* about certain measures under Article 41, and if *it considers* them inadequate *it may take such action as may be necessary to maintain or restore international peace and security* (Article 42). Indeed, the powers of the Security Council to deal with international conflicts are constitutive and almost exclusive (as it has the primary responsibility for the maintenance of peace and security according to Article 24 UN Charter and the sole enforcement power under Chapter VII) so that the Security Council must enjoy the capability and the power to decide on the necessary steps for the settlement of a given conflict and on the restoration of international peace and security thereafter, irrespective of the pre-history of that conflict. The powers of the Security Council have to be interpreted against the need for effective protection of basic values like international peace. Effectiveness underpins the Charter regime, at least as regards maintenance of peace and security (see the first words of Article 24 UN Charter). The ICJ once affirmatively cited the Secretary-General stating that the Security Council powers were not restricted to those specific grants of authority contained in Chapter VI, VII, VIII and XII, but the Member States conferred on the Security Council powers commensurate with its responsibility for the maintenance of peace and security. The only limitations that were mentioned there were the fundamental principles and purposes found in Chapter I of the Charter.¹² The broad, purpose-oriented interpretation of the Security Council Chapter VII powers is endorsed by the more or less undisputed power of the Security Council to authorise the use of force by Member States although

¹¹ See i.a. A. Orakhelashvili, "The Post-War Settlement in Iraq: The UN Security Council Resolution 1483 (2003) and General International Law", *Journal of Conflict & Security Law* 8 (2003), 307 et seq. (310); Stahn, see note 5, 105, fn. 94.

¹² Legal Consequences for States of the Continued Presence of South Africa in Namibia (Namibia Case), ICJ Reports 1971, 16 et seq. (para. 110).

the precise legal basis for this in the Charter is not clear.¹³ Another hint is the fact that the Security Council may reconstruct and rebuild peace not in conformity with the view of the people or nations assisted by the United Nations.¹⁴ A broad interpretation is further evidenced by the practice of the Security Council to subsume internal situations under Article 39 UN Charter.¹⁵ When a state commits cruelties in such a way as to deny the fundamental human rights of its nationals and to shock the conscience of mankind, the situation ceases to be of sole concern to that state.¹⁶ For this reason, it cannot be argued that the Security Council would not enjoy powers in case of purely internal conflicts.

An important corollary of the constitutive character of the UN Security Council powers is the irrelevance of the unlawfulness of previous actions of other actors. The requirements of the efficient restoration of international peace and security in conformity with Article 39 UN Charter might – at first sight – even contradict the requirements of the

¹³ The legal basis for an authorisation can be seen either in implied powers or can be attributed to Arts 42, 48 UN Charter. For a detailed analysis see de Wet, see note 5, 260 et seq.; D. Sarooshi, *The United Nations and the Development of Collective Security*, 2000; see also J.A. Frowein/ N. Krisch, in: B. Simma et al (eds), *The Charter of the United Nations. A Commentary. Vol. I*, 2nd edition 2002, Article 42 Mn. 20; J. Gardam, “Legal Restraints on Security Council Military Enforcement Action”, *Mich. J. Int’l L.* 17 (1996), 285 et seq. (287 et seq.); V. Gowlland-Debbas, *Collective Responses to Illegal Acts in International Law*, 1990, 416 et seq. (421 et seq.); C. Gray, “From Unity to Polarization: International Law and the Use of Force against Iraq”, *EJIL* 13 (2002), 1 et seq. (3). Nowadays the power to authorise is so widely accepted that it is taken for granted, see e.g. J. Stromseth/ D. Wippman/ R. Brooks, *Can Might Make Rights? Building the Rule of Law After Military Interventions*, 2006, 22.

¹⁴ See C. Chinkin, “The state that acts alone: bully, good Samaritan or iconoclast?”, *EJIL* 11 (2000), 31 et seq. (39).

¹⁵ Examples for Security Council resolutions that regarded a purely internal crisis as a threat to peace and security in the sense of Article 39 and by which the UN Security Council authorised use of force are S/RES/794 (1992) of 3 December 1992 on Somalia, S/RES/940 (1994) of 31 July 1994 on Haiti, S/RES/929 (1994) of 22 June 1994 on Rwanda and S/RES/1264 (1999) of 15 September 1999 on East Timor. For more detail see C. Gray, see note 13, 1 et seq. (3 et seq.) and I. Österdahl, “The Exception as the Rule: Lawmaking on Force and Human Rights by the UN Security Council”, *Journal of Conflict & Security Law* 10 (2005), 1 et seq. (2 et seq.).

¹⁶ R. Jennings/ A. Watts, *Oppenheim’s International Law, Volume I*, 9th edition 1992, 333.

legality or even of the legitimacy of the resolve of a threat or breach of peace, security or other basic values. Irrespective of the question as to whether the Security Council can retroactively justify any unilateral illegal act or its consequences (a power which is rejected by some writers),¹⁷ the fact that the Security Council takes advantage of previous illegal acts and promotes their success does not amount to a legal *obligation* to authorise *ex post facto* the unilateral actions because the Security Council in exercising its duties has to respond to the crisis and to the situation created by the unilateral use of force in some way. The Security Council is faced with a *fait accompli* and, as a result, it is forced to make the best of this situation which developed without its consent or involvement.¹⁸ In such a case the Security Council cannot be reproached for building upon the military advantages reached by previous unilateral illegal acts in its response to those acts and to the given circumstances of the respective crisis. The military situation resulting from the unilateral recourse to force is not more than a mere fact resulting in a new *status quo* that the Security Council has to take into consideration. In no way is there a legal obligation to legalise un-authorised (and therefore illegal) use of force¹⁹ nor can succeeding actions by the Security Council that build upon the situation created by the use of force be seen as an implicit legalisation. The Security Council would contradict the core character of the UN Charter of the prohibition of the unilateral use of force if it generally would legalise *ex post facto* such force. This statement, however, does not exclude that the Security Council may lawfully retroactively legalise unilateral force in particular circumstances or may lawfully build on the situation obtained by illegal force.

The constitutive nature of the Chapter VII powers implies that the Security Council is allowed to deviate from international legal obligations or rights under international customary or treaty law. The notion of enforcement inherently implies the authority of derogation from international law, in particular to infringe on the sovereign rights of the target states (the states where the threat or breach of peace occurs) or to impact on the rights and duties of the UN Member States as long as the

¹⁷ H. Körbs, *Die Friedenssicherung durch die Vereinten Nationen und Regionalorganisationen nach Kapitel VIII*, 1997, 537. Against his position de Wet, see note 5, 296.

¹⁸ De Wet, see note 5, 297.

¹⁹ Regarding the non-existence of such obligations for the UN Security Council see i.a. Österdahl, see note 15, 1 et seq. (14).

Security Council acts for the maintenance and restoration of international peace and security as required by Article 39 UN Charter.

This task of the UN Security Council referring to the Charter principles themselves is the ultimate legal constraint for the Security Council in exercising its discretionary powers. This does not mean that the Security Council is above the law. But the Security Council acts under the authority of the UN law which is more than a common international treaty (as it is the nucleus of a constitutionalisation of an international community of states). It is the very international law enshrined in the Charter that allows the Security Council to surrender any legal obligation to the core aim of maintaining and restoring peace.²⁰ In Kelsen's words, "The Council may create new law for the concrete case".²¹ This statement concisely describes the essence of the constitutive character of the Chapter VII powers. Therefore, authorisations by the Security Council preclude the illegality of acts taken in conformity with the mandate and suspend rules of contemporary international customary law and treaty obligations (apart from peremptory norms and limitations contained in the Charter itself).²² An argument in favour of the power of the Security Council to affect the rights and positions of the states concerned can also be drawn from Article 40 UN Charter which clarifies that provisional measures taken before enforcement measures according to Arts 41 or 42 "shall be without prejudice to the rights, claims, or positions of the parties concerned". *E contrario* this means that enforcement measures will have an impact on the rights and positions. The priority of UN law and, accordingly, of Security Council measures under Chapter VII over other obligations of international law is also expressed in Article 103 UN Charter; the priority of UN law is not limited to treaty obligations²³ and applies also to authorisations by

²⁰ See T.D. Gill, "Legal and Some Political Limitations on the Power of the UN Security Council to Exercise Its Enforcement Powers Under the Chapter VII of the Charter", *NYIL* 26 (1995), 33 et seq. (62 et seq.); V. Gowlland-Debbas, "Security Council Enforcement Action and Issues of State Responsibility", *ICLQ* 43 (1994), 55 et seq. (78); Orakhelashvili, see note 6, 61. See also ICJ Reports 1971, see note 12, 16 et seq. (paras 112 et seq.)

²¹ H. Kelsen, *The Law of the United Nations*, 1951, 295.

²² Gowlland-Debbas, see note 5, 370. It is not contested that states can contract out of customary law.

²³ See R. Bernhardt, in: B. Simma et al. (eds), *The Charter of the United Nations. A Commentary. Vol. II*, 2nd edition 2002, Article 103 Mn. 21.

the Security Council.²⁴ As these considerations are true for authorisations, they must be even more true for actions of the Security Council itself. This may, in peculiar circumstances, also include the endorsement of previous illegal actions like the unilateral use of military force by certain states or of agreements obtained by unlawful military threats. For, it would be formal to deny the validating effect solely on the ground that the Security Council resolution was taken in arrears. Admittedly, prior authorisation and retrospective validations are different situations. What is decisive, however, is for the Security Council to affirm that the unilateral act is to be in accordance with the ends of the United Nations. Whether this happens in advance or in arrears, does not appear to make such fundamental difference.²⁵ The retroactive validation also does not contradict peremptory norms²⁶ since the peremptory prohibition of the use of force only obliges states, not the United Nations as an organisation when acting under Chapter VII (see the wording of Article 2 (4) UN Charter) acknowledging and adopting the use of force in question as its own (see *mutatis mutandis* article 11 of the Rules on State Responsibility).²⁷ Furthermore, rules like article 52 VCLT which declare void coercively imposed treaties, do not apply in case of force in accordance with the Charter (which is the case in situations of retroactive authorisation, see the wording of article 52). Furthermore, and decisive in cases which lack *ex-post* authorisation, here rules like article 52 VCLT appear not to be applicable to Chapter VII measures due to article 75 VCLT or article 76 of the Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations.²⁸ The sanction of nullity does not apply to a treaty imposed by the United Nations in the course of enforcement ac-

²⁴ R. Kolb, "Does Article 103 of the Charter of the United Nations Apply only to Decisions or also to Authorizations Adopted by the Security Council?", *ZaöRV* 64 (2004), 21 et seq.

²⁵ *Contra* Orakhelashvili, see note 6, 75.

²⁶ *Contra* Milano, see note 6, 1015-1018; Orakhelashvili, see note 6, 74 with further references.

²⁷ Responsibility of States for Internationally Wrongful Acts, A/RES/56/83 of 12 December 2001.

²⁸ Article 75 VCLT only refers to the aggressor state and to treaty obligations arising for the aggressor state in consequence of UN measures. But this rule must also refer to the other state party to such treaty as otherwise the effect of Article 75 was incomplete and unbalanced and would restrain the powers of the UN Security Council under Chapter VII.

tion;²⁹ and this must also apply in case a void treaty is confirmed by succeeding Security Council resolutions under Chapter VII. The validity of such agreement derives from the constitutive nature of the powers of the Security Council and does not depend on the retroactive validation of the previous illegal unilateral use of force which led to the treaty. Although pure recommendations are said not to be governed by Article 25 UN Charter as they are not mandatory in nature, they also have the effect of rendering unlawful acts lawful.³⁰

Allowing the Security Council to derogate from international law does not contradict the explicit affirmation of principles of justice and international law in Article 1 (1) UN Charter. In contrast, the broad, purpose- and effectiveness-oriented interpretation of the powers of the Security Council under Chapter VII is confirmed when looking at Article 1 (1) and the drafting history thereto. According to Article 1 (1) the UN may, in order to maintain peace and security, take effective collective measures and use peaceful means to adjust or settle disputes. The requirement of conformity with principles of justice and international law is mentioned only in the context of the peaceful settlement of disputes, not in the context of collective measures thus confirming the powers of the Security Council acting under Chapter VII to derogate from international law. The requirement of conformity with justice and international law principles was inserted intentionally in order to narrow the discretionary powers of the organs concerned with the peaceful settlement of disputes and situations which might lead to a breach of peace³¹ which means that these are situations which have not yet reached the stage necessary for the applicability of Chapter VII enforcement powers. In contrast, the political considerations of the United Nations when adopting collective enforcement measures under Chapter VII were not limited. The Security Council should have the power to end hostilities (almost) without considering issues of law since

²⁹ M.H. Mendelsohn/ S.C. Hulton, "The Iraq-Kuwait Boundary", *BYIL* 64 (1993), 135 et seq. (149 et seq.). See also R.G. Steinhardt, "The Potsdam Accord – Ex Nihilo Nihil Fit?", *Friedenswarte* 72 (1997), 29 et seq. (44) who points to the fact that "in the era of the UN Charter ... there will inevitably be ambivalence about the legality of peace treaties concluding with a losing party whose battlefield fortunes leave it no room to negotiate."

³⁰ Gowlland-Debbas, see note 5, 371; contra J.E.S. Fawcett, "Security Council Resolutions on Rhodesia", *BYIL* 41 (1965-1966), 103 et seq. (121).

³¹ R. Wolfrum, in: B. Simma et al. (eds), *The Charter of the United Nations. A Commentary. Vol. I*, 2nd edition 2002, Article 1 Mn. 18.

the process of defining justice would entail delays.³² The hands of the Security Council should not be tied. It should enjoy maximum flexibility in the application of collective enforcement measures when maintaining or restoring peace.³³ For this reason, there was agreement at the San Francisco Conference not to accept any definition of the terms “any threat to the peace, breach of the peace or act of aggression” since general definitions might be applicable in one case but not in another.³⁴

The capability to deviate from international law implies that the Security Council may not order the restoration of the *status quo ante* which usually is the *status quo iuris*. The Security Council is neither obliged nor confined to order the restoration of the *status quo ante*. The Security Council’s deliberations on the useful and necessary means and steps to overcome an international crisis may and usually will take into consideration the *status quo ante*. Primarily, however, the Security Council is to be led by its concern about restoration or maintenance of peace and security. The restoration of the *status quo ante* might be destructive in that context and not serve the objective of peace restoration, in particular, if the former *status quo* caused the crisis. The goal of Security Council actions then must be a more secure state of affairs.³⁵ For this reason, the unlawfulness of a previous unilateral action does not

³² Wolfrum, see note 31, Article 1 Mn. 19. See the discussion in *Documents of the United Nations Conference on International Organization, Vol. VI*, reprint 1998, 12 et seq., in particular 23-33.

³³ Gill, see note 20, 65 et seq.; de Wet, see note 5, 186 points to a discussion in the committee on the Security Council at San Francisco where a Norwegian proposal on limiting the enforcement powers of the Security Council was dropped because of the reference to justice and international law in Article 1 (1) which was seen to oblige also the Security Council. This discussion, however, was far from being conclusive, see D. Akande, “The International Court of Justice and the Security Council: Is there Room for Judicial Control of Decisions of the Political Organs of the United Nations?”, *ICLQ* 46 (1997), 309 et seq. (320). Therefore, one must be careful in deriving conclusions from this regarding accepted limits for Security Council enforcement powers. This discussion can only be understood as reflecting unity that even enforcement measures are not above basic demands of international law.

³⁴ See Gowlland-Debbas, see note 13, 452.

³⁵ See also B. Faßbender, “Uncertain Steps into a Post-Cold War World: The Role and Functioning of the UN Security Council after a Decade of Measures against Iraq”, *EJIL* 13 (2002), 273 et seq. (296 et seq.); B. Orend, “Justice after War”, *Ethics & International Affairs* 16 (2002) 43 et seq. (45); M. Walzer, *Just and Unjust Wars*, 3rd edition 2000, 119.

and cannot infect all measures subsequently taken by the Security Council, even if those steps do not call for a restoration of the *status quo ante* but seek to resolve the conflict in a way that could endorse the unilateral act, and might even validate it retrospectively building a solution to the crisis upon the situation created by the unilateral act.

The fact that the discretion of the Security Council is not restricted to the restoration of the *status quo ante* is confirmed by UN Security Council practice. Since the beginning of the UN, the Security Council almost always limited its reactions to unlawful use of force to a call for ceasefires and restoration of peace and in several cases avoided condemnation of aggressive states and the imputation of responsibility.³⁶ The cases are very rare in which the Security Council ordered (even forceful) restoration of the *status quo ante*. The Security Council action against Iraq after Iraq tried to annex Kuwait is almost the only example of a forceful restoration of the *status quo ante*.³⁷ This practice endorses that the restoration of peace and security does not necessarily presuppose the restoration of the *status quo ante*.

In sum, it can be stated that the Chapter VII powers are constitutive in nature. In order to reach their vital objective effectively, their discharge is primarily guided by their aim of peace restoration or maintenance.

³⁶ Gowlland-Debbas, see note 13, 468 et seq.; see also S. Ratner, "Foreign Occupation and International Territorial Administration: The Challenges of Convergence", *EJIL* 16 (2005), 695 et seq. (700).

³⁷ The first resolution following the attack by Iraq, S/RES/660 (1990) of 2 August 1990, demanded Iraq to withdraw immediately all forces to the positions in which they were located before the conflict. Resolution S/RES/678 (1990) of 29 November 1990 then authorised to use all necessary means to reaffirm Resolution 660 and to implement this and the subsequent Security Council resolutions. The controversy over the question whether Resolution 678 mandated an enforcement action under Chapter VII or endorsed collective self-defence shall be left aside here. Other examples of Security Council resolutions ordering the restoration of the *status quo ante* refer to the status of Jerusalem and to the Syrian Golan Heights, see S/RES/476 (1980) of 30 June 1980 and S/RES/497 (1981) of 17 December 1981. An example for conflict solutions that did not return to the *status quo ante* are the UN resolutions on Southern Rhodesia, cf. Gowlland-Debbas, see note 13, 472.

b. Security Council Functions and the Changing Notion of Peace

Since the purpose of the Chapter VII powers to restore international peace and security is of primary importance for their interpretation and since the exercise of these powers is released by unilateral, illegal recourse to force or other modes of breaching peace, the notion and concept of peace is crucial. It inevitably influences the scope of the powers of the Security Council. The more the concept of peace expanded beyond the mere absence of force³⁸ and embraced broader concepts like a stable social and public order allowing people to act in self-determination, the broader the powers of the Security Council have to be developed. Therefore, the determination of the notion of peace is decisive for the Security Council and its powers. In order to enable the Security Council to exercise its powers in a useful way that corresponds to the very *raison d'être* (to maintain and restore peace and security), the Security Council must be empowered to consider the legal, social and economic prerequisites of sustainability of peace and security. There is a difference between merely stopping war and making peace.³⁹ Restoring international peace and security whose universal maintenance is the core aim of the United Nations requires the creation of a durable, stable and sustainable conflict free situation after war.

The last decades witnessed a development in which, due to the rising number and changing character of armed conflicts between states and even within states and between states and non-state actors, the international community increasingly became aware of the prerequisites of peace in a society and the different conditions of peace under peculiar circumstances.⁴⁰ The non-military sources of instability came within the ambit of the Security Council's competences. In the years since 1990 the Security Council increasingly employed its powers under Chapter VII in internal conflicts, humanitarian crises⁴¹ or new threats like ter-

³⁸ As was the definition of peace by Kelsen, see note 21, 19.

³⁹ See W.M. Reisman, "Stopping War and Making Peace: Reflections on the Ideology and Practice of Conflict Termination in Contemporary World Politics", *Tul. J. Int'l & Comp. L.* 16 (1998), 5 et seq. (15-29).

⁴⁰ See the former Secretary-General Boutros Boutros-Ghali's Report "An Agenda for Peace, Preventive Diplomacy, Peacemaking and Peace-Keeping", Doc. A/47/277-S/24111 of 17 June 1992, 22 where he identifies the need to include comprehensive efforts to support structures that consolidate peace and advance a sense of confidence and well-being.

⁴¹ Already at the San Francisco Conference in 1945, there was awareness that sincere human rights violation could amount to a threat to peace, actually

rorism thus determining such situations to be threats to international peace which implies a teleological, dynamic understanding of “international peace” requiring for example respect for basic human rights, far beyond the mere absence of armed hostilities.⁴² This also indicates a change in the notion of the type of peace which has to be restored after armed hostilities. Therefore, the Security Council must be in a position to take account of different requirements in order to be able to exercise its powers of peace restoration effectively. Even a broad notion of peace and a purpose-oriented interpretation of the powers of the Security Council, however, cannot cover up the prerequisites of the Security Council powers under Chapter VII as contained in Article 39 UN Charter.

A broad notion of peace can only direct the exercise of the Security Council powers in the restoration of peace if a situation amounts to a crisis that has the potential to spark international armed hostilities in the short or medium term.⁴³ For a situation to be regarded as a threat to peace requires at least some violence. The wording and the purpose of the Security Council powers prohibit refraining from the requirement of a link between a threat to peace and a danger of armed hostilities. Otherwise, the Security Council would turn from being a peace enforcer to a law enforcer.⁴⁴ A broad understanding of the Security Council Chapter VII powers includes the capacity of the Council to deal with long term, structural causes of threats to peace in order to restore peace in a given situation once the scope of application of its powers is opened.

In advocating a purpose-oriented interpretation of the Security Council powers by recourse to a broad notion of peace, the post-

not surprising after the Holocaust. See Stromseth/ Wippman/ Brooks, see note 13, 24, fn. 11.

⁴² See S.R. Ratner, “The Security Council and International Law”, in: Malone, see note 3, 595-598.

⁴³ de Wet, see note 5, 139 et seq.

⁴⁴ Admittedly, the practice of the Security Council shows that it uses its Chapter VII powers also for law enforcement purposes (see for example Gowlland-Debbas, see note 13, 471 et seq.; Ratner, see note 42, 601). This, however, must not be the sole objective of a Security Council action under Chapter VII. The Security Council is not hindered to consider, *inter alia*, issues of law enforcement when determining a situation to be a threat to peace. Regarding the double strategy of the Security Council when acting under Chapter VII see in more detail de Wet, see note 5, 150 et seq.

conflict settlement function of the Security Council⁴⁵ becomes important. This function of the Security Council is highlighted by measures taken by the Security Council in order to create the conditions for lasting and steadfast peace in its resolutions providing for disarmament,⁴⁶ establishing *ad hoc* criminal tribunals,⁴⁷ compensation commissions⁴⁸ and UN administrations.⁴⁹ Provisional administration by the United Nations was in fact contemplated in the drafting of the UN Charter. A proposal to accordingly amend the Chapter VII powers was withdrawn out of a concern that such specific inclusion would prepare ground for an argument of implicit exclusion of other powers not listed.⁵⁰

In its post-conflict settlement function, the Security Council deals with issues of justice and law after armed hostilities have been terminated. Such issues are part of peace restoration. The objections to a positive notion of peace⁵¹ go beyond what is necessary to keep the contour of the UN Charter and to determine definable limits of the Security Council powers. Attributing positive contents to the term peace in

⁴⁵ Regarding the “post-conflict settlement function” of the UN Security Council see Stahn, see note 5, 94, 111. On peacebuilding generally see J. Galtung, “Three Approaches to Peace: Peacekeeping, Peacemaking and Peacebuilding”, id. (ed.), *Essays in Peace Research. Vol. II: Peace, War and Defence*, 1976, 282; F.O. Hampson, *Nurturing Peace: Why Peace Settlements Succeed or Fail*, 1996; P.R. Pillar, *Negotiating Peace: War Termination as a Bargaining Process*, 1983; J. Taylor, *How Wars End*, 1985. For the interplay between a broad description of peace and new roles for the Security Council see also Faßbender, see note 35, 296 et seq.

⁴⁶ See with respect to the Iraq Resolution S/RES/687 (1991) of 3 April 1991.

⁴⁷ S/RES/827 (1993) of 25 May 1993 and S/RES/955 (1994) of 8 November 1994 with respect to Former Yugoslavia and Rwanda.

⁴⁸ S/RES/687 (1991) of 3 April 1991. For doubts regarding the legality of the exercise of the Security Council powers insofar due to the lack of independence of the commission, shortcomings in the equality of arms and in the right to be heard cf. de Wet, see note 5, 359-362.

⁴⁹ S/RES/1037 (1996) of 15 January 1996, S/RES/1244 (1999) of 10 June 1999, S/RES/1272 (1999) of 25 October 1999 and S/RES/1410 (2002) of 17 May 2002 with respect to Eastern Slavonia, Kosovo and East Timor. For more detail see de Wet, see note 5, 311 et seq. Cf. also R. Wolfrum, “International Administration in Post-Conflict Situations by the United Nations and Other International Actors”, *Max Planck UNYB* 9 (2005) 649 et seq. (668-672).

⁵⁰ S. Chesterman, *You the People. The UN, Transitional Administration, and State Building*, 2004, 50.

⁵¹ Raised e.g. by de Wet, see note 5, 140, 144.

Chapter VII does not mean that the discretion of the Security Council becomes unlimited or that one would de-link the threat to peace from the threat of an outbreak of an international armed conflict.⁵² Peace means more than silence of weapons, but silence of weapons is a necessary requirement for peace so that a threat to peace in the sense of Article 39 UN Charter requires a situation charged with the potential of an outbreak of an international armed conflict. The latter situation is a necessary condition for a threat to peace in the sense of Article 39, but its termination is not a sufficient object of peace restoration. Alternatively, one could differentiate the meaning of peace in Article 39 first part from that in Article 1 (1), Article 39 second part and Article 42 UN Charter.

Both the objective of bringing weapons to silence and of restoring sustainable peace⁵³ by building the necessary conditions, are therefore, embraced by the Chapter VII powers. The duty of the Security Council under Chapter VII to restore peace and security engenders a twofold function for the Security Council: first, a peace enforcing function which ends the military phase of armed conflicts, and then, second, a peace and stability building and organising function which directs reconstruction and reconciliation.⁵⁴ Both functions are addressed by the enforcement powers of the Security Council. They belong together and are closely inter-related. Military interventions require a post-intervention strategy.⁵⁵ The practice of the Security Council in the 1990s evidences the direct link between military intervention and subsequent reconstruction of the targeted state, considering, in particular, the international transitional administrations. Thus, a broad concept of peace not only favours a broad reading of the Security Council powers but also allows for a new understanding of the role of the Security Council after the silence of weapons has been restored. The Security Council has the task to create the conditions for lasting peace and security by altering the basic attitudes, aims or expectations of the belligerents, in particular in case of ethnically, culturally or economically motivated armed conflicts where the restoration of the *status quo ante* cannot solve the basic problems that prompted the conflict, not to mention additional problems and concerns caused by the violence.

⁵² As implied by de Wet, see note 5, 155.

⁵³ This term describes one of the objectives of UN peace operations.

⁵⁴ Regarding the latter Faßbender, see note 35, 279 et seq.

⁵⁵ See Chesterman, see note 50, 246.

The issues to be tackled are diverse and comprehensive, including *inter alia* and in different configurations, disarmament, prosecution and punishment of war criminals, restoration of the internal public order and legal security, repatriation of refugees, protection of human rights, economic and infrastructure reconstruction, monitoring elections and strengthening representative governmental institutions and processes of political participation. Thus, the changing notion of peace is even capable of influencing the responses of the Security Council to prior illegal acts and its determination of the necessary steps for peace enforcing measures given the subsequent task of building stable peace.

2. The Role of the Security Council, in Particular with Respect to Unilateral Force

Taken literally, unilateralism in the use of military force⁵⁶ is the opposite of common action which in contemporary international law means collective action by the UN Security Council or under its authorisation. Nevertheless one can differentiate between unilateral actions that pursue egoistic, even hegemonic motives and those that follow a common goal or value. Additionally, the settings under which unilateral acts may be taken can be different as regards the number of partaking or contributing states⁵⁷ and their motives, the reaction or even involvement of the directly affected “target” states and of other non-partakers be it acceptance or denial or something in-between, and the pre-history of a conflict and of (unilateral or collective) attempts to resolve it. Irrespec-

⁵⁶ On the term “unilateralism” see in more detail Dupuy, see note 1, 19 et seq. (20). Unilateral acts can be divided into acts intending or having legal meaning, i.e. acts by which a state unilaterally expresses consent to create a legal obligation, on the one hand, and unilateral real actions on the other hand, by which a state does not want to create legal obligations but unilaterally seeks to change a situation though this might cause legal consequences (like state responsibility). Regarding the former see A. Weingerl, “Definition of Unilateral Acts of States” under <<http://www.esil-sedi.eu/english/pdf/Weingerl.PDF>>. They are currently considered by the ILC.

⁵⁷ In the context of the NATO Kosovo intervention and its contested legitimacy the fact was emphasised that three of the five permanent members of the Security Council were involved in the recourse to force, see P. Hilpold, “Humanitarian Intervention: Is there a Need for a Legal Reappraisal?”, *EJIL* 12 (2001), 437 et seq. (448 et seq.) with further references.

tive of such factual discrepancies, one feature common to unilateral actions as understood here is the illegality of the unilateral action. Even unilateral acts that sincerely proclaim rather than merely pretend to enforce common values and common attempts of conflict resolution still fail to conform to the rules on the use of force laid down in international law, in particular the prohibition on the use of force in the UN Charter.

a. Unilateral Action and Community Objectives

In legal literature commentators have claimed that the legal assessment of the legitimacy, if not legality of the unilateral use of force could be influenced by its circumstances, motives and objectives and that there could be a category of unilateral illegal acts that in exceptional circumstances could be seen as lawful or at least acceptable thus not entailing legal sanctions.⁵⁸ From this perspective, there is a clear difference between a hegemonic unilateralism and a unilateral pursuit of common values of the international community (as expressed by Security Council resolutions and in line with them).⁵⁹ As convincing as such deliberations might appear at first sight, the problem remains that these or other factual differences do not alter the legal appraisal of the action. A state or a group of states that unilaterally pursues common values (previously defined by the Security Council) does not act differently to a hegemon that intentionally breaches rules of international law for its own profit. In both situations the unilateral act fails to follow the rule of law on the use of force and this must be decisive if the UN Charter and its basic values shall be seen as a constitutionalisation of an international community of states. The idea of legitimacy cannot overrule the given set of rules of international law. First and foremost, legitimacy in international law follows from rule-obedience, not from motives since the latter – being internal facts – are hardly controllable from outside. Even if the unilateral act might breach the law only in a formal sense (as the state or group of states used force without prior authorisation of the UN Security Council but [maybe] in material accordance with the aims of the UN and in line with the ends of the resolutions of the Security Council), it is still a breach of law because at least the means used to

⁵⁸ See for example T. Farer, “A Paradigm of Legitimate Intervention” in: L. Fidler Damrosch (ed.), *Enforcing Restraint: Collective Intervention in Internal Conflicts*, 1993, 317 et seq. (324 et seq.); Stahn, see note 5, 104.

⁵⁹ See Gowlland-Debbas, see note 5, 378 who nevertheless stresses that resort to force without express authorisation is prohibited.

pursue the common objectives are not in accordance with international law. The means only were in accordance with the resolutions if the Security Council had approved the use of force for attaining those aims. If it did not do so, the means used by the unilateral actor are beyond those accepted by the Council. Material and formal aspects of law cannot be divided. They belong inseparably together at least as long as core rules (like the prohibition of the use of force) are concerned. The formal rule of prior authorisation by the Security Council to use force serves a material objective. It ensures that the resolutions of the Security Council or the objectives of the United Nations are not misunderstood, misinterpreted or misused. Though the ends of an illegal unilateral act may be in line with community objectives and Security Council resolutions, the means are not.

One objection that might be raised here is that the legal assessment of actions against the background of certain rules is influenced by the understanding and interpretation of those rules shared among the nations (see article 31 (3) VCLT).⁶⁰ Accordingly, it may make a difference if an action of a state contradicts the wording of a norm but corresponds to the sense and spirit of the norm as interpreted by the international community. But still the decisive question is: who is the international community, in particular who is allowed to speak on its behalf and who defines the prevailing and therefore decisive legal opinion? In the UN system of conflict resolution, the international community of UN Member States established organs. Therefore, as the primary responsibility for the maintenance of international peace and security (Article 24 UN Charter) and the sole responsibility for the use of coercive force (outside self-defence) rest with the Security Council, the latter's assessment of means and ends is decisive. In case of its paralysis, there might be a residuary power of the General Assembly (see Arts 10, 12 UN Charter),⁶¹ but not of single states or regional organisations to pursue common values. Therefore, even if a representative group of states understands the unilateral act not to be illegal or illegitimate, this is not decisive for the legal appraisal of the illegal act or of its consequences under the UN Charter. Allowing unilateral acts because of their reference to UN aims and to Security Council resolutions does not guarantee that common values are aimed at and enforced. Beyond

⁶⁰ On the relevance of subsequent practice for Charter interpretation see G. Ress, in: B. Simma et al. (eds.), *The Charter of the United Nations. A Commentary. Vol. I*, 2nd edition 2002, Interpretation Mn. 27 et seq.

⁶¹ See also below under b.

the quite formal problem of misinterpreting and misunderstanding Security Council resolutions on a given conflict (and beyond the problem of misusing UN objectives and basic values of the international community in order to attain other aims),⁶² the fundamental substantive problem remains: if the Security Council did not authorise the use of coercive force to solve a certain dispute or conflict, the unilateral use of force does not correspond to the common values or objectives of the international community. In exercising its determination of common objectives in a given conflict and its discretion to choose the means of response⁶³ the Security Council did not include the use of force. The common objectives of the international community as defined in the UN Charter and the means and instruments to implement and enforce them are inseparably interlinked because it is the Security Council that defines which conflict endangers international peace and security and which measures have to be taken in order to remedy a situation threatening world peace and security. The reasons why the Security Council did or could not find unanimity for an authorisation of the use of force are not decisive. Irrespective of why the Security Council did not authorise use of force (either because of an imminent veto of a permanent member or because there was a common understanding of all or of a broad majority of Security Council members that the use of force would not resolve the conflict), the fact remains that the responsible organ of the international community acting in accordance with the relevant rules as set down in the UN Charter did not authorise use of force. And that is what matters. In such a situation one cannot undermine a permanent member's right to veto by accusing this member of using it illegitimately. Permanent members enjoy their right to veto not for their

⁶² In addition to substantive criteria of legitimacy (see e.g. Farer, see note 58, 327) there have been many proposals to introduce procedural safeguards in order to take care that common values are not misused or misapplied by states acting unilaterally, like e.g. majority decisions, transparent discourses, presentation of evidence of severe breaches of international law to the public or at least in the Security Council, contribution of a representative number of states, provision of collectiveness by the use of regional organisations, objectivity of actors and involvement of targeted states. See A. Cassese, "‘Ex Iniuria Ius Oritur’: Are We Moving Towards International Legitimation of Forcible Humanitarian Countermeasures in the World Community?", *EJIL* 10 (1999), 23; Hilpold, see note 57, 450, 455 et seq.; Stahn, see note 5, 103.

⁶³ See V. Gowlland-Debbas, "The Functions of the UN Security Council in the International Legal System", in: M. Byers (ed.), *The Role of Law in International Politics*, 2000, 277 et seq. (287).

own purposes. In using their powers the members are supposed to act in the interest of the United Nations and the community of states.⁶⁴ Even if a permanent member could misuse the veto power for selfish aims, the veto cannot be disregarded, for the sole reason not to enable misuse of (unilateral) force by others. Still it is the UN Security Council member's assessment to decide which response to a particular crisis is in the interest of the community of states.⁶⁵

Imparting a right to unilateral action on behalf of the international community to states or regional security organisations with the aim to forcefully enforce either community values expressed in the UN Charter or at least the alleged intention of Security Council resolutions would collide with this competence. The determination of reasons for enforcement actions is a centralised decision allocated to the Security Council.⁶⁶ Over-stepping its resolutions and powers by using unauthorised force does not amount to a pursuit of community objectives. The respect for the definition of community interests by the Security Council requires strict obedience to its resolutions and its implementation of UN objectives and relates both to the means and ends. The second guess of a group of states of what the United Nations objectives require in a crisis is irrelevant as the competence of legal appraisal of a crisis in the light of the UN objectives is vested in the United Nations and in particular in the Security Council as far as use of force is concerned.⁶⁷ If it were different, the whole UN system of collective security would become irrelevant.

⁶⁴ The need for reform of the Security Council might have its core objective in the issue how to avoid misuse of the UN system by permanent members of the Security Council (regarding this suspicion see Gray, see note 13, 8) and to enhance collective action. Safeguards in this context could be furthering transparency and accountability of Security Council decisions making or a workable agreement between the permanent Security Council members on the appropriate use of their right to veto, cf. R. Butler, "Bewitched, Bothered and Bewildered: Repairing the Security Council", *Foreign Aff.* 78 (1999), 9 et seq.; Chinkin, see note 14, 40 et seq.; Faßbender, see note 35, 288 et seq.

⁶⁵ In addition, Article 53 (1) UN Charter explicitly requires Security Council authorisation in case of an action of regional organisations. There is also no proof for a new customary rule on a right of regional organisations to use force without Security Council authorisation, see C. Gray, *International Law and the Use of Force*, 2nd edition 2004, 321 et seq.

⁶⁶ Gowlland-Debbas, see note 13, 451.

⁶⁷ See also Gowlland-Debbas, see note 5, 368.

One might object, however, that the impartation of the power to authoritatively define the common will of the Security Council is a mere fiction, because given the absence of agreements under Article 43 UN Charter, the Security Council can and will only apply enforcement measures if there are at least some (permanent) Security Council members who are prepared to act under its mandate. Due to this dependence of the Security Council on the readiness of certain states, in particular the United States,⁶⁸ to contribute troops to enforcement measures, it is not the will of the Security Council as an institution but the will of those states that decide whether peace can be restored by using force. In other words: the common will of the international community must correspond to the coinciding interests of the troop contributing states that are prepared to lead, otherwise there will be no Security Council resolution authorising the use of force.⁶⁹ Thus, the Security Council appears not to define the common will, but the will of some predominant states. This insight does not pose a problem insofar as the common will of the community of states conforms to the will of the predominant states being part of that community, and *vice versa*. A problem results only if the common will cannot be implemented because it does not correspond to the individual interest of some Security Council members which succeed in hampering effective actions by the Security Council. Then the decisions of the Security Council will not reflect the common will. This objection has its merits. In the end, it cannot convince. First, it assumes the identifiableness of a common will outside the Security Council procedures. The General Assembly may utter a will of the majority of UN members, but in legal terms cannot define a common will on the issue of enforcement actions. The General Assembly lacks competence insofar, at least as long as the Security Council is seized of the matter, under Article 12 UN Charter. If the Security Council members agree to a resolution that tries to solve a conflict without using force, the General Assembly cannot decide otherwise. The proclamation of a common will to the opposite by the General Assembly would amount to a usurpation of authority, thus illegal and irrelevant. Second, the objection previously described is the reverse of the lifted position of the Security Council members, in particular its permanent ones. This position is in conformity with the current UN sys-

⁶⁸ Security Council practice illustrates that the Security Council will be in a position to exercise its military enforcement function almost only if the United States is prepared to contribute troops.

⁶⁹ See S. Chesterman, *Just War or Just Peace*, 2001, 112-218.

tem. One can criticise it; but there is no way of changing it if one wants to find solutions to current problems of unilateralism within the existing UN system. The current functioning of the Security Council indeed has its failures and weaknesses. The right conclusion to draw from this is the need for formal safeguards so that the powers of the Security Council members are not misused or discharged for egoistic motives. Additionally, the possibility that the voting behaviour is motivated by selfish interests applies also for the members of the General Assembly. The above objection can only underline the importance of agreements under Article 43 UN Charter which would, to a certain extent, remedy the problem of the Security Council depending on states willing to contribute troops.

It has been contended that unilateral interventions may crystallise a rule of international law on the lawful unilateral use of force with the objective of putting an end to large-scale atrocities amounting to crimes against humanity or genocide and constituting a threat to the peace.⁷⁰ Here again one must not overlook that the resolution of the conflict between the prohibition on the use of force and the basic requirements of humanity is allocated to the UN Security Council in the UN system as it stands today. Otherwise, a group of states could agree among themselves that the (unilateral) use of force was in the proclaimed interest of common objectives without the institutional checks and balances of an international institution like the United Nations. That would seriously undermine the current system of international law. Organs of the international community of the United Nations and not a group of states (even if representative) are called to define and enforce common values and to choose the right means.⁷¹ It is an expression of arrogance if particular states pretend to have the exclusive prerogative to utter and protect the concerns of the community.⁷² Additionally, and irrespective of the ambiguous and conflicting nature of UN purposes,⁷³ a breach of the

⁷⁰ Cassese, see note 62, 29; see also A. Buchanan, "Reforming the International Law of Humanitarian Intervention", in: J.L. Holzgrefe/ R.O. Keohane (eds), *Humanitarian Intervention*, 2003, 130 et seq. (158 et seq.).

⁷¹ See M. Byers/ S. Chesterman, "Changing the Rules about Rules? Unilateral Humanitarian Intervention and the Future of International Law", in: Holzgrefe/ Keohane, see note 70, 202.

⁷² C. Bagnoli, "Humanitarian Intervention as a Perfect Duty. A Kantian Argument", in: T. Nardin/ M.S. Williams (eds), *Humanitarian Intervention*, 2005, 117-148.

⁷³ See M. Koskenniemi, "The Police in the Temple – Order, Justice and the UN: A Dialectical View", *EJIL* 6 (1995), 327 et seq.

ban on the unilateral use of force cannot be justified by solving international humanitarian problems and by promoting the respect for human rights (see the UN purposes in Article 1 (3) of the Charter) since the principle of the prohibition of the use of force contained in Article 2 (4) UN Charter is an obligation of the UN members explicitly taken in pursuit of the purposes of Article 1 of the UN Charter, as proves the chapeau of Article 2 UN Charter. This introductory part of Article 2 clarifies that there is no room for the alleged contradiction between the ban of the unilateral use of force and the promotion of the respect for human rights. In contrast, the chapeau confirms that it is – *inter alia* – the respect for human rights that requires the prohibition of the use of force given the scourges of war. For this reason, one also can not derive an argument in favour of unilateral use of force from the current practice of the Security Council to use and authorise force in order to remedy internal humanitarian problems in a state.⁷⁴ The humanitarian intervention authorised by the Security Council is totally different from a unilateral intervention since it is a collective response. Furthermore, the Security Council acts under Chapter VII, so that its reaction to a humanitarian crisis is motivated and reasoned by its tasks with regard to international peace and security.⁷⁵ International custom even affirms that there is need for Security Council authorisation and no room for unilateral use of force. The practice of the Security Council is important for the interpretation of its powers within the Charter framework (and can contribute to the development of general international law) but the discharge of its powers for humanitarian intervention cannot be equated to allowing unilateral intervention for the same purposes, all the more so since, according to Article 1 (1) UN Charter, it is only the maintenance of international peace and security which allows for effective collective measures and not the mere breach of human rights.

One problem remains: a resolution of the Security Council could be ambiguously worded so that some states could interpret it in favour of an authorisation to use force. One could consider whether the disputed content of a Security Council resolution could make way for (unilateral) use of force not intended by the Security Council, by interpreting resolutions in favour of an implicit authorisation. This argument how-

⁷⁴ See Österdahl, see note 15, 1 et seq. (17 et seq.) who, however, appears to understand her deliberations only in a political, not in a normative sense.

⁷⁵ This does not preclude that the Security Council also works for other ends like the respect for human rights. The history of international law evidences that peace, security and human rights are interlinked.

ever must face the objection that first of all the Security Council is the authoritative and authentic interpreter of its resolutions,⁷⁶ besides an eventual control by the ICJ.⁷⁷ This position was also clearly expressed by the UN Secretary-General when emphasising that only the Security Council was competent to determine whether its resolutions on Iraq did provide a lawful basis for actions by states in order to enforce no-fly zones in Iraq.⁷⁸ If the Security Council decision-making majority contradicts a certain interpretation of its resolutions, this is binding upon UN Member States.⁷⁹ The binding force, not only of the resolutions of the Security Council but also of their interpretation by the Se-

⁷⁶ M.C. Wood, "The Interpretation of Security Council Resolutions", *Max Planck UNYB* 2 (1998), 73 et seq. (82 et seq.). The PCIJ, Advisory Opinion of 6 December 1923, Series B No. 8, 37 stated that there was an established principle that the right of giving an authoritative interpretation of a rule solely belonged to the body who has the power to modify it. See also ICJ Reports 1971, see note 12, 16 et seq. (53). For the importance of consent (at least of the Security Council majority) over the interpretation of a Security Council resolution with respect to Resolution S/RES/1441 (2002) of 8 November 2002 and the Iraq war see D. McGoldrick, *From 9-11 to the Iraq War 2003*, 2004, 66, 85.

⁷⁷ Regarding the ICJ's competence to review Security Council resolutions see M. Bedjaoui, *New World Order and the Security Council: Testing the Legality of Its Acts*, 1994; Gowlland-Debbas, see note 63, 307 et seq.; B. Martenczuk, "The Security Council, the International Court and Judicial Review", *EJIL* 10 (1999), 517 et seq. (525 et seq.); W.M. Reisman, "The Constitutional Crisis in the United Nations", *AJIL* 87 (1993), 83 et seq.; de Wet, see note 5, 25 et seq.

⁷⁸ See the statement reported by Gray, see note 13, 9.

⁷⁹ This issue must not be confounded with the question as to whether the Security Council is the exclusive interpreter of its own powers. The latter issue is one of limiting the powers of the Security Council (e.g. in the area of law making and in judicial functions) whereas the decisive question here is the limitation of the powers of states. It has rightfully been pointed out by G. Nolte, "The Limits of the Security Council's Powers and its Functions in the International Legal System", in: M. Byers (ed.), *The Role of Law in International Politics*, 2000, 315 et seq. (316) that the ICJ did not declare the Security Council to be the exclusive interpreter of its own powers. There are constitutional limitations to its powers which could be put forward by UN Member States, see Nolte, *ibid.*, 318 et seq. This consideration might lead to a nullification of a measure of the Security Council in case it manifestly overstepped the limits but cannot reason the lawfulness of unilateral actions derived from a proclaimed lack of exercise of Security Council powers.

curity Council, itself follows from Article 25 UN Charter and is in line with article 31 (4) VCLT. There might, however, arise the problem that ambiguous wording was used in the drafting of a resolution in order to avoid a veto of one of the permanent Security Council members covering a lack of true consent. But even in such a case the majority should be able to account for the intended meaning.⁸⁰ The decisive, authoritative character of the Security Council interpretation does not depend on possible shifts in the way of interpreting Security Council resolutions⁸¹ because, irrespective of a more text-oriented or purposive interpretation of the language of a resolution, the question always remains whose appreciation (either of terms and wording or of purposes) matters.

Even if one did not ascribe key interpretative legal value to a protest by the Security Council majority against a peculiar interpretation of a Security Council resolution, those states acting unilaterally anyway no longer could refer to common objectives as a justification of their unilateral acts because the use of force cannot be seen as serving common objectives after the Security Council (majority) opposed such interpretation. If there is no agreement among the majority of Security Council members about the exact positive meaning of a Security Council resolution, the interpretative task is left to the community of states in accordance with the accepted rules of interpretation, if any, in case of resolutions of international organisations.⁸² It is, however, inconceivable that at least the majority of the Security Council members do not have a clear-cut answer to the question as to whether a resolution was meant to authorise use of force all the more since the use of force is the most eminent issue in international law.⁸³ What can remain doubtful, how-

⁸⁰ An example of such situation is Resolution S/RES/1244 (1999) of 10 June 1999 to establish an international security presence in Kosovo (KFOR). The language of the resolution did not directly authorise use of force in order to secure support for it from Russia and China. Russia was of the view that the resolution did not itself authorise force. See Gray, see note 13, 5.

⁸¹ As alleged by M. Byers, "The Shifting Foundations of International Law: A Decade of Forceful Measures against Iraq", *EJIL* 13 (2002), 21 et seq. (23-27).

⁸² On the interpretation of Security Council resolutions see in more detail Wood, see note 76, 73 et seq.

⁸³ This problem occurred regarding the interpretation of Resolution S/RES/1154 (1998) of 2 March 1998 and Resolution S/RES/1205 (1998) of 5 November 1998 which was referred to by the United States and the United Kingdom as providing legal basis for their use of force in response

ever, is the range of application in case of an agreed authorisation of the use of force.⁸⁴ But those cases are of relatively minor importance compared to the current problems of unilateralism.

b. Unilateralism and the UN System

The problems of the functioning of the UN Security Council which had already been perceived when the United Nations was established⁸⁵ cannot be seen as a confirmation of the possibility for lawful unilateral actions which are deemed to replace UN Security Council actions. The view presented by some commentators that the paralysis of the Security Council restores the freedom of each state to have recourse to unilateralism at least in cases of a material breach of peace and common values⁸⁶ must be denied.⁸⁷ It would result in a return to the reign of “spheres of influence”⁸⁸ and to the overcome doctrine of legitimate war, the incapability of which stood in the centre of the foundations of the United Nations. The proposal at the San Francisco Conference to allow the UN members to act as they may consider necessary in the interests of peace,

to the withdrawal by Iraq of cooperation with the UN weapons inspectors. When the Security Council debated about this operation, only Japan shared the view presented by the United States and the United Kingdom whereas the other Security Council members contradicted. See Gray, see note 13, 11 et seq.

⁸⁴ Resolution S/RES/678 (1990) of 29 November 1990 e.g. raised doubts as to how far the states could go in their use of force because it authorised the use of force as was necessary to restore the independence of Kuwait. See J.A. Frowein, “Unilateral Interpretation of Security Council Resolutions – A Threat to Collective Security?”, in: V. Götz/ P. Selmer/ R. Wolfrum (eds), *Liber amicorum Günther Jaenicke*, 1998, 97 et seq. (101 et seq.). In this context the legal assessment of the United Kingdom and the United States air strikes against Iraq in February 2001 to enforce the no-fly zone brought division amongst the international community; see Gray, see note 13, 9 et seq.

⁸⁵ See Kelsen, see note 21, 265 et seq., in particular 269 et seq.; Hilpold, see note 57, 451, 463.

⁸⁶ Cf. e.g. A.C. Arend/ R.J. Beck, *International Law and the Use of Force*, 1993, 69; W.M. Reisman, “Coercion and Self-Determination: Construing Charter Article 2 (4)”, *AJIL* 78 (1984), 642 et seq.; R. Wedgwood, “NATO’s Campaign in Yugoslavia”, *AJIL* 93 (1999), 828 et seq. (833).

⁸⁷ See L. Henkin, “Kosovo and the Law of ‘Humanitarian Intervention’”, *AJIL* 93 (1999), 824 et seq.; Hilpold, see note 57, 437 et seq. (451).

⁸⁸ Dupuy, see note 1, 29.

right and justice was not accepted.⁸⁹ While a UN Charter interpretation must not be static, the necessary teleological and evolutionary approach to the Charter cannot be used to expand the competences of single states but has to be used to face restrictive assertions of Member States' sovereignty.⁹⁰ Instead the problems of the proper functioning of the UN system might give an occasion to rethink and reinterpret the relationship between the UN Security Council and the UN General Assembly.⁹¹ Strengthening multilateral facilities to solve conflicts appears to be a better answer to current challenges in international law than creating incentives for unilateral use of force. If there is need for a use of force that contradicts the UN Charter due to the missing Security Council authorisation but proclaims to be in the interest of its spirit and values, this need should be met by other measures within the multilateral collective UN system and not outside the UN by unilateral acts of some, even many states. To allow a unilateral use of force as a lawful response to alleged or real disobedience to Security Council resolutions would make it more unlikely that the Security Council will be able to determine a breach of resolutions because, for example, Russia and China will fear that this could be used by the United States and other states for a unilateral use of force proclaiming an implied justification of a unilateral use of force. Such argument could have a negative effect on the readiness of the Security Council members to express condemnation and to determine imputability of illegal acts.⁹² Additionally the authority of the Security Council would be undermined. The peculiar role and authority of the Security Council and the influence and position of

⁸⁹ See Kelsen, see note 21, 270 who points to the danger of deterioration of the legal status under international law.

⁹⁰ Gowlland-Debbas, see note 5, 361 et seq. (374).

⁹¹ Here one could refer to the Uniting for Peace resolution of the UN General Assembly. The cases in which this resolution was used are quite diverse, see Q.D. Nguyen/ P. Daillier/ A. Pellet, *Droit International Public*, 6th edition 1999, 815 et seq. (957); J.F. Guilhaudis, "Considérations sur la pratique de l' Union pour le maintien de la paix", *A.F.D.I.* 1981, 382-398. Kelsen, see note 21, 970-977 argues in favour of a force monopoly of the Security Council with the exception of a General Assembly recommendation in case the Security Council is blocked by the exercise of the veto right or has ceased to deal with the matter. De Wet, see note 5, 309 proposes a (restricted) residual role of the General Assembly to terminate open-ended authorisations of the use of force. This question transcends the focus of this article and, therefore, will not be deepened here.

⁹² Gray, see note 13, 13; id., see note 65, 280.

its members (especially its permanent ones) balance the formal equality of states which is the basis of the UN system and of international law in general with the reality of asymmetric capabilities of states. This softening of the equality of states cannot be and should not be extended by new forms of (allegedly) justified or legitimate unilateralism. This applies all the more since contemporary international law, besides the equality of states, is also coined by a general obligation to cooperate.⁹³ The principle of the equality of states would be distorted and evaporated in meaning if unilateral force was allowed (beyond Article 51 UN Charter), thus fundamentally shaking the basis of international law. Additionally, allowing unilateral coercive actions would open a Pandora's box and could result in the erosion of the Charter consensus about the use of force. Determining criteria for lawful unilateral use of force would also face the problem of misuse and lack of clarity (since they must refer to the broad objectives of the UN and therefore unavoidably would be open-textured and vaguely or generally formulated) thus threatening peace and security.⁹⁴ For all of these reasons, if the Security Council fails, the authority to define the common UN objectives for a concrete crisis and to determine the necessary steps for their implementation is better vested in another organ of the UN instead of a coalition of certain states that define on their own what the UN objectives allegedly require.

In a more general perspective, the declaration of belief in community values accompanied by the hot debate on legitimate unilateralism cannot be isolated from a workable institutional setting for the international community of states. Values need institutions that work for them and ensure their observance and implementation. As the values are universal, the institutions must be universal as well. Reintroducing legitimate unilateralism is the wrong reaction to the need for a sound implementation of values and rights. It cannot solve the problems because the identification of community values in a concrete situation needs collective mechanisms, this means mechanisms within and in accordance with the contemporary United Nations' system. Also the inauguration of the International Criminal Court, though not formally part of the UN sys-

⁹³ Regarding the latter see Dupuy, see note 1, 22 et seq.

⁹⁴ For a critique see also Hilpold, see note 57, 450. He rightly points out (at 458 with further references) that similar catalogues of criteria for legitimising unilateral humanitarian interventions brought about totally diverging views and assessments by writers when applied to the NATO intervention in Kosovo.

tem, and the establishment of international *ad hoc* criminal tribunals confirm that there are better multilateral forms of reacting to breaches of international law, upholding the rule of law than illegal unilateral use of force. Even if one points to the fact that since the entry into force of the UN Charter the importance and awareness of human rights has increased so that one could observe a shift in balance between the prohibition of the use of force and the respect for human rights,⁹⁵ the invention of an International Criminal Court appears to be the proper institutional answer to the claimed in-balance. New or heightened common objectives of the community of states cannot be protected by unilateral recourse to force without watering down their value. The strengthening of human rights implementation must not sacrifice a core principle of the UN system like the prohibition of the unilateral use of force as both work to the same end, i.e. to reduce if not avoid atrocities and human suffering. There is no choice between protecting human rights on the one hand and, on the other hand, respecting the prohibition of force; instead it is a debate over the right means. There are a number of reactions to human rights violations besides unilateral use of force.⁹⁶

3. Conclusion

Both the wording of the Council powers under Chapter VII, the core aim of maintaining and restoring international peace and security with its effectiveness implication, and the changing function of the Council which progressed simultaneously with the changing notion of peace require a constitutive understanding of the Chapter VII powers. This result is confirmed by the decisive role the Council plays in the collective security system of the UN to counter threats to peace and security. It is its evaluation and assessment which counts. Constitutive interpretation connotes that the Council may create new law and alter existing inter-

⁹⁵ This argument, however, is debatable because encouraging the respect for human rights is an aim of the UN since its inauguration in the same way as the maintenance of peace and because the core principle of the prohibition of the use of force was breached since the 2nd half of the 20th century not less than the human rights obligations.

⁹⁶ Gowlland-Debbas, see note 5, 379. She points to the ICJ Nicaragua decision where the court decided that the protection of human rights cannot be compatible with the mining of ports or the training, arming and equipping of the contras (Military and Paramilitary Activities in and against Nicaragua, ICJ Reports 1986, 14 et seq. (134 et seq.)).

national rules accordingly, even that it may retroactively authorise use of force in particular circumstances.

III. Limitations of the Powers of the Security Council

1. Introductory Deliberations

Even the broad, purposive interpretation of the powers of the Security Council advocated here does not mean that the powers are without limits. The discretion of the UN Security Council is not absolute. It takes place within the frame of the Charter, and the tasks and powers are allocated to the Security Council for specific purposes. The mere fact that the practice of the Security Council in exercising its powers is inconsistent does not mean that it ought not to be grounded on clear principles.

A first limitation is that any authorisation to use force has to be given in unambiguous terms which, in case of an authorisation *ex post facto*, have to be clearer than in case of prior authorisations. States shall not be tempted to claim implicit authorisation *ex post* from obscure language in subsequent resolutions.⁹⁷ A lack of condemnation of the unilateral actions in subsequent Security Council resolutions does not serve as an *argumentum e contrario* because one permanent member can block the condemnation.⁹⁸

Second, there is need for formal safeguards guaranteeing the responsibility and accountability of the Security Council.⁹⁹ In particular when resolutions are taken in the aftermath of unilateral actions, the broad interpretation of the UN Security Council powers must be balanced by due limits to the UN Security Council discretion in choosing the necessary peace measures. If the UN Security Council authorises the use of force in order to enforce or implement peace agreements or cease-fires, the Security Council has to take care of a greater control of the use of

⁹⁷ In favour of even implicit *ex post* authorisations B. Simma, “Regional Enforcement of Community Objectives”, in: V. Gowlland-Debbas (ed.), *United Nations Sanctions and International Law*, 2001, 117 et seq. (118 et seq.). On state practice proclaiming implied (prior) authorisation see Gray, see note 65, 264-279.

⁹⁸ de Wet, see note 5, 297.

⁹⁹ See F. Berman, “The Authorization Model”, in: Malone, see note 3, 159 et seq.

force, e.g. by close coordination with the Secretary-General.¹⁰⁰ Another means of intensified control of authorised use of force is the unified overall command and control by the UN Security Council.¹⁰¹ Since the Security Council acts as the agent of the international community when using or authorising force it cannot completely delegate its powers to states; this is also a requirement of general international law.¹⁰² The responsibility rests with the Security Council that in turn must safeguard its steadfast and continuing influence by clearly defining the mandate regarding extent and objectives and by providing monitoring tools like effective reporting procedures in order to have effective supervision.¹⁰³ As functional limitations may be inadministrable and as open-ended mandates might be difficult to withdraw, military mandates also require time limits.¹⁰⁴ Otherwise the termination of a military mandate would require a new resolution of the Security Council which could be prevented by a permanent member's veto (reverse veto) with the effect that a mandate could be continued merely by the will of one Security Council member. Then it was no longer the Security Council (majority) that decides about authorisation but a single member which would amount to an illegal delegation of powers by the Security Council.¹⁰⁵

Third, it is uncontested that the Security Council powers are subject to certain substantive legal restraints emanating from international law; what is contested, however, is the exact extent to which international

¹⁰⁰ Cf. Gray, see note 13, 7 et seq.

¹⁰¹ This was applied by Resolution S/RES/1244 (1999) of 10 June 1999 with respect to the KFOR. In principle, even merely authorised enforcement measures by the Security Council are attributable to the UN since they are subject to the overall control by the Security Council, see *mutatis mutandis* arts 6 and 7 of the Rules on State Responsibility; Sarooshi, see note 13, 163 et seq.; M. Zwanenburg, *Accountability under International Humanitarian Law for United Nations and North Atlantic Treaty Organization Peace Support Operations*, 2004, 70 et seq., 130 et seq. Contra Frowein/ Krisch, see note 13, Article 42 Mn. 29.

¹⁰² See Frowein/ Krisch, see note 13, Introduction to Chapter VII, Mn. 33; de Wet, see note 5, 265 et seq.

¹⁰³ For more detail see Frowein/ Krisch, see note 13, Article 42 Mn. 25; de Wet, see note 5, 269 et seq.

¹⁰⁴ de Wet, see note 5, 290, 307. See also Frowein/ Krisch, see note 13, Introduction to Chapter VII Mn. 38.

¹⁰⁵ de Wet, see note 5, 190, 308.

law obliges the Security Council when acting under Chapter VII.¹⁰⁶ Here, the limitations for the Security Council powers entailed in the UN Charter itself (which can be called constitutional limitations)¹⁰⁷ and in those rules of general international law which take precedence over the UN Charter (which means peremptory norms of international law, *ius cogens*)¹⁰⁸ become important. The Security Council must respect such hierarchically superior rules. Accordingly, the priority of Security Council resolutions stated in Article 103 UN Charter is limited. The constitutional limitations of the Security Council discretion in the discharge of its powers result from the prerequisites of the relevant articles of the UN Charter, from the *raison d'être* of the Security Council powers indicated therein (thus the objective of peace termination both expands and restrains the Chapter VII powers) and from the purposes and principles of the UN Charter contained in Chapter I, Arts 1 and 2. The Security Council may only discharge its powers in accordance with the latter (see Article 24 (2) UN Charter). Everything else would be illegitimate because an organisation like the United Nations that was founded in order to foster certain fundamental principles and objectives in the community of states cannot act except in conformity with those principles.

The following sections will analyse in more detail the limits flowing from the purposes and principles of the UN Charter (see below under 2.), from peremptory norms (see below under 3.) and from inherent constitutional restraints (see below under 4.).

2. Purposes and Principles of the UN Charter

a. Equality, Self Determination and Human Rights

Arts 1 and 2 UN Charter contain several fundamental principles on which the United Nations is founded. Besides the primary goal of

¹⁰⁶ de Wet, see note 5, 185; A. Reinisch, "Developing Human Rights and Humanitarian Law Accountability of the Security Council for the Imposition of Economic Sanctions", *AJIL* 95 (2001), 851 et seq. (856).

¹⁰⁷ ICTY, Prosecutor v. Tadic, Appeal Case IT-94-1-AR 72, para. 28, reprinted in *ILM* 35 (1996), 32 et seq. (42).

¹⁰⁸ Orakhelashvili, see note 6, 60. Zwanenburg, see note 101, 150, however, contests that the Security Council cannot derogate from peremptory norms.

maintaining international peace and security, Article 1 (2) and (3) lists further purposes of a secondary nature: respect for the equality of rights and self-determination of peoples, solution for international economic, social or humanitarian problems and respect for human rights. Principles which have to be followed therein include the equality of states (Article 2 (1)), the obligation to ensure that non-members respect the principles of the United Nations (Article 2 (6)), and non-intervention (Article 2 (7)) with the latter being not applicable to enforcement measures. The principles enshrined in Article 2 (2) to (5) primarily refer to the UN Member States.¹⁰⁹

The above-named purposes and principles are very broad in scope and to some extent contradictory and ambiguous. Nevertheless they provide some guidelines for the exercise of the Security Council discretion, though they are not clear cut limits to the Security Council powers. The Security Council, however, has to take all of the purposes and principles in consideration when acting under Chapter VII while the maintenance and restoration of peace and security is the primary goal. The supreme character of the latter purpose is not explicitly expressed in Article 1, but can be derived from its prime position in Article 1 (1) and in Article 23 (1) regarding the election of non-permanent members to the Security Council, and furthermore from the preamble to the UN Charter and from the drafting history.¹¹⁰ The supreme character of peace and security restoration is affirmed when looking at the function and powers of the United Nations main organs. It is the maintenance of peace and security that is named first there (see Article 11 for the General Assembly and Article 24 for the Security Council).¹¹¹ The exigencies of the secondary goals cannot keep the Security Council from exercising its powers in order to achieve its primary goal of maintaining and restoring peace, but it can have an impact on the way the Security Council exercises its peace enforcement powers. In this regard, the different UN purposes have to be balanced; the Security Council cannot

¹⁰⁹ Regarding the meaning of the principle of good faith to the UN see de Wet, see note 5, 195 et seq.

¹¹⁰ See *inter alia* the *Documents of the United Nations Conference on International Organization, Volume VI*, see note 32, 26.

¹¹¹ The Charter provisions indicated actually only refer to the “maintenance” of peace whereas the restoration is added in Article 39. This illustrates that maintenance of peace includes its restoration in case of its breach. This conclusion in particular may be drawn from Article 24 (2) which attributes (*inter alia*) the Chapter VII powers of the Security Council to its primary responsibility for the “maintenance” of peace and security.

maintain peace and security at the *complete* expense of any of the other goals.¹¹² The rights and positions of states, peoples or individuals targeted by UN actions (like the sovereignty of states, the right to self-determination and human rights) are not absolute limitations to the Chapter VII powers requiring unconditional respect but can be restricted by Chapter VII measures, at least provisionally. The Chapter VII powers are limited (only) by the obligation duly to *consider* positions like the right to self-determination and the respect for human rights (see also under IV. 1.). The fact that human rights are mentioned in Article 1 (3) UN Charter in the context of international co-operation in solving international problems but not in the context of collective measures (Article 1 (1) UN Charter), is not an argument against the human rights obligation of the Security Council acting under Chapter VII because of the explicit reference by Article 24 UN Charter to the first Chapter of the UN Charter.¹¹³ Some commentators draw a distinction between the different measures in Chapter VII: whereas fundamental human rights are said to limit the Chapter VII powers only in case of non-military enforcement measures, military measures of the Security Council are said to be limited only by basic norms of law of armed conflict. Such deliberations are reasoned by the claim that the law of armed conflict was *lex specialis*.¹¹⁴ This view appears too general and over-simplified. First, the ICJ did not define the relationship between the law of armed conflict and human rights law to be one of mutual exclusiveness and alternativeness but preferred to some extent a parallel, cumulative application of human rights law and humanitarian law of armed conflict since they serve the same ends.¹¹⁵ Second, law of war be-

¹¹² de Wet, see note 5, 193.

¹¹³ See also the attribution of certain basic human rights to the purposes and principles of the UN Charter by the ICJ, ICJ Reports 1971, see note 12, 16 et seq. (57 para. 131) and United States Diplomatic and Consular Staff in Teheran, ICJ Reports 1980, 3 et seq. (42 para. 91). Contra Zwanenburg, see note 101, 154 et seq., 218 et seq. who does not take due account of Article 24 UN Charter.

¹¹⁴ De Wet, see note 5, 198 et seq. For a more nuanced view see H. Krieger, "A Conflict of Norms: The Relationship between Humanitarian Law and Human Rights Law in the ICRC Customary Law Study", *Journal of Conflict and Security Law* 11 (2006), 265 et seq. On the interpretative influence of humanitarian law upon human rights norms see McGoldrick, see note 76, 45 et seq.

¹¹⁵ ICJ, Opinion of 9 July 2004, para. 105 et seq., Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory. See also Rat-

comes less relevant as soon as the conflict is no longer purely military and international administration controls the targeted area (i.e. “occupies” in humanitarian law parlance), still acting under Chapter VII. At least in this phase of the conflict, human rights must be respected since they can be implemented more easily.¹¹⁶ The said categorical distinction between humanitarian law and human rights law, therefore, is not convincing.

b. Humanitarian Law/ Law of Armed Conflict

In contrast to human rights, the respect for humanitarian law is neither explicitly referred to in Article 1 nor in Article 2 UN Charter. Nevertheless, the basic rules of the law of armed conflict also oblige the Security Council. This can be derived from Article 1 (3) UN Charter all the more since the law of armed conflict has a humanitarian underpinning. The primary objective is to protect individuals.¹¹⁷ An armed force employed in the pursuit of common objectives of all nations must respect basic rules of the law of war. Additionally there is an argument of practical necessity: if UN troops did not act in compliance with the law of war their opponents might as well not comply with humanitarian law either.¹¹⁸ The applicability of the law of armed conflict to Chapter VII enforcement measures is confirmed – at least to some extent – by the practice of the United Nations itself. Objections raised against the relevance of the law of war which argue that – as a matter of principle – peace enforcement under Chapter VII was not a war and that military presence accompanied by such UN operations were not occupations¹¹⁹

ner, see note 36, 704; A. Roberts, “Transformative Military Occupation: Applying the Laws of War and Human Rights”, *AJIL* 100 (2006), 580 et seq. (597); R. Wolfrum, “Iraq – from Belligerent Occupation to Iraqi Exercise of Sovereignty: Foreign Power versus International Community Interference”, *Max Planck UNYB* 9 (2005), 1 et seq. (5).

¹¹⁶ Roberts, see note 115, 591 et seq.

¹¹⁷ Cf. Gardam, see note 13, 301 et seq., 314; McGoldrick, see note 76, 40; de Wet, see note 5, 204.

¹¹⁸ See Gill, see note 20, 81 et seq.

¹¹⁹ For an overview see E. de Wet, “The Direct Administration of Territories by the United Nations and its Member States in the Post Cold War Era”, *Max Planck UNYB* 8 (2004), 291 et seq. (323-325); Zwanenburg, see note 101, 208, 222. Even the Convention on the Safety of United Nations and Associated Personnel <<http://www.un.org/law/cod/safety.htm>>, even if

are not convincing since there can be no doubt that, first, military enforcement measures by the Security Council do represent an armed conflict with other troops in the targeted area and that, second, their continued presence in the targeted area and its administration is an occupation because the area is placed under the authority of the UN or the states acting on its behalf. Governmental functions are executed without consent and to the exclusion of the domestic government (see article 42 of the Hague Regulations¹²⁰). United Nations troops are not automatically perceived as liberators but may face resistance from local people.¹²¹

c. Scope of Obligations

The crucial questions are: which are the concrete rules that oblige the Security Council, and what is their content?¹²² Which human rights are human rights in the sense of Article 1 (3) UN Charter? Is the Security Council bound by each norm of the law of armed conflict? What is the exact content of the right to self-determination? As regards humanitarian law and human rights law there seems to be consent that the Security Council is not bound by each existing rule but only by fundamental and basic principles of humanitarian and human rights law.¹²³ Only

applicable, does not provide for derogation from humanitarian law in case of Chapter VII measures but confirms it, see its article 2 (2).

¹²⁰ Convention (IV) respecting the Laws and Customs of War on Land and its Annex: Regulations concerning the Laws and Customs of War on Land. The Hague, 18 October 1907.

¹²¹ Ratner, see note 36, 714–715, 718.

¹²² See e.g. Reisman, see note 77, 92. This issue may be separated from the question as to the obligations of the states involved in enforcement actions, in particular of troop contributing states. The legal assessment of their actions, however, must pay attention to the Security Council authorisation and, thus, is linked with the questions under consideration here, see Gardam, see note 13, 317.

¹²³ See, for example, de Wet, see note 5, 215 who names “core elements of self-determination, human rights, ... humanitarian law and state sovereignty.” Gill, see note 20, 72 refers to “fundamental human rights or humanitarian norms”, at 77 to “essential human rights and humanitarian values”, at 79 to “core provisions”. See also A. Reinisch, see note 106, 859 (“fundamental humanitarian norms”) and the fundamental principles and rules of international humanitarian law applicable to UN forces spelled out by the UN Secretary-General in its bulletin on the observance by the UN forces of international humanitarian law (Doc. ST/SGB/1999/13, reprinted in: *ILM* 39

fundamental rules that are universally accepted norms of customary law have to be respected by the Security Council.¹²⁴

Moreover, one could consider that all those human rights rules and instruments that have been developed under the auspices of the UN must be respected since the United Nations would act inconsistently if it demanded its members to respect human rights norms which the organisation itself would not pay attention to.¹²⁵ Such view, however, neglects that the Security Council is bound solely by the principles and purposes of the UN and not by any rule whose legal force is claimed by the United Nations or by any of its organs. Otherwise other organs of the United Nations could limit the powers of the Security Council beyond the limits enshrined in the UN Charter itself by proclaiming certain human rights to be of binding force. The context and source of the human rights proclamations must be considered. Therefore, it does not contradict the principle of good faith to decouple the Security Council enforcement powers from human rights standards proclaimed in different contexts. The UN purpose of respect for human rights is complied with by the Security Council if human rights as a category are respected; this does not necessitate that each human rights norm proclaimed in the framework of the United Nations is observed under all conditions. Of course, the whole tenor of the UN Charter is to promote the protection of human rights¹²⁶; but it is not the whole tenor of the Charter, and in particular not Arts 55 and 56 UN Charter that oblige the Security Council when acting under Chapter VII. An additional argument is that the Security Council's obligations in the discharge of enforcement powers in the common interest of its members

(1999), 1656 et seq.) and which in particular refers to protection and treatment of civilians, means and methods of combat, treatment of detained members of armed forces, of wounded and sick and of medical and relief personnel. This bulletin was perceived as concretising the binding principles and spirit of humanitarian law, D. Shraga, "UN Peacekeeping Operations: Applicability of International Humanitarian Law and Responsibility for Operations-Related Damages", *AJIL* 94 (2000), 406 et seq. (408).

¹²⁴ Gardam, see note 13, 315, 319; Gill, see note 20, 79 sees the minimum yardstick in the non-derogable rights of the International Covenants. Regarding the customary rules of humanitarian law see the new two volumes by J.M. Henckaerts/ L. Doswald-Beck, *Customary International Humanitarian Law*, 2005.

¹²⁵ This view is presented by Akande, see note 33, 324 and de Wet, see note 5, 199.

¹²⁶ As says Akande, see note 33, 323.

are not different from those of the UN Member States. Therefore, human rights binding only on some of the UN Member States cannot oblige the Security Council. If, and to the extent that rules are derogable¹²⁷ and subject to restrictions, such limits to human rights and humanitarian law obligations also apply to the Security Council and its measures. Finally, one must not forget that, as already pointed out, human rights and humanitarian law obligations may be weighed against the effectiveness of the measures taken under Chapter VII for the restoration of peace and security so that the Security Council may deviate.¹²⁸

These deliberations illustrate that the purposes and principles of the UN Charter are not strong limits of the Security Council powers but serve as guidelines. The concrete demands of the purposes and principles must be considered but may be overruled since they have to be balanced against the need for effective measures to restore peace and security. The Security Council merely must take care that the principles and purposes are fully taken into consideration and respected to a certain extent. The balance is directed by a principle of proportionality of the means to the ends (which is required by the constitutional limitations inherent in Chapter VII, see below under 4.) which determines the extent to which the Security Council may derogate from international law insofar as international law is at all binding the Security Council acting under Chapter VII. The extent of derogation must be proportionate to the breach of or threat to the peace which determines the necessary characteristics of the peace restoration measures. This means, for example, that the limiting effect of the purposes and principles of the UN Charter in respect to the exercise of the Security Council's discretion and to the discharge of its powers is higher if the rights and positions of third parties not involved in the armed conflict are concerned.

d. In Particular: Law of Occupation

As regards humanitarian law, a question of current concern is the law of belligerent occupation. The Security Council had authorised the administration of the coalition powers (the so-called Coalition Provisional Authority, CPA) in Iraq to radically change the legal order of

¹²⁷ For non-derogable rights see article 4 International Covenant on Civil and Political Rights.

¹²⁸ See also de Wet, see note 119, 323.

Iraq¹²⁹ in its resolutions on the reconstruction and reformation of Iraq. Such authorisation may contradict article 43 of the Hague Regulations requiring respect for the laws in force in the occupied country, unless absolutely prevented. The changes ordered by the CPA were inimical to the concept of a socialist system mandated by the Iraqi constitution in force at that time and contradicted basic provisions of Iraqi law. Similar problems can be found with regard to Kosovo and East Timor.¹³⁰ The question arises whether (and to what extent) the sovereignty of the targeted country and the right of the occupied population to self-determination which underpin article 43 Hague Regulations really restrain the powers of the UN Security Council.

On the one hand, one could argue that the derogation is only provisional as the intended changes in the legal and economic order are not necessarily lasting (even privatisations can be redone; with respect to a new currency, however, this is far more complicated). On the other hand, one has to take into account that the changes also referred to institutions of governance and the process of constitutionalisation in Iraq. Irrespective of the possibly provisional nature, the changes ordered by the CPA appear not to be completely covered by the powers of the occupant under the law of occupation. The broad discretion of the Security Council as to the restoration of peace and security has to consider the requirements of stable, sustainable peace and security. Therefore, it is no surprise that S/RES/1483 (2003) and S/RES/1511 (2003) on Iraq authorise the creation of conditions for sustainable development. This seems to be an expression of the post-conflict settlement function and the responsibilities of the Security Council flowing from it (see above under II. 1. b.). Restoring lasting peace in a country of turmoil requires the Security Council to think in terms of sustainability. Therefore, the Chapter VII powers of the Security Council must be interpreted not only in the light of the needs of short time restoration of peace by ter-

¹²⁹ See C. McCarthy, "The Paradox of the International Law of Military Occupation: Sovereignty and the Reformation of Iraq", *Journal of Conflict & Security Law* 10 (2005), 43 et seq. (67 et seq.); McGoldrick, see note 76, 128-138. Security Council Resolution S/RES/1483 (2003) of 22 May 2003, op. para. 8 (lit. i), provides for legal and judicial reforms. Security Council Resolution S/RES/1511 (2003) of 16 October 2003, op. para. 7 provides for the drafting of a new constitution and for the holding of democratic elections. Cf. also Wolfrum, see note 115, 20-23.

¹³⁰ McCarthy, see note 129, 51 et seq., 53; J. Friedrich, "UNMIK in Kosovo: Struggling with Uncertainty", *Max Planck UNYB* 9 (2005), 225 et seq. (235, 238 et seq., 268); de Wet, see note 119, 328 et seq.

minating the armed hostilities but also against the background of the requirements of lasting peace. This may require altering the internal order of a state. The Security Council therefore is empowered to deviate from certain rules of the law of military occupation, in particular those that (or insofar as they) do not protect individual human beings but rather the interests of the occupied state in ensuring its sovereignty and self-determination.¹³¹ The restraints of law of military occupation insofar do not appear to be appropriate for an occupation that is authorised by the Security Council for the purpose of restoring peace and security. This is easily understandable since the law of occupation was created against the background of a totally different situation, an international order of belligerent states in the absence of any organisation having the monopoly of legitimate force. In particular the exigencies of the comprehensive task of administering the territory under occupation seem not to be sufficiently reflected in the rules on occupation, all the more since an occupation subsequent to Security Council enforcement action is subject to the primary aim of peace restoration. This aim calls for specific and more differentiated demands when compared to the purpose of the occupation according to the Hague Regulations which appear to be limited to restoring and ensuring public order and safety in the occupied territory according to the formulation in article 43 Hague Regulations. Traditional occupation law assumes the capacity and desirability of maintaining existing domestic institutions of the target state. This reflects a conservationist approach of order conservation understandably backed by mistrust in occupants. The traditional assumption of the law of wars was a bad occupant occupying a good country.¹³² The occupants' territorial powers were based on the mere fact of their military control. Therefore, they were limited. Such concept of occupation collides with the peculiar transformative goals of peace restoration undertaken by the international community. The difference is a legal and a political one. First, the occupation by or on behalf of the international community is legal and legitimate. Second, it affects states where domestic institutions collapsed, failed, were inexistent or caused the atrocities due to their malfunction. Thus, the transformative goal re-

¹³¹ Article 43 Hague Regulations is one example as far as it binds the UN to the pre-existing legislation. See also de Wet, see note 119, 329; Wolfrum, see note 115, 13-15; id., see note 49, 680. Contra R. Kolb, *Droit humanitaire et opérations de paix internationales*, 2002, 83 et seq. (88).

¹³² Roberts, see note 115, 580 et seq. (601). On the functions of occupation see in more detail N. Bhuta, "The Antinomies of Transformative Occupation", *EJIL* 16 (2005), 721 et seq. (725-730).

flects the attempt to counter the reasons of the crisis.¹³³ Due to the lack of appropriateness, and insofar as this is the case, the derogation from the law of occupation by the Security Council under Chapter VII appears proportionate to the Security Council measures' objective of peace restoration. For this reason, the law of occupation in the Hague or Geneva Conventions does not completely oblige the Security Council.¹³⁴ The rules of occupation are to be respected by the Security Council only insofar as they do not hinder or retard the task of the Security Council in restoring international peace and security. Thus, the Security Council can lawfully overcome the international law of occupation to a certain extent. Besides article 43 of the Hague Regulations, arts 54 and 64 of the Fourth Geneva Convention relative to the Protection of Civilian Persons in Time of War could be affected. The latter norms (though being more permissive) restrain the capacity of the occupying power to reform penal law and the functioning of domestic courts and institutions, and provide for other limits of the full governmental, legislative and judiciary powers of the occupying power.

This result is not contradicted by the fact that the Security Council, when adopting its resolutions on Iraq endorsed the respect for relevant international law,¹³⁵ for two reasons: first, the Security Council cannot restrain its powers. It can only duly decide not to exercise them. Therefore, its decision to fully comply with international law does not mean that it is obliged to do so. Second, the Security Council resolutions on Iraq are ambiguous.¹³⁶ The solemn respect for the applicable interna-

¹³³ S. Chesterman, "Occupation as Liberation", *Ethics & International Affairs* 18 (2004/3), 51 et seq. (63); Roberts, see note 115, 586-590.

¹³⁴ See also Chesterman, see note 133, 54, 61. D.J. Scheffer, "Beyond Occupation Law", in: ASIL (ed.), *Future Implications of the Iraq Conflict*, 2004, 130 et seq. (136) argues that UN operations render a full application of occupation law inappropriate and even undesirable. Gardam, see note 13, 321 states an obligation of the Security Council to comply with "appropriate" rules of humanitarian law. Cf. also the analysis made by Kolb, see note 131, 60 et seq., in particular at 80 et seq. on inapplicable rules or rules that have to be altered to meet the needs of UN enforcement measures. For inappropriateness of the law of occupation in general see de Wet, see note 119, 326 et seq.

¹³⁵ See the analysis by McCarthy, see note 129, 66 et seq.

¹³⁶ See for example S/RES/1483 (2003) of 22 May 2003 reference to a properly constituted, internationally recognised, representative government, Orakhelashvili, see note 11, 312 et seq. Additionally, Wolfrum, see note 115, 17 et seq. points to a differentiation made there with regard to the au-

tional law in its resolutions¹³⁷ is watered down by the operative parts of the same resolutions. Therefore, the solemn affirmation of the relevant international law cannot be played off against the steps and means deemed necessary by the Security Council or by the authorised agent in order to restore sustainable peace and security. It cannot be argued that the Security Council intended to base itself solely on existing international rules. Insofar, the CPA can be seen as an institution mandated by the Security Council. This institution thus may under the authority of the Security Council lawfully deviate from the established rules of military occupation.¹³⁸ The substantive justification for this limited respect for Hague or Geneva law can be seen in a right to democracy¹³⁹ or to the self-determination of people which allows the Security Council to introduce transformations establishing institutions of democratic governance in a state which more or less was coined by a totalitarian system without real participation of the people. If the right to self-determination has been withheld from a people, the measures of the Security Council taken in order to grant this right to them cannot be seen as contrary to the requirements of occupation. Additionally, since the right of peoples to self-determination was ranked to be of qualified, *erga-omnes* character,¹⁴⁰ the formal derogation from the law of occupation by the Security Council is in line with a superior, at least equally ranked, norm of international law.

thority given to the United Kingdom and the United States in contrast to that given to other states. In his reading, the Security Council did not fully bind the former to the Geneva Conventions.

¹³⁷ See the preamble and para. 4 of Security Council Resolution S/RES/1483 (2003) of 22 May 2003 and para. 1 of Security Council Resolution S/RES/1511 (2003) of 16 October 2003.

¹³⁸ In this direction also T.D. Grant, *Iraq: How to Reconcile Conflicting Obligations of Occupation and Reform*, <<http://www.asil.org/insights/insigh107a1.htm>>.

¹³⁹ G.H. Fox/ B. Roth (eds), *Democratic Governance and International Law*, 2000; T.M. Franck, "The Emerging Right to Democratic Governance", *AJIL* 86 (1992), 46 et seq. Interestingly, the appeal to democracy is found increasingly often in Security Council resolutions. The Security Council praised democratic governance for reasons of national reconciliation, security and reconstruction of government institutions, G.H. Fox, "Democratization", in: Malone, see note 3, 69.

¹⁴⁰ East Timor, ICJ Reports 1995, 90 et seq. (para. 29).

e. Equality of States

Another issue of controversy is the alleged discriminatory character of measures in view of the equality of states, for example if the possession of certain weapons by a state causes UN enforcement measures, whereas the UN does not act with respect to other states in like situation, or if humanitarian interventions are authorised in one case but not in other comparable cases. Authorisation by the UN Security Council for coercive measures to prevent the proliferation or the use of weapons of mass destruction or to terminate severe violations of human rights conforms to the given normative framework as the Security Council enjoys broad discretion to avert threats to peace by whatever means it deems useful. Therefore, the Security Council can authorise action that has, at first sight, discriminatory impact because weapons are denied to one state and that are deployed by other states. Treating states differently in different situations does, however, not amount to discrimination but corresponds to a doctrine of reasonableness. As states, conflicts and surrounding conditions differ, the Security Council can and may exercise its leeway in different ways. The discretion vested in the Security Council allows for flexible reactions and does not force the Security Council to follow a certain pattern of action when faced with a breach of peace or an act of aggression. The constitutive character of the Security Council powers under Chapter VII and of its identification of a threat or breach of peace marks a difference. The deeper reason for the alleged discriminatory impact is the incontestable fact that the Security Council is a political organ. Therefore, some even expect the Security Council to act inconsistently.¹⁴¹

3. Peremptory Norms

Peremptory norms of international law (*ius cogens*) that limit the powers of the Security Council in particular refer to humanitarian law and human rights. Due to the mention of human rights already made in Article 1 (3) UN Charter, the respect for human rights by the Security Council acting under Chapter VII has a twofold, but not congruent basis. Comparing the limits flowing from peremptory norms to those flowing from the purposes and principles of the UN Charter, one must state that due to their hierarchy the former legal restraints are capable of

¹⁴¹ Österdahl, see note 15, 19 et seq.

limiting the Security Council powers in a stronger way than the latter. Whereas peremptory norms must be fully respected by any actor of international law, the principles and purposes of the UN Charter only have a rank equal to the Charter provisions empowering the Security Council, the task of the Security Council to maintain peace and security even being of primary character. Peremptory norms are not accessible for any balancing process against the requirements of peace and security maintenance and restoration.

The decisive question is which norms of humanitarian law and which human rights are peremptory. This tricky issue cannot be developed here. Some remarks may suffice. First of all, one must consider that rules on human rights and humanitarian law, even if customary by nature, may not prove to be peremptory. Second, even if peremptory to states, one has to consider whether its peremptory character also applies to international organisations. Rules may differ not only with respect to their content and their obligations, but also with respect to their addressee. To state that a certain norm of human rights law obliges – as a rule of *ius cogens* – all states does not necessarily mean that it also applies with the same legal quality to the United Nations. Some claim, for example, that article 43 of the Hague Regulation was a humanitarian rule of peremptory character.¹⁴² Even if this was a peremptory norm for states, it is not a peremptory rule for the United Nations when maintaining or enforcing peace. As shown above the occupation of a country by foreign states is different to an occupation by the international community. Thus, the arguments and the rationale offered in favour of the *ius cogens* nature of a specific norm may not apply in different contexts.

4. Inherent Constitutional Limitations, in Particular the Objective of Peace Restoration

As already mentioned, the formulations in the Charter provisions empowering the Security Council and its objectives limit the discretion of the Security Council. These confines serve as inherent, more or less explicit constitutional limitations to its powers. The core constitutional constraint is the objective of peace restoration. The Security Council functions to maintain or restore peace and security; its powers are lim-

¹⁴² M. Sassòli, “Legislation and Maintenance of Public Order and Civil Life by Occupying Powers”, *EJIL* 16 (2005), 661 et seq. (680 et seq.).

ited to those actions necessary for the restoration of peace, see the wording of Article 42 UN Charter. All measures taken by the Security Council must work for that end. Thus, the core objective of peace restoration is accompanied and complemented by a principle of necessity and proportionality which is more or less implicitly entailed in Chapter VII as evidenced by the relationship between military and non military enforcement measures (Arts 41 and 42 UN Charter) and by the wording of Article 42 already referred to, and Article 40.¹⁴³ The impact of the enforcement measures of the Security Council upon the rights and positions of the targeted state, population and individuals shall be minimised as much as possible.¹⁴⁴

The twin requirements of necessity and proportionality are determinants for the legality of the discharge of the Chapter VII powers, in particular of the use of military force. Necessity relates to whether the situation requires the use of force, proportionality determines the amount of force that the Security Council is allowed to use to achieve its aim of peace restoration.¹⁴⁵ It is a constitutional restraint to the Security Council's *ius ad bellum* under Chapter VII not restricted to a protection of territorial sovereignty (as was the classical view) but guiding and thus limiting the right of the Security Council to derogate from any international law.¹⁴⁶ The guiding effect of necessity and proportionality, however, is watered down by the quite imprecise character of necessity and proportionality since the restoration of peace and security is quite a nebulous concept that first must be determined in concrete terms by the Security Council, and therefore, by the margin of appreciation enjoyed by the Security Council in defining the concrete requirements of necessity and proportionality in a given situation.¹⁴⁷ This problem of the functioning of the necessity and proportionality principle can be remedied by integrating the demands of justice after war as additional limits to the discharge of Chapter VII powers by the Security Council, at least to a certain extent (see below under IV.).

Considering peace restoration as final end of all enforcement measures of the Security Council engenders also a temporal limitation to the measures taken by the Security Council: the Security Council acting

¹⁴³ For more detail see Gardam, see note 13, 307-312.

¹⁴⁴ Frowein/ Krisch, see note 13, Introduction to Chapter VII Mn. 30.

¹⁴⁵ Gardam, see note 13, 305.

¹⁴⁶ See also Gardam, see note 13, 301 et seq.

¹⁴⁷ Regarding the problems of the functioning of the necessity and proportionality test see Gardam, see note 13, 310 et seq.

under Chapter VII may infringe upon the rights and positions of the states concerned only as long as this is necessary for peace and security restoration and proportionate thereto. For this reason, its measures may only be provisional. As soon as peace is restored, the Security Council no longer is allowed to act under Chapter VII. The measures, for example, suspending the right to self-determination must be removed as soon as the people are in a position to independently exercise their sovereignty by means of representative public governmental institutions. This restriction is not only reasoned by the *telos* of the Security Council powers but also by the respect for the right to self-determination. For both reasons, therefore, the Security Council cannot impose a permanent settlement of a dispute or a permanent allocation of rights on any state.¹⁴⁸ A principle of limited duration applies to all measures taken under Chapter VII.¹⁴⁹

Within these limits in terms of time and proportionality, the Security Council may also infringe upon the territorial sovereignty. Some authors claim that since the United Nations is based on sovereign equality, independence, and territorial integrity of its members, the Security Council was bound to respect the territory of each state. They must, however, concede that the Security Council may order provisional restrictions on the territorial sovereignty and may clarify the delimitation of existing frontiers as has happened in relation to the Iraq-Kuwait conflict: the Security Council outlined a mandate for the demarcation commission in S/RES/687 (1991) of 3 April 1991 and adopted the final report of the said commission in S/RES/833 (1993) of 27 May 1993.¹⁵⁰ The Security Council anyway is empowered to determine a provisional border for the purposes of guaranteeing a cease-fire or troop withdrawal.¹⁵¹ In addition, the right to self-determination may even speak in favour of Security Council powers to delimit frontiers, in case of ethnic minorities within a state aiming at independence. In this case, the Security Council action could create conditions which allow a people to exercise its right to self-determination,¹⁵² for example by enforcing the

¹⁴⁸ Gill, see note 20, 68; see also Wolfrum, see note 31, Article 1, Mn. 19.

¹⁴⁹ With respect to international administration de Wet, see note 119, 334.

¹⁵⁰ See e.g. Akande, see note 33, 85-88; M. Herdegen, *Die Befugnisse des UN-Sicherheitsrates*, 1998, 29; Orakhelashvili, see note 6, 61 with further references. Regarding the delimitation between Iraq and Kuwait, see de Wet, see note 5, 364-366.

¹⁵¹ De Wet, see note 5, 365, 366.

¹⁵² Gill, see note 20, 33 at 90.

observation of minority rights. The Dayton Peace Agreement on Bosnia and Herzegovina¹⁵³ can be grouped under this category. Regarding Kosovo or East Timor, one could even think about a power of the Security Council to authorise secession and state-building, yet only within the context of peace restoration.¹⁵⁴ These examples evidence that even the territorial integrity of a state is not immune from the powers of the Security Council. This is confirmed by Article 2 (4) UN Charter which obliges the Member States and not the United Nations acting under Chapter VII to respect the territorial integrity. Inherent limitations to the Security Council powers, however, result from the purpose of the powers which oblige and at the same time restrict the Security Council to take measures in order to restore peace. This may require changes of the territory; but as soon as peace has been restored, the powers no longer apply. This means that any territorial change is only provisional, not permanent,¹⁵⁵ and that its mandatory effect upon the Member States ends when peace is restored. In other words: territorial changes cannot be permanent. They are – like other means used by the Security Council – only tools that serve the ends of peace restoration. After peace is restored, the peoples concerned may exercise their right of self-determination and decide about their territorial status. The states concerned may reach an agreement about the final determination of their border, irrespective and independent of the line drawn by the Security Council resolution or its agents.¹⁵⁶ Here again, the temporal limits of the Security Council powers under Chapter VII become important. Such considerations in addition to the above substantive limitations, re-

¹⁵³ *ILM* 35 (1996) 75 et seq. The Dayton Peace Agreement was endorsed by the Security Council Resolution S/RES/1031 (1995) of 15 December 1995 enacted under Chapter VII. The role of the UN in the negotiations, however, was very limited, cf. K. Oellers-Frahm, “Restructuring Bosnia-Herzegovina: A Model with Pit-Falls”, *Max Planck UNYB* 9 (2005), 179 et seq. (188 et seq., 217); for the ethnic aspects in the constitution see *ibid.* 197-199.

¹⁵⁴ Orakhelashvili, with respect to Kosovo cf. Friedrich, see note 130, 268 et seq.; S.G. Simonsen, “Nationbuilding as Peacebuilding: Racing to Define the Kosovar”, *International Peacekeeping* 11 (2004), 289 et seq.; de Wet, see note 5, 330 et seq., with respect to East Timor cf. I. Martin/ A. Mayer-Rieckh, “The United Nations and East Timor: from Self-Determination to State-Building”, *International Peacekeeping* 12 (2005), 125 et seq. Regarding the debate over the right of liberation movements to use force and of third states to assist them, cf. Gray, see note 65, 52 et seq.

¹⁵⁵ Wolfrum, see note 31, Article 1 Mn. 19.

¹⁵⁶ See also de Wet, see note 5, 367.

strain the powers of the Security Council when acting under Chapter VII.

The objective of peace restoration, however, means much more than temporality and proportionality. It engenders material limits to Council actions as implied in the peace focus. Struggling for peace necessitates measures which are oriented towards justice and the rule of law.

IV. In Particular: Security Council Powers and the Demands of Justice After War

1. Effectiveness of Peace Restoration, the Demands of Post-War Justice, and the Functions of the Security Council

Military enforcement actions by the Security Council aiming at the restoration of peace and security must consider both the requirements of effective termination of armed hostilities and the demands of just war termination.¹⁵⁷ The Security Council may not successfully restore peace and security if the exigencies of justice during and, in particular, after the termination of armed hostilities are not met. The objective of peace restoration can only be attained by enforcement actions under Chapter VII if the war terminating measures do not contradict basic requirements of justice. Already at the San Francisco Conference in 1945 it was affirmed that real and durable peace cannot be based on anything other than international and profound social justice.¹⁵⁸ Otherwise the seed for new bloodshed will be sown.¹⁵⁹ Therefore, it is particularly important for the UN and its Security Council to end in a fair and just way both the armed hostilities caused by enforcement actions and the underlying conflicts that caused enforcement actions. In a recent report the Secretary-General confirmed that justice, peace and democracy are mutually reinforcing imperatives in restoring conflict societies.¹⁶⁰ Justice and international law are not identical. The UN Charter is aware of the differ-

¹⁵⁷ See also C. Stahn, "Justice under Transitional Administration", *Houston Journal of International Law* 27 (2005), 311 et seq. (315).

¹⁵⁸ *Documents of the United Nations Conference on International Organization, Volume VI*, see note 32, 26 et seq., 32, 453.

¹⁵⁹ See also C. Tomuschat, "How to Make Peace after War – The Potsdam Agreement of 1945 Revisited", *Friedenswarte* 72 (1997), 11 et seq. (28).

¹⁶⁰ Report of the Secretary-General, *The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies*, Doc. S/2004/616.

ence (cf. the third recital of the Preamble and the explicit endorsement of both in the second part of Article 1 (1)).¹⁶¹ Therefore, the actions of the victorious must pay due respect to *basic* rules of international law. A peace order that contradicts basic requirements of law or that follows from breaches of fundamental rules of international law in previous Security Council enforcement measures may not prove to be a lasting settlement of the conflict in question because it attracts the odour of illegitimacy. In any event, the creation of a peace order after conflict suffers from the inherent tension because such an order is set up by the military victors. The peace order results from coercion and makes it suspicious and susceptible to distrust. The problems are strongly exacerbated if the establishment and maintenance of this order is accompanied by severe breaches of international law. Interveners that are perceived not to stick to the same standards they demand of others will rarely gain the necessary local support.¹⁶² Hence, demands of justice after war confirm the obligation of the Security Council when taking enforcement actions under Chapter VII to respect basic requirements of humanitarian law and human rights law,¹⁶³ thus bridging the gap regarding the applicable law for transitional international administrations.¹⁶⁴

Consequently, the demands of justice after war also limit the Chapter VII powers of the Security Council in its peace restoration, and direct the exercise of the Security Council's discretion.¹⁶⁵ These restraints to the Security Council powers do not follow from the purposes and principles of the United Nations but result from the very objective of the Security Council powers to restore peace and security. They are implied constitutional confines in accordance with the ends of the Security Council measures. The character of the requirements of justice after war more or less fully corresponds to the limits of the Security Council powers developed from a purposive interpretation of these powers. Accordingly, the exigencies of justice after war are less extensive and may easier be balanced against the effectiveness of enforcement measures as long as the Chapter VII measures are mainly dealing with the task of ending the armed hostilities in the military phase of a conflict. But they

¹⁶¹ See also Kelsen, see note 21, 16 et seq.

¹⁶² Stromseth/ Wippman/ Brooks, see note 13, 315.

¹⁶³ Friedrich, see note 130, 284 et seq.; Orend, see note 35, 45.

¹⁶⁴ For the ambiguities in the applicable law insofar cf. Stahn, see note 157, 318 et seq.

¹⁶⁵ See Doc. S/2004/616, see note 160, paras 2, 21.

become extremely important for the exercise of the Security Council's discretion the more the Security Council works as a post conflict organiser of peace and security.

This can be exemplified when looking at the respect for basic rules of international law like human rights which oblige the Security Council due to the limitations to its powers flowing from the purposes and principles of the UN Charter (see above under III. 2.) A post-armed conflict restoration of peace and security that does not take due account of the internationally recognised standards of human rights may not be lasting. It may lack legitimacy and acceptance, given the growing influence of human rights principles on the notion of legitimate intervention.¹⁶⁶ For a provisional period certain rights might be restricted or even inapplicable (as a consequence of their derogable nature¹⁶⁷), in particular as long as this is necessary for the success of military enforcement actions taken under Chapter VII. But with respect to establishing a post-conflict order, the Security Council must take care that customary human rights standards (both individual rights and group rights of minorities in particular in cases where a struggle for minority protection caused or contributed to the conflict) are fully complied with, not only when self-government has completely been restored. During the transitional period in which a lasting peace order by or due to Security Council resolutions under Chapter VII is established, the respect for human rights by the United Nations and its agents must be increased step by step. A civil UN administration (or an administration authorised by the UN Security Council) that is undertaken in the interest of the local people must pay due respect to customary human rights norms, otherwise its transformative endeavour will lack credibility.¹⁶⁸

Accordingly, due to the difference between stopping armed hostilities on the one side and building lasting peace on the other, the prerequisites for exercising the Security Council powers are different corresponding to the different functions the Security Council plays in the different phases of peace restoration under Chapter VII. In the beginning, the Security Council acts as peace enforcer, later it becomes a post-conflict organiser of peace and stability, in particular when admin-

¹⁶⁶ Stromseth/ Wippman/ Brooks, see note 13, 50 et seq.

¹⁶⁷ See also de Wet, see note 5, 322.

¹⁶⁸ Friedrich, see note 130, 284 et seq.; de Wet, see note 5, 320 et seq. goes further and obliges the UN administration to respect all human rights developed by the UN since the UN is the very same organisation that is executing the administration.

istering the targeted area. As the mere war terminating function becomes less relevant and the post conflict settlement function of the Security Council more relevant, so the more the Security Council must respect basic rules of international law, and the less it can deviate from them. This consideration implements the constitutional proportionality requirement in the discharge of the Chapter VII powers (see above III. 4.) and contributes to its workability and precision. The authority of the Security Council to derogate from international law is limited according to the demands of peace restoration. The more the actions of the UN Security Council succeeded in terminating the armed attacks between belligerents the less the derogation from international law appears necessary for the peace restoration, at least in a general perspective. And the more the situation in the territory under attack approaches a peaceful condition, the more the measures of the Security Council can and must regard the requirements of international law and of the rights of the people, human beings and states concerned. Since enforcement measures necessitate the use of force *vis-à-vis* states and peoples, their rights and positions like sovereignty and self-determination can be more easily restricted and must be less respected than the rights of individuals. Rights of individuals or norms protecting individual interests contained in human rights law or humanitarian law, however, must be paid greater attention to because their suspension will contribute less to the useful effect of enforcement actions and the attainment of their military goals. And the more the UN attains progress on peace restoration, the more the positions of states and peoples concerned by the Security Council action must be restored and restrictions to collective positions like self-determination or sovereignty and, even more, to individual rights must come to an end, in order to safeguard full respect for international law again. In other words: the balance of peace enforcement and peace restoration on the one hand against full respect for the purposes and principles of the United Nations and the demands of justice after war on the other hand, is influenced by the exigencies of the situation and by the progress made by the Security Council in restoring peace and reaching a post-conflict settlement. From this perspective it generally appears that a transitional administration is bound to unconditionally respect at least customary human rights.¹⁶⁹

¹⁶⁹ Another source of human rights obligations might flow from international human rights instruments in force at the occupied territory prior to the enforcement measures.

This deliberation can, to a certain extent, be affirmed by the drafting history of Article 1 (1) UN Charter. During the founding conference, some delegates emphasised the different stages of peace restoration and conflict settlement in a general way. If a breach of peace or a threat to peace occurs, the United Nations was seen to be responsible for stopping the breach or threat and removing it. In a second phase the United Nations could try to find a just adjustment or settlement of the situation or of the dispute leading to the threatening of peace. There was in principle no opposition to the notion that once peace is restored by a cease-fire or other means that cause the silence of weapons, the stability of this peace must be based upon justice so that the settlement of disputes takes due regard of rules of international law and the rights of the states concerned.¹⁷⁰ The analysis of Article 1 (1) UN Charter has shown that the principles of justice and of international law are binding on the Security Council before a breach of peace or a threat to peace occurs (see above II. 1. a.). In a similar way, the demands of justice and the rules of international law become relevant to a much greater extent as soon as the termination of the armed conflict begins to succeed and the Security Council progresses to its peace and stability organising function while still acting under Chapter VII. Justice and international law may be infringed only with respect to the immediate enforcement of peace,¹⁷¹ but not, at least not to the same extent, with respect to creating a just and durable post-war settlement of the causes for the conflict.

2. Basic Exigencies of Justice After War

Doing justice after war implies some prerequisites in restoring peace which are either procedural or substantive. Here, only basic require-

¹⁷⁰ See *Documents of the United Nations Conference on International Organization, Volume VI*, see note 32, 453; Gill, see note 20, 66-67. One has, however, to concede that these statements appear to have been made in the context of peaceful settlement of conflict subsequent to enforcement measures because the Security Council was not seen to have the power to settle a crisis or a dispute between states by addressing compulsory resolutions to the relevant states. See N. Angelet, "International Law Limits to the Security Council", in: V. Gowlland-Debbas (ed.), *United Nations Sanctions and International Law*, 2001, 77-79.

¹⁷¹ See the statement of Professor Payssé at the UN Conference on International Organization in San Francisco 1945, reprinted in *Documents of the UN Conference on International Organization, Vol. VI*, see note 32, 33.

ments can be indicated in rather general terms since the concrete requirements of justice after war that direct the transformation of a conflict society to a stable post-conflict society differ according to the peculiarities of each crisis. The conception of transitional justice is contextualised and partial.¹⁷² At least some of the exigencies of post war justice which need to be identified can be learnt from past experiences with post conflict settlements. It is doubtful, however, whether all necessary lessons have already been learnt. The inauguration of the UN Peacebuilding Commission in December 2005¹⁷³ testifies to this. The exigencies are relevant for the exercise of the UN Security Council powers under Chapter VII and form a nucleus of a new body of international law on administrative rules for international administration of foreign territory. The Security Council must respect them when prescribing measures of peace enforcement and post-conflict reconstruction. It requires the Security Council to provide in its resolutions in explicit terms for the institutions and designs necessary for the implementation of the demands of post war justice. In particular the resolutions which establish or mandate transitional international administrations may be more detailed in setting the mandate, the objectives and the legal framework for the operation of the transitional administrations than previous ones,¹⁷⁴ in particular if the Security Council intends authorising or mandating a deviation from international rules.¹⁷⁵

a. Procedural Exigencies

In procedural terms, sustainable peace requires participation of the people and the government (if there is an identifiable recognised one¹⁷⁶) affected by the peace enforcement measures. Since direct participation of the people living in the occupied territory will be difficult to organise in a society suffering from the consequences of war, indirect participa-

¹⁷² With respect to justice in political transitions see in general R.G. Teitel, *Transitional Justice*, 2000, 6.

¹⁷³ See S/RES/1646 (2005) of 20 December 2005, see also A/RES/60/180 of 20 December 2005 and S/RES/1645 (2005) of 20 December 2005 and . In this regard, Wolfrum, see note 49, 696 rightly points out that a new institution without clear standards of accountability for the UN will not remedy the recognised deficits.

¹⁷⁴ Chesterman, see note 50, 239-241; Stahn, see note 157, 320.

¹⁷⁵ See with respect to humanitarian law Sassòli, see note 142, 681, 690.

¹⁷⁶ Regarding this problem for transitional administrations see de Wet, see note 119, 338 et seq.

tion by existing or interim domestic institutions, in the beginning preferably at local or regional level,¹⁷⁷ or – in exceptional cases – by non-state actors,¹⁷⁸ must be preferred. Participation appears not to be practicable as long as the military phase is continuing. The requirements of effective and fast war termination govern the exercise of the Security Council's discretion in choosing the necessary enforcement measures to be taken. There appears to be no room for participative decisions at an early stage. Participation and accompanied principles like procedural fairness and representation increasingly become important the more the war termination progresses towards reaching peace settlement, in particular in the negotiations leading to a peace treaty. At the latest, at this stage which actually in most cases will be beyond the phase of enforcement measures under Chapter VII, the vanquished must have a voice to express their interests and must be given a chance to participate. But even in earlier phases of peace restoration representative participation must be granted. The idea of participation is not incompatible with the character of enforcement measures under Chapter VII. International provisional administrations put in place or mandated by the Security Council after the armed hostilities ended are capable of making the local people increasingly take part in the exercise of administrative powers and functions. The Security Council mandate for the international administrative institutions must include an obligation to interact with domestic actors. Additionally, the relationship between domestic and international actors and the way this will change over time must be clarified.¹⁷⁹ Local support will further the success of restoring a sustainable peace order and safeguard sensitivity for local delicacies. Past experiences with international transitional administrations endorse this.¹⁸⁰ Last but not least, increased participation and representation is a means of the gradual re-establishment and re-transfer of authority to the domestic government or justice institutions as required by the temporal limitations of Chapter VII powers and by the respect for self-

¹⁷⁷ Chesterman, see note 50, 144. The development of local democratic institutions was mandated by S/RES/1272 (1999) of 25 October 1999, para. 8 on East Timor; for more detail insofar see M. Benzing, "Midwifing a New State: The United Nations in East Timor", *Max Planck UNYB* 9 (2005), 295 et seq. (343 et seq.). For gradual democratic participation in Kosovo see Friedrich, see note 130, 256 et seq., 287 et seq.

¹⁷⁸ See Chesterman, see note 50, 128.

¹⁷⁹ See Chesterman, see note 50, 129, 240.

¹⁸⁰ Stahn, see note 157, 314; de Wet, see note 119, 339.

determination demanded by the purposes and principles of the UN Charter (see above under III. 2. and 4.).

Another exigency is multi-lateralisation. The process of peace building must be internationalised in order to avoid reproaches of hostile occupation, revenge or victor's justice. Sustainable peace restoration demands impartiality and moderation which are realised by including neutral third parties in the process of peace restoration both as regards decision making and implementation. Multi-lateralisation safeguards the necessary degree of neutrality and moderation and adds to the legitimacy of the Security Council intervention.¹⁸¹ Integrating third parties like NGOs and non-partisan states in restoring peace can be implemented by putting states not involved in the military enforcement actions in charge of transitional administrations and monitoring institutions, or by integrating NGOs in the monitoring of human rights observance. This is necessary although the Security Council itself institutionalises some kind of moderation and neutrality. Any resolution adopted within the Security Council is usually taken under participation of Council members that are not directly engaged in a military enforcement action. At the San Francisco Conference hope was expressed that the proceedings of the Security Council would provide for just settlement of disputes.¹⁸² This view, however, reflects too high a confidence in the proper functioning of the Security Council. Admittedly, the necessity to obtain a positive vote for a resolution within the Security Council provides some checks and balances. The composition of the Security Council institutionalises an internationalisation of peace making. The Security Council, for political reasons, must also take account of the positions in the General Assembly. For these reasons, some scholars expect a basically fair treatment by the Security Council.¹⁸³ Nevertheless, one must be more cautious. Some states, in particular those targeted, may still regard the internationalisation of conflict settlement by the Council to be one-sided and biased by Western political values. In particular cases a resolution by the Security Council might look like a shared hegemony of certain Security Council members, for

¹⁸¹ C. Stahn, "Jus ad bellum – Jus in bello – Jus post bellum: Towards a Tripartite Conception of Armed Conflict", 9 <<http://www.esil-sedi.eu/english/pdf/Stahn2.PDF>>.

¹⁸² See Kelsen, see note 21, 271.

¹⁸³ Tomuschat, see note 159, 27 (with respect to Iraq); Faßbender, see note 35, 280 who argues that the interests of the defeated state can be better protected in the framework of the Council.

example where the decision of the Security Council is taken only by bare weighted majorities in the Security Council and against majorities in the General Assembly,¹⁸⁴ or where a powerful permanent member succeeds in tailoring resolutions to its own needs.¹⁸⁵ Therefore, the integration of neutral third parties in the restoration of peace furthers its legitimacy and acceptance.

b. Substantive Exigencies

With respect to basic substantive requirements of sustainable peace restoration, the Security Council acting under Chapter VII is bound to correspond to certain fundamental demands of justice.

First and foremost, as a general demand, the conditions for peace restoration forced by the Security Council upon the vanquished must be moderate instead of draconian or vengeful. The self-esteem of the target people must be secured and the relations between perpetrators and victims have to be restored. Justice requires the reintegration of both perpetrator and victim into the international community.¹⁸⁶ Any contempt for the offender does not work for sustainable peace. And it is only the Security Council as the executive of the common will that is capable of attaining reintegration.¹⁸⁷

Also for this reason, all measures of peace restoration must be guided by the constraints of necessity and proportionality. The measures taken by the Security Council must be appropriate to the threat or breach of peace. This necessitates defining in clear terms the aims and strategic objectives of the enforcement actions (both as regards terminating the violence and building the peace thereafter)¹⁸⁸ at the very beginning, because only in this way can one judge when enforcement

¹⁸⁴ T. Farer, "Beyond the Charter Frame: Unilateralism Or Condominium?", *AJIL* 96 (2002), 359 et seq. (360).

¹⁸⁵ Examples are the Security Council resolutions S/RES/1422 (2002) of 12 July 2002 and S/RES/1487 (2003) of 12 June 2003 on jurisdictional immunities for troop contributing states not parties to the ICC.

¹⁸⁶ See C. Villa-Vicencio, "Restorative Justice in Social Context", in: Nigel Biggar (ed.), *Burying the Past: Making Peace and Doing Justice After Civil Conflict*, 2nd edition 2003, 235 et seq. (239).

¹⁸⁷ Faßbender, see note 35, 280.

¹⁸⁸ On the necessity of clarity see Berman, see note 99, 158 (with respect to mandated military enforcement); Chesterman, see note 50, 240-243 (with respect to international administrations).

measures become disproportionate to their aim and therefore illegal or when the actions taken or mandated by the Security Council have to come to end, unless circumstances change considerably so that the ends of the action must be re-defined. A prior definition of the mandate and the objectives of peace enforcement and peace restoration actions also remedies the often improvisational and unprepared character of peace organising measures.¹⁸⁹

Furthermore, ensuring moderation and self-esteem of the vanquished in principle calls for respecting the *right of people to self-determination* as a corollary of the sovereignty of the occupied state to determine its internal political and economic order including the permanent sovereignty over natural resources.¹⁹⁰ The respect for the right to self-determination requires that any mandatory conflict solution is only provisional, as is the case when the Security Council acts under Chapter VII. The Security Council may, however command or allow for regime changes and changes of the internal order and basic rules in the occupied territory if the restoration of peace requires the construction and maintenance of a new kind of regime that is peaceful and more pro-human rights.¹⁹¹ Failing to address such internal institutional reasons for a conflict might inevitably result in its re-occurrence. The political or ethnical tensions underlying a conflict must be resolved. In case of ethnic conflicts restoring peace may not only necessitate rebuilding state institutions but call for nation-building.¹⁹² Restoring peace will require establishing an impartial, international transitional administration in case the former internal order or disorder contributed to the rise of a threat or breach of peace or in case the violence led to a

¹⁸⁹ See Berman, see note 99, 161 (with respect to S/RES/678 (1990) of 29 November 1990); S. Chesterman, "Virtual Trusteeship", in: Malone, see note 3, 219 et seq. (221); Stahn, see note 157, 327 with respect to transitional administrations.

¹⁹⁰ As expressed e.g. in S/RES/1483 (2003) of 22 May 2003, para. 20. See also Orakhelashvili, see note 11, 311.

¹⁹¹ See Orend, see note 35, 50. Regarding the dangers of – unilateral – regime change (e.g. destabilisation, civil war etc) cf. R.N. Haass, "Regime Change and Its Limits", *Foreign Aff.* (2005) <<http://www.foreignaffairs.org/20050701faessay84405/richard-n-haass/ regime-change-and-its-limits.html>>.

¹⁹² For the distinction between state and nation-building see A. von Bogdandy/ S. Häußler/ F. Hanschmann/ R. Utz, "State-Building, Nation-Building, and Constitutional Politics in Post-Conflict Situations: Conceptual Clarifications and an Appraisal of Different Approaches", *Max Planck UNYB* 9 (2005), 579 et seq. (580 et seq., 613).

collapse of domestic institutions. The task of provisional administrations prescribed by the Security Council will then be to help (re)building domestic reform and justice institutions and restoring public trust in them. Meanwhile the demands of representation and participation must be considered as soon as possible without threatening attained stability and peace.¹⁹³ In particular the security institutions of a state may usually be suspect because they were the former core instruments of suppression.¹⁹⁴ New institutions of human rights observance (ombudspersons, courts, truth commissions)¹⁹⁵ and third party monitoring of their sound working might also contribute to a restoration of stable peace. This raises the question how such transformations are compatible with the sovereignty and the right to self-determination. In this respect, one must recall, first, that the constraints of occupation law do not oblige the Security Council (or its authorised agents) when acting under Chapter VII (see above under III. 2.). Thus, the fact that occupation law does not support regime change is irrelevant. Second, there are limits to the right to self-determination prohibiting aggressive domestic regimes or regimes that do not take account of international obligations and basic requirements like non-aggression, non-intervention and respect for human rights. Even the proclamation of sovereignty and self-determination cannot and does not make an aggressive regime acceptable to the international community. Measures taken by a legitimate organisation like the United Nations to facilitate the reintegration of an perpetrator state within the international community are not a hostile intervention contradicting the sovereignty and self-determination of the people and state addressed but a valuable help in reaching again a situation of normalcy where human rights, democracy and the rule of law are the yardsticks of government.¹⁹⁶ This serves the necessary restoration of relationship between aggressor and victims.

¹⁹³ Cf. also Secretary-General, see note 160, 27 et seq., 52 et seq. Chesterman, see note 50, 143 points to the need for balancing participation with effective peace restoration by international institutions. In short term democratic openings in post-conflict societies may increase instability, Fox, see note 139, 74. For the peculiar problems of transitional administrations in the reconstruction of independent judiciary see Stahn, see note 157, 323 et seq.

¹⁹⁴ See F.O. Hampson, *Nurturing Peace*, 1996, 229.

¹⁹⁵ Regarding the contribution of human rights institutions to the restoration of peace and its confines see M. Minow, "Innovating Responses to the Past", in: N. Biggar (ed.), *Burying the Past: Making Peace and Doing Justice After Civil Conflict*, 2nd edition 2003, 87 et seq.

¹⁹⁶ Tomuschat, see note 159, 28.

This consideration underlines that the regime change that was organised in Iraq had been legitimate and corresponded to the powers of the Security Council since the regime of Saddam Hussein was atrocious in both its internal and external affairs. The regime change cannot be seen as punishment irrespective of the intentions of some of the Security Council members.¹⁹⁷ On the other hand, one must not forget that measures taken for peace restoration must not have an open-ended effect but, in principle, have to be provisional. The provisional nature is not only required by the constitutional restraints for the Security Council powers (see above under III. 4.) but is confirmed by the exigencies of justice in transition. This also places particular demands on peace restoring measures which do have a fundamental and durable impact on the internal or even constitutional order of the target state, like establishing a new economic order or a new governmental system. A conflict society that has to be guided back to a stable post-conflict society requires particular guidelines which must pay due attention to the peculiarities of transition. Under such circumstances making laws serves transformative purposes in addition to its conventional purposes.¹⁹⁸ Basic laws must be suitable to provide the legal design of dynamic processes. Thus, they must in themselves be dynamic and accessible to change and subject to participation of domestic institutions and people corresponding to the progress made. The more fundamental the character of rules and institutions that are enacted or established, the more participation must be increased. Rules regulating the recognition, amendment or abolition of laws enacted by international provisional administrations for the time thereafter must also be provided.¹⁹⁹ In all of these efforts, the cultural context has to be observed. No effort to build up norms, rules and institutions will succeed if in contradiction to prevailing, deeply rooted cultural attitudes unless the transformative process is conceived as a long time endeavour shaping legal and political

¹⁹⁷ Contra Faßbender, see note 35, 281.

¹⁹⁸ Compare Teitel, see note 172, 191 et seq.

¹⁹⁹ These demands seem not to be fulfilled by the Dayton accords. They served their purpose as peace agreements but are almost unworkable as constitution while changing them is seen as a threat to re-ignite the conflict, S. Chesterman, "Walking softly in Afghanistan: the Future of UN State-Building", *Survival* 44 (2002/3), 37 et seq. (39); G. Nystuen, *Achieving Peace or Protecting Human Rights? Conflicts between Norms Regarding Ethnic Discrimination in the Dayton Peace Agreement*, 2005; Oellers-Frahm, see note 153, 217-222.

cultures that are receptive for democracy which has not existed before.²⁰⁰

Closely related to the right to self-determination is the necessary respect for the territorial integrity of the vanquished which in principle, has to be guaranteed. In particular, territorial punishments are not tenable. The UN and the victorious states acting on its behalf may not be allowed to compensate their losses by acquisition of territory. Instead, aggression should be punished by consequences for the responsible individuals by means of criminal prosecution and individual liability for compensation.²⁰¹

Criminal prosecution of war crimes and other severe offences is another prerequisite of justice after war.²⁰² Soldiers and leading politicians, even heads of states from all sides of the conflict must be held accountable for their offences. This is an important part of the individualisation of coming to terms with consequences of war.²⁰³ Criminal accountability, however, may compete with the interest in pursuing reconciliation and societal reconstruction which sometimes might give rise to the need for amnesty. Criminal justice is not the only way to pursue reconciliation. Truth commissions may also work as sound forms of accountability. Thus, criminal justice may not be achieved at all cost in any circumstances. It may suffice to prosecute only those most responsible for the core crimes.²⁰⁴

Instead of collective punishment, individual responsibility is required in order to avoid prolonging the in-justices of war into the time of peace. For this reason, collective punishments by way of, for example, forceful resettlements of population must not happen. This would contradict the rights of human beings and the idea of punishing or

²⁰⁰ On the interrelatedness of rule of law and legal and political culture in the context of nation-building see Stromseth/ Wippman/ Brooks, see note 13, 68 et seq., 310 et seq.

²⁰¹ On the demise of the concept of punishment for aggression see also Stahn, "Jus ad bellum – Jus in bello – Jus post bellum? – Rethinking the Conception of the Law of Armed Force", *EJIL* 17 (2006), 921 et seq. (939). This concept still was present at the Potsdam Agreement of 1945, compare Tomuschat, see note 159, 21 et seq.

²⁰² See M.C. Bassiouni (ed.), *Post-Conflict Justice*, 2002.

²⁰³ On increased individualisation in this regard see also Stahn, see note 201, 940.

²⁰⁴ A. Seibert-Fohr, "Reconstruction through Accountability", *Max Planck UNYB* 9 (2005), 555 et seq. (575 et seq.).

holding accountable only those responsible for the aggression, and could amount to ethnic cleansing. The only exception under which forced resettlement might be legitimate is to reverse prior expulsions, deportations or settlements that had taken place during the conflict or that caused the conflict.²⁰⁵ Another corollary of the idea of individualisation of guilt concerns the reparation and compensation for war losses and is confirmed by the idea of avoiding revenge. Both ideas require that the compensation of the perpetrator to the victims for at least some of the costs incurred or damage done during the time of violence must be proportionate to the aim of peace restoration. This means that the aggressor is demanded to compensate only insofar as affordable in order not to infringe the rights of younger generations which are not responsible.²⁰⁶ In particular it means that the compensation should come from the personal wealth of elites of the perpetrator state who were most responsible for the aggression.²⁰⁷ In terms of Security Council powers this means *inter alia* that the Security Council under Chapter VII is empowered to sanction individuals personally responsible for breaches of the peace or threats to the peace by commanding freezing of assets or extradition, as happened in the past.²⁰⁸ Recently, the UN General Assembly adopted a resolution on Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Viola-

²⁰⁵ The Dayton Peace Agreement grants to everyone a right to return to the domicile or residence of origin (Annex 7 to the Agreement, *ILM* 35 (1996), 136 et seq.); enabling the effective exercise of this right, however, will take time after all that had happened in Bosnia-Herzegovina.

²⁰⁶ See also Stahn, see note 201, 939 et seq. The idea of non-excessive reparation already was respected after World War II, see Tomuschat, see note 159, 20, but cannot be found in the Rules on State Responsibility which without any exception postulates full reparation, see arts 31, 36 of A/RES/56/83 of 12 December 2001, see note 27. A lack of full reparation may pose problems of equal treatment because some may be compensated while others are not. For the dilemma of transitional reparatory justice see Teitel, see note 172, 132 et seq. One may remedy such problems to a certain extent by differing between individual and collective losses.

²⁰⁷ Orend, see note 35, 48.

²⁰⁸ See S/RES/1533 (2004) of 12 March 2004, S/RES/1572 (2004) of 15 November 2004, S/RES/1596 (2005) of 3 May 2005, and S/RES/1636 (2005) of 31 October 2005 with respect to the situations in Congo, Cote d'Ivoire, and the Middle East (assassination of Prime Minister Hariri).

tions of International Human Rights Law and Serious Violations of International Humanitarian Law.²⁰⁹

Finally, justice after war requires the Security Council to determine in its measures under Chapter VII clear mandates and responsibilities for military forces and civilian administrations and to establish clear accountability including civil responsibility and criminal culpability to the United Nations and its personnel or to the mandated agents and their staff in case of crimes, damages or excess of power.²¹⁰ In particular, the governmental powers of provisional administrations must be defined and institutions must be established or existing institutions be allowed to exercise independent judicial control over the decisions of the provisional administration.²¹¹ This includes enabling the prosecution of war crimes and establishing a human rights monitoring system while the United Nations or its agents work for the restoration of peace.²¹² Criminal prosecution of war crimes must include prosecution of service members of troops taking part in UN enforcement measures in order for the United Nations to avoid any impression of double standards and exacting revenge.²¹³ The responsibility of the Security Council here is to ensure that any crime committed by soldiers of troop-contributing states is prosecuted by the troop contributing states.²¹⁴ Furthermore, the principle of jurisdictional immunity for the United Nations personnel or the deployed troops must be reformed in this respect in order to allow for judicial control. The same applies to troops that were contributed by states not parties to the ICC. Granting jurisdictional immunities to them²¹⁵ contradicts the idea of establishing justice after war.

²⁰⁹ A/RES/60/147 of 16 December 2005.

²¹⁰ See V. O'Conner, *Model Codes for Post Conflict Criminal Justice*, 2007.

²¹¹ On the need for accountability see Chesterman, see note 50, 145 et seq. For past shortcomings insofar see Ratner, see note 36, 715-716; Stahn, see note 157, 321 et seq., 330 et seq.; Wolfrum, see note 49, 685-687.

²¹² With respect to the latter requirement cf. de Wet, see note 5, 336.

²¹³ Orend, see note 35, 43 at 54. This principle was neglected at Potsdam, see Tomuschat, see note 159, 21.

²¹⁴ See the Final Report on the Accountability of International Organizations at the Berlin ILA Conference, reprinted in *International Organizations Law Review* 1 (2004), 221 et seq. (252). This responsibility may be implemented by including provisions into the agreements between the UN and those states authorised to use force or by explicitly requesting such prosecution in the Security Council resolution mandating the use of force.

²¹⁵ As had happened by S/RES/1422 (2002) of 12 July 2002 and S/RES/1487 (2003) of 12 June 2003. This was partly re-introduced by Resolution

The non-renewal of these immunities in 2004 was rightly welcomed by the Secretary-General as a “significant contribution to the efforts of the Organization to promote justice and rule of law in international affairs”.²¹⁶

V. Conclusion

Thinking about the powers of the Security Council under Chapter VII in the age of new challenges for the collective security system leads to the conclusion that the powers of the Security Council must be interpreted in a broad and purpose-oriented way considering, in particular, the need for effectiveness of the Security Council measures to terminate armed conflicts and to restore peace. The Security Council powers must be strengthened, not weakened. They are constitutive in nature, to a large extent determining the law applicable to a conflict. The Security Council is allowed to deviate from international law and to act in a way independent from the (il)legality of previous acts by other actors, in particular of prior unilateral use of force. The prime objective of conflict termination and peace restoration which is decisive for the interpretation of the Security Council powers both expands and limits the Chapter VII powers. Due to this prime objective the Security Council functions have been extended from a mere war terminator to a post-conflict organiser of peace and security, accompanied by a changing notion of peace. These changes demand an interpretation of the Chapter VII powers that provides for effective war termination and peace restoration at the same time and enables the Security Council to respond to the challenges to the collective security system.

On the other hand, the analysis of the constitutive character of its powers has also shown that there are limits that derive from implied constitutional confines (primarily the objective of peace restoration), from purposes and principles of the United Nations and from peremptory norms of international law. Purposes and principles of the United Nations like respect for human rights oblige the Security Council even when acting under Chapter VII. But they can, to a certain extent, be weighed against the requirements of peace restoration and therefore do

S/RES/1593 (2005) of 31 March 2005, op. para. 6, referring the situation in Darfur to the ICC.

²¹⁶ *Report of the Secretary-General on the Work of the Organization*, Doc. A/59/1 of 2004, Suppl. No. 1, para. 210.

not represent absolute limits of the Chapter VII powers under all circumstances.

Peace restoration as an end requires measures to be of provisional character and calls for respect for the demands of post-war justice. A contemporary analysis of the Chapter VII powers has to consider the emerging awareness for the exigencies of justice after war since peace enforcement and restoration reasonably can only aim at sustainable peace. The basic prerequisites of post-war justice therefore belong to the implied confines of the Security Council enforcement powers. The demands of post-war justice influence the exercise of the Council's discretion to restore peace, adding additional limits to the exercise of the Chapter VII powers. This does not introduce a new category of legal restraints to the Security Council powers but evidences the importance of carefully considering the ends of any peace enforcement measure. The demands of justice after war also confirm the requirement of a necessity and proportionality principle in the exercise of the Security Council powers under Chapter VII that direct the derogation from basic rules of international law. Furthermore, the demands of justice after war also contribute to a greater workability and precision of the proportionality principle. Both the objective of peace restoration and the demands of post-war justice work for the same end in this regard: any derogation from international law is allowed only as long as and insofar as necessary for restoring peace, and must be proportionate to that aim. The extent to which the Security Council is allowed to deviate from international law, in particular from fundamental principles of human rights and humanitarian law – besides peremptory international law – depends (in reverse proportionality) on its progress on peace restoration. The more the military phase of an armed conflict comes to an end the higher the respect for such rules must be. International rules representing individual rights or protecting individual interests shall be respected to an even greater extent. Any derogation from collective positions (like sovereignty, self-determination) can be reasoned more easily than a deviation from rules protecting individuals. Some rules of occupation law appear unsuitable for peace restoration.

Thus, the proportionality principle works in two ways engendering two differentiations: first, a differentiation between different functions of the Security Council under the overall umbrella of peace restoration (war terminating function and peace organising function, depending on the progress in peace restoration), and second, a differentiation as regards different types of rules in international law (rather collective rules or rather individual rules) have to be made. These two differentiations

must be considered when assessing the limits for the powers of the Security Council to derogate from international law under Chapter VII under the proportionality requirement.

When determining the limits to the UN Security Council powers under Chapter VII one should not pay too much attention to principles like self-determination which are highly contested in their exact legal meaning and quite double-edged. Whereas for some, self-determination is a norm of *jus cogens*, others reject the notion of self-determination as a binding norm at all, in particular since decolonisation has been completed.²¹⁷ Indeed, one must take care that a principle genuinely designed to free peoples from colonial domination is not used now as a doctrine for the protection of states' prerogatives, in particular the right to territorial integrity and to exclusive decision-making on the internal order, even against the necessities of sustainable peace restoration. More important principles of international law flowing from human rights law and humanitarian law, however, must be respected to a much greater extent by Security Council resolutions. The reason for this difference is that the latter body of law protects rights of individuals whose positions stand in the centre of the primary United Nations goal of avoiding or terminating war.

According to the preamble of the UN Charter, the final aims of the United Nations and its peace-keeping or restoring activities are the needs and rights of human beings which are negatively affected by the scourge of war. In contrast, the rights and positions of nations or people are only collective in nature. Nations, states and people usually survive war whereas individual human beings are tortured, killed, raped or deprived. Therefore, collective positions and rights might be restricted more easily by Security Council measures under Chapter VII.

²¹⁷ See Steinhardt, see note 29, 46.