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(p. 128) 5.3 Legal Parameters for the Use of Force in the Context of the UN Collective Security System

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5.15 The UN collective security system requires express authorization of any use of force other than in self-defence.

5.16 Such authorization should also be provided for law enforcement operations including detentions (see Chapters 25 and 26).

5.17 The UN Charter and customary international law prohibit the use of force in international relations outside the maintenance or restoration of international peace and security within the context of the UN collective security system or in the exercise of the right of self-defence.

- 1.** The UN Charter and customary international law of a peremptory (*jus cogens*) nature prohibit the threat or use of force in international relations in any situation or for any purpose other than in self-defence, or in the maintenance and restoration of international peace and security within the context of the UN Collective Security System.¹ Consequently, any use of force which is undertaken in the absence of consent by a Host Government other than in the context of self-defence requires the express authorization of the UN Security Council through a decision in the form of a resolution authorizing the use or threat of force which is based upon Chapter VII (or in the case of authorization to a regional organization or arrangement upon Chapter VIII) of the Charter.
- 2.** In addition to the above, a State may consent to the deployment of foreign military forces within its territory and authorize the use of force for the purpose of assisting it in the maintenance of law and order or acting against threats to its civilian population, and in restoring a stable environment. While such consent is not strictly speaking an exception to the abovementioned prohibition of the use of force, it does provide a sufficient legal basis for the deployment of foreign military forces and the use of force for purposes not otherwise prohibited under international law.² Such consent must be freely given by the lawful government of the State requesting assistance and can provide an additional legal basis alongside an authorization by the UN Security Council under Chapter VII of the Charter. In case of deployment by the UN or a regional organization of troops or police units onto the territory of a State within the context of a peace operation of a non-enforcement

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(p. 129) character, such Host State consent forms a strict legal requirement as referred to elsewhere in this Handbook.³

3. In the absence of such Host State or express authorization by the Security Council, any force used outside the context of self-defence will be in violation of the prohibition of the use of force and constitute an illegal act under international law. The use of force for purposes of law enforcement outside areas where a State exercises territorial or functional jurisdiction, or otherwise is permitted under international law, such as in relation to vessels and aircraft of its nationality in international sea or airspace or in the combating of piracy in international waters, will equally require express authorization by the Security Council. This applies both in relation to law enforcement conducted upon another State's territory and in relation to areas not subject to any State's jurisdiction.⁴

5.18 Any force used in enforcement and peace enforcement operations, other than in self-defence, requires specific authorization provided for by the Security Council within the mandate to be worked out under the specific Operational Plan (OPLAN) and Rules of Engagement (ROE) for the operation. The OPLAN and ROE may under no circumstances exceed the level or objective of the force provided for in the mandate. In addition, the general principles of necessity and proportionality relating to any use of force are likewise relevant to the employment of force within the context of enforcement and peace enforcement operations.

5.19 The nature and purpose of both enforcement and peace enforcement operations (referred to in Section 5.01) signifies that the use of force within the context of such operations need not be restricted to reactive and defensive responses to counter overt hostile acts or intent. On the contrary, the force necessary to carry out the mandate, within the limitations posed by mandate, articulated through the OPLAN and the ROE, and the principles of necessity and proportionality, is legally permitted. Where circumstances require, this can include the use of offensive and proactive force and threat of force necessary for mission accomplishment and to carry out the mandate.

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(p. 130) 1. The necessary authorization for the use of force or threat of force beyond self-defence will be formulated within the terms of a mandate issued by the Security Council. The mandate is given in the form of a resolution issued by the Security Council, acting under Chapter VII of the Charter, in which the Council sets out the general purposes and objectives of a particular mission and authorizes a State or group of States, a regional organization or arrangement, or a particular UN or regional peace enforcement mission to utilize force to achieve those objectives. This authorization will be worked out in an OPLAN and in ROE which are drawn up by the UN or

relevant regional organization, or by the lead nation, in accordance with the terms of the mandate. The terms of the mandate may under no circumstances be exceeded in the OPLAN or ROE.⁵

2. As stated previously (see Sections 5.01 and 5.02 with supporting commentary), the use of force in the context of enforcement and peace enforcement operations is not restricted to self-defence and may include offensive measures of a proactive nature designed to impose particular conditions or terms of settlement determined by the Council, within the overall terms of its mandate, upon a particular State or other group or entity. As a rule, the broader the terms of the mandate and authorization are, the more force may be employed to carry it out. However, the principles of necessity and proportionality relating to the use of force (not to be confused with their counterparts within the context of the humanitarian law of armed conflict in so far as it is applicable to the situation) are relevant to all situations in which force is employed including UN (authorized) enforcement measures. Consequently, force beyond what is required under the circumstances to achieve the objectives and purposes of the mandate would be unnecessary and/or disproportionate and hence illegal. The reason for this is that the Security Council as an organ of the United Nations is bound by the Purposes and Principles of the UN Organization under Article 24(2) of the Charter. These include the core rules principles of international law of a peremptory nature to which the principles of necessity and proportionality belong.⁶

5.20 Wherever and whenever circumstances do not require the use of force to secure the mission objectives or maintain force protection or where the use of force would be counterproductive, the principles of necessity and proportionality would prohibit the use of force. Likewise, where a lesser degree or duration of the use of force

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(p. 131) would suffice to secure the mission objectives and maintain force protection, the use of force in excess of what was required would be unnecessary and/or disproportionate, and consequently illegal.

5.21 Peace enforcement operations lie conceptually between military enforcement operations and traditional peacekeeping. While sharing the characteristics of possessing a Security Council mandate under Chapter VII of the Charter and the ability to operate proactively and coercively outside the context of self-defence, they will not involve the conduct of hostilities against a State and may or may not involve participation of the Peace Enforcement Force as a party to a non-international armed conflict in support of a government, depending on whether the material conditions for the existence of such a conflict and the participation of the Peace Enforcement Force as a party thereto are met. Consequently, force will be applied on a case-by-case basis and may not necessarily include the use of high intensity force on a protracted and systematic basis as will be the case with military enforcement operations which are synonymous with full-scale warfare. Where at all feasible, they will require the cooperation and consent of the Host State government and other relevant parties. Consequently, the use of force parameters must be strictly and judiciously tailored to what is required to achieve the mission objective and maintain such consent and cooperation without prejudice to the inherent right of self-defence.

1. The distinction between enforcement and peace enforcement operations has been set out previously (see Sections 5.01 and 5.02 and supporting commentary) and need not be repeated here. Suffice it to say in this context that while consent is not legally required for either type of operation (and would be irrelevant within the context of a 'pure' military enforcement operation such as Korea or Desert Storm), it can be both desirable and necessary from a more practical, political, and operational perspective within the context of a peace enforcement operation which is deployed to assist a government or internationally mandated transitional authority to provide a stable environment. Since such operations do not necessarily aim to impose a military solution or usually involve sustained high intensity combat operations over an extended period of time, they will only use force when the situation objectively requires this to carry out the mandate. Moreover, even where they are actively engaged as parties to a non-international armed conflict in support of a government, policy considerations aimed at maintaining support of the government and population may often militate in favour of restraint in the use of force to avoid collateral civilian casualties to a greater extent than is required under the humanitarian law of armed conflict. Consequently, the use of force must be carefully and judiciously applied with a view to maintaining the maximum consent, or at least acquiescence, possible under the circumstances in order to facilitate and promote mission accomplishment. This can mean that policy and operational (p. 132) restrictions can be imposed upon the tactics and means and methods of force employment through the OPLAN and ROE which go beyond what would be required under the relevant rules of the humanitarian law of armed conflict.⁷ For example, the Peace Enforcement Mission in Afghanistan (ISAF) acted under a Chapter VII mandate in an environment in which large parts of that country were and remain highly unstable, and are (or have been) operating within the context of a non-international armed conflict between the Afghan Government supported by ISAF on one side, and Opposing Militant Forces (OMF) consisting of organized elements of the former Taliban regime and

assorted local allies and foreign volunteers on the other. In those areas of that country where hostilities were conducted, the rules of the humanitarian law of armed conflict relating to the conduct of hostilities applicable to non-international armed conflict were legally applicable and the existence of a Chapter VII mandate provides a legal basis for the mission. Such rules permit the use of force against OMF fighters and military objectives and do not rule out the occurrence of collateral civilian casualties and damage which is not excessive in relation to the concrete military advantage anticipated from a particular engagement.⁸ However, the main objective of the ISAF mission was to support the Afghan Government in its efforts to create a stable environment and constitutional order and was not primarily aimed at imposing a 'classical' military solution by defeating the adversary, notwithstanding frequent engagements with OMF where those occurred. Moreover, the effort was primarily aimed at increasing the Afghan Government's authority and winning and maintaining the support of the civilian population and not inflicting as much damage upon the adversary as was legally permitted. Hence, while offensive force was sometimes necessary within the overall objective of the mission, it was considered to be counterproductive to the objectives of the mission to employ force in many situations to the maximum extent allowed under the law of armed conflict where this would have undermined the consent of the Afghan Government and civil population.⁹ Similar considerations apply to most other peace enforcement missions.

³ See Section 6.01 and supporting commentary.

⁴ Under international law, the exercise of enforcement jurisdiction outside State territory requires a general attribution of enforcement jurisdiction or a specific authorization. Such general attribution is provided in the UN Law of the Sea Convention of 1982 in relation to maritime areas falling under the functional jurisdiction of coastal States (e.g. the contiguous zone, the exclusive economic zone, and the continental shelf) and in relation to vessels flying the State's flag and in relation to piracy outside the territorial waters of another State. However, in relation to law enforcement elsewhere, a specific authorization is required. An example of such authorization is SC Res. 1851 of 16 December 2008 which authorizes law enforcement measures directed towards combating piracy off the coast of Somalia in Somali territory and territorial waters.

⁵ The legal basis for the operation and the use of force is provided in the mandate issued by the Security Council or other issuing authority. The Operational Plan and Rules of Engagement are instruments to implement the mandate and consequently may never exceed the mandate. See Simma et al., *The Charter of the United Nations*, 1183–5 and *Capstone Doctrine* (see sub-Chapter 5.2), 16 and 54–5. For general comment on the relationship between legal, policy, and operational considerations in the context of ROE, see sub-Chapter 5.4.

⁶ See para. 3 of the commentary to Section 5.02. Necessity and proportionality are core principles relating to any use of force to which the Security Council is bound and considers itself bound by. See *Capstone Doctrine*, 51.

⁷ Ibid.

⁸ Under IHL/LOAC the law prohibits an 'attack' (which is synonymous with a combat engagement) which is expected to cause excessive death, injury, or damage to civilians and their property in relation to the concrete military advantage anticipated from the attack. See Section 16.06. Consequently an attack which caused significant collateral death, damage, or injury would not be illegal if the military advantage anticipated was substantial. But, notwithstanding these fairly permissive legal parameters, most ISAF actions, particularly in the latter phase of deployment, were aimed at avoiding collateral effects altogether in view of the mission objectives and the need to maintain support from the Afghan government and population.

⁹ This was both stated NATO policy and was apparent from the numerous reports relating to civilian casualties released by the UN Assistance Mission in Afghanistan (UNAMA), NGOs—such as Human Rights Watch and Amnesty International—and independent journalists and scholars. There were repeated requests by the Afghan Government to NATO during the ISAF Mission to use caution and restraint in operations conducted against OMF elements to avoid civilian casualties and maintain support for ISAF's mission.