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Characterization and Legal Basis for Peace Operations

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(p. 153) Chapter 6 Peace Operations

6.1 Characterization and Legal Basis for Peace Operations

6.01 While a strict division between peacekeeping and peace enforcement has often proven to be difficult or even impossible to achieve and maintain in practice, there are clear distinctions in legal concept and in the resulting applicable legal regime between peace enforcement falling short of traditional war-fighting operations on the one hand, and other peace operations which are essentially consensual in nature, on the other.

1. The UN Charter makes no reference to any kind of military operation other than enforcement operations under Chapter VII, which were dealt with in the previous chapter (see sub-Chapter 5.1). Nevertheless, the concept and practice of UN operations have emerged and developed over the years into one of the major tools the UN possesses and utilizes in the maintenance of international peace and security.¹ UN peacekeeping and what is now referred to as 'peace operations' in UN parlance and within the context of this Handbook are conceptually and legally distinct from enforcement measures under Chapter VII of the Charter, even though it is not always possible to maintain a strict distinction in practice between peace enforcement and certain aspects of peace operations from a practical perspective. Enforcement measures involving the use of force, as set out in the previous chapter, are characterized by lack of the need of consent and by the (possibility of) the use of proactive (offensive) force to carry out the mandate provided by the Security Council and impose the will of the international community, and have their legal basis in Chapter VII of the Charter. As stated previously, they can be conceptually subdivided into 'enforcement operations' involving full-scale and protracted hostilities directed against a State which are aimed at imposing a solution and 'peace enforcement operations', which operate under a Chapter VII authorization to employ force beyond self-defence, and will usually be undertaken in support of a government or transitional authority with the aim of providing a stable environment and may in some cases be or become engaged as parties to a non-international

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(p. 154) armed conflict in support of a government if the material conditions for the existence of such a conflict and their participation as a party to that conflict are fulfilled. Even when this is not the case, their operations will not be legally dependent upon the consent of the relevant parties and their use of force, while tailored to fulfilling the mandate with as much restraint as possible, will not be restricted to self-defence.²

2. In contrast, UN peace operations are not conceptually based upon Chapter VII of the Charter and consequently legally require the consent of the Host State in order to be able to deploy and operate on that State's territory and are additionally subject to the principles of impartiality and restricted to the use of force in self-defence.³ In addition to the legal requirement of Host State consent, peace operations are also dependent upon the consent, or at the least acquiescence, of all the parties to the conflict or dispute, in order to function and carry out their mandate, and are not intended or usually organized and equipped to engage in protracted hostilities or impose a solution militarily. Their primary purpose is to act in support of efforts aimed at promoting disengagement of the parties to a particular conflict and of achieving a diplomatic solution.⁴ Traditionally, the role and function of peacekeeping operations during the first decades of UN Peacekeeping, in the 1950s and 1960s, was to act as a buffer between opposing forces after a ceasefire agreement had been reached and oversee and facilitate the carrying out of the terms of such agreements through monitoring, interposition, and persuasion. Since the end of the Cold War, these traditional tasks have been progressively expanded to include in many cases the promotion of a stable environment, the maintenance of public order, the provision of humanitarian assistance in cooperation with civilian governmental and non-governmental agencies, and the protection of

civilians from violations of humanitarian and human rights law to the extent possible within the terms of their mandate and their operational capabilities.⁵ This has sometimes resulted in the blurring of the distinction between 'peace enforcement' and 'peacekeeping', to some extent from a practical perspective, but even so, the legal basis and operational capabilities of peace enforcement operations and peacekeeping and other consent-based peace operations are quite distinct and remain highly relevant, notwithstanding the fact that many recent peacekeeping operations operate in

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(p. 155) unstable environments against the background of often complex intrastate conflicts involving multiple actors and tenuous consent (of some) of the parties to the conflict and sometimes are provided with mandates under Chapter VII of the Charter as an additional means of inducing compliance of the parties and signalling the resolve of the international community.⁶

3. Essentially, despite the existence of undeniable 'grey areas' and a certain degree of overlap between more 'robust' forms of peacekeeping operations on the one hand and peace enforcement operations on the other, the essential difference between the two lies in the elements of consent, impartiality, and the use of coercion. Peace enforcement may strive for the maximum degree of consent feasible under the particular circumstances, but is not legally or operationally dependent upon it. Likewise, impartiality, while sometimes possible, is not required or always feasible or even desirable within the context of peace enforcement. Finally, and as a consequence of the foregoing, peace enforcement operations will be mandated, organized, and equipped to employ coercion and use force to a far greater degree than peacekeeping or other consent-based peace operations would normally be.⁷ By contrast, peacekeeping or other consent-based peace operations, whether conducted by the UN or by a regional organization or arrangement, are governed by and subject to the principles of consent of the parties, impartiality, and restricted to the use of force in self-defence, which in contemporary UN doctrine includes defence of the mandate (see Chapter 24 'Force Protection, Unit Self-Defence, and Personal Self-Defence: Their Relationship to Rules of Engagement').⁸ Consequently, while contemporary peace operations are undeniably multifaceted and multidimensional, there are clear distinctions between enforcement measures including peace enforcement operations which are essentially non-consensual and coercive and peacekeeping and other consensual peace operations, which are bound by these core principles and are primarily an instrument in support of a broader political solution to a particular conflict or situation.⁹

6.02 Enforcement operations and peace enforcement operations have their legal basis in Chapter VII of the Charter and are not subject to the consent of the Host State where they are deployed, nor to considerations of impartiality in the conduct of their operations. (See sub-Chapters 5.1 and 5.3 above.) By contrast, peace operations other than enforcement and peace enforcement operations are subject to the consent of the Receiving State and are governed by the principles of impartiality and restricted to the use of force in self-defence. These operations will be referred to subsequently as peace operations.

See commentary to Section 6.01.

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6.03 Peace operations have their legal basis in the general powers of the Security Council, of the General Assembly, and of regional organizations. The authorization of such operations with the consent of the Receiving State has emerged in UN practice as a means of support for diplomatic efforts to establish and maintain peace. Notwithstanding the absence of a specific provision in the UN Charter which refers to such operations, they have become an established and generally accepted instrument in the maintenance of peace.

1. As stated previously, the Charter makes no specific reference to peacekeeping or peace operations and the instrument of peacekeeping has emerged in UN practice, starting with the first observer missions in the years immediately following the coming into force of the Charter and continuing up to the present day.¹⁰ They were initially a pragmatic solution to the failure of the UN collective security system to function as it was originally intended due to Cold War tensions and the inability of the Permanent Members of the Council to reach agreement on the employment of enforcement measures and filled a gap left by the political stalemate that characterized international relations over the first four decades of the UN's history. Since the end of the Cold War, they have developed into a multifaceted instrument of UN policy to not only contain traditional inter-State conflicts but to assist broader efforts by the UN, by regional organizations, and by other actors, which are directed towards promoting the overall settlement of intrastate conflicts and restoration of stability following breakdowns of authority, preventing large-scale violations of human rights, and assisting in post-conflict efforts aimed at conflict prevention and the (re)establishment of democratic self-governance.¹¹

2. The legal basis for peace operations is to be found in the general powers of the UN Security Council to promote peaceful settlement of disputes and to maintain and restore international peace and security. These find their bases in Article 1(1) and in Chapters VI and VII of the Charter respectively.¹² Former UN Secretary General Dag Hammarskjöld referred to them as being 'Chapter VI and a half' measures, and prior to the end of the Cold War, all peace operations of a non-enforcement character were undertaken on the basis of a Chapter VI mandate of the Council, or in some cases of the General Assembly.¹³ The involvement of the latter organ was a direct result of the Cold War political situation referred to immediately above and resulted in a major controversy regarding the legality of the General

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(p. 157) Assembly's role in peace operations and in a crisis within the UN which led to vehement opposition by two Permanent Members of the Council to UN peace operations set up by the General Assembly in the Suez and Congo crises of the 1950s and 1960s and their refusal to pay contributions for the UN Emergency Force (UNEF) and UN Organisation in the Congo (ONUC) missions.¹⁴ Although the International Court of Justice determined in its 1962 Advisory Opinion on *Certain Expenses* that the General Assembly had the power to make specific recommendations of a non-mandatory character related to international peace and security, including the establishment of missions such as those in Suez and the Congo, and that the expenses involved in the conduct of such operations constituted expenses of the UN organization to which all Member States were required to contribute financially,¹⁵ this controversy and ensuing crisis, together with shifts in the membership and influence of the various groupings of States within the General Assembly and the political situation in general, has led to the reasserting of the predominant role of the Security Council in conducting peace operations and all such operations since the early 1960s have been exclusively mandated and politically controlled through the Council.¹⁶ Hence, while the General Assembly is theoretically capable of setting up a peace operation through its general powers of recommendation, the practice over the past near half century has been that the Security Council has paramount authority to authorize and conduct peace operations of both an enforcement and a more consensual character and the Assembly's role has been largely ancillary and supportive to that of the Council in this context.¹⁷

3. Under Chapter VIII of the Charter, regional organizations and arrangements have the power to conduct peace operations of a non-enforcement character within the context of the maintenance of regional peace and security and the settlement of regional disputes and conflicts (see Chapter 7 for further elaboration). The Council has taken a flexible approach to what constitutes a regional organization and has been generally supportive of the efforts of such organizations in the conducting of various types of peace operations, irrespective of whether such organizations technically qualify, or even view themselves as 'regional organizations' within the

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(p. 158) context of Chapter VIII of the Charter. Such regionally initiated peace support operations are subject to the consent of the Receiving State's government and the consent or acquiescence of other relevant partners in the same way UN-initiated peace support operations are and follow the same basic principles of impartiality and defensive force as their UN counterparts. As such, they do not require UN authorization in order for them to be carried out. In practice, however, the UN Security Council has been generally supportive of such regional efforts and has often provided them with political endorsement and on request a degree of logistical and material support.¹⁸ These should not be confused with peace enforcement operations undertaken by regional organizations which do require Security Council authorization under Article 53(1) of the Charter.¹⁹

6.04 Political control, exercised by the Security Council, by regional organizations, and by States is the predominant factor for the regulation of such operations, alongside any conditions posed by the Receiving State which have been accepted by the Security Council or other authorizing entity such as a regional organization. This regulation is further subject to the abovementioned principles of consent, impartiality, and the restriction of force to self-defence. These existing legal restraints are worked out into multinational and national rules of engagement (ROE) which often contain additional restraints of an operational or policy nature.

1. The political control by the Security Council or by the appropriate organ of a regional organization through the provision and supervision of the execution of the mandate provides the overall parameters and legal basis for any peace support operation alongside the consent of and any conditions imposed by the Receiving State. These are further governed by the abovementioned basic principles of impartiality and the restriction of force to self-defence and mission accomplishment.

2. The operational planning and regulation of a peace operation will be worked out in an Operations Plan (OPLAN) and rules of engagement (ROE) within the overall framework of the mandate and subject to the political control of the Security Council or other mandating authority. The drawing up of the OPLAN and ROE for the particular mission will normally be entrusted to the relevant designated body or authority within the organization charged with the administrative and operational direction and supervision of such operations. Within the UN, this is the Department of Peacekeeping Operations (DPKO), which forms part of the UN Secretariat under

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(p. 159) overall direction of the UN Secretary General and which is under the direction of the Under-Secretary General for Peacekeeping Affairs. Within DPKO, the Office of Operations and the Office of Military Affairs would be primarily responsible for the formation of the relevant OPLAN and the drawing up of mission-specific ROE, based upon the UN model ROE and taking into account the restrictions imposed by individual Troop Contributing Countries (TCCs) upon specific types of operations (these are often referred to as 'national caveats').²⁰ While it is the policy of the UN to discourage the imposition of such caveats, it is nevertheless a common practice that TCCs will often insist upon certain restrictions on the operational deployment of the forces they contribute to a particular mission as a condition of their participation in the mission. (An example of such a caveat could be that the troops provided by a particular TCC will not be used for crowd and riot control duties since they may not be trained or authorized to carry out such tasks.)

3. Once the OPLAN and ROE have been drawn up in consultation with the TCCs providing forces and other personnel and equipment for the mission in question, and the voluntary contribution of the troops by the participating States has been agreed, the forces provided will be transferred to the operational command and control of the UN or regional organization which has mandated and

is carrying out the mission through a 'Transfer of Authority Agreement' (TOA) between the relevant organization such as the UN and the individual TCCs contributing forces to the mission.²¹ For further specifics concerning the command and control arrangements in UN peace operations, see sub-Chapter 6.5 'Authority, Command, and Control in United Nations-led Peace Operations'.

4. The Security Council or relevant organ within a regional organization carrying out a specific peace support operation will retain overall political control and authority over the mission, while the actual conduct of the mission falls under the responsibility of the UN Secretary General and his delegated officials for UN peace support operations, or the counterpart organ, agency, and officials within the context of a regional peace support operation.

6.05 While all consent-based peace operations share the abovementioned general characteristics which define their legal status and which differentiate them from enforcement and peace enforcement operations, their mandates and objectives, the challenges they face, and their resulting practices will differ (widely) from case to case. In cases where peacekeeping forces become involved in hostilities, the principles and rules of international humanitarian law will be applicable to them for the duration of their participation as parties.

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(p. 160) **1.** As stated previously (see Sections 5.01, 5.02, and 6.01 with supporting commentary), peace operations differ conceptually and in the nature of their objectives, legal basis, and in many of their operational aspects from enforcement operations, including peace enforcement operations. Nevertheless, modern UN peacekeeping is multifaceted and often faces complex challenges. These can include the use of force in the context of self-defence and mission accomplishment, sometimes in exceptional cases even reaching the threshold of participation as parties within the context of a (non-international) armed conflict. If the conditions for this are met, international humanitarian law will apply as law to them for as long as they remain parties. In such cases, UN forces are bound by the principles of humanitarian law as set out in the Secretary General's Bulletin on the *Observance by United Nations Forces of International Humanitarian Law*,²² as well as by humanitarian law rules contained in treaties and in customary law to which individual TCCs are bound. Whenever force is employed, even within a relatively localized and temporary context, which rises to the level of conducting hostilities, these humanitarian principles and rules would be applicable. In all other situations, short of hostilities and whenever UN forces exercise jurisdiction over persons or a geographical area, human rights standards and rules would be applicable to UN forces as customary law.

 References

Footnotes:

¹ M. Bothe, 'Peace-keeping' in B. Simma, (ed.). *The Charter of the United Nations: A Commentary*, 2nd edn, 2 vols (Oxford: Oxford University Press, 2002), 1171 *et seq.*; N.D. White, *Keeping the*

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Peace: The United Nations and the Maintenance of International Peace and Security (Manchester, New York: Manchester University Press; 1993), 199–206 .

² See Sections 5.01 and 5.02 with supporting commentary.

³ *United Nations Peacekeeping Operations: Principles and Guidelines*, DPKO International Publication, UN Secretariat, March 2008, available online at <<http://www.un.org/en/peacekeeping/operations/principles.shtml>> (hereinafter, cited as *Capstone Doctrine*). See for discussion of the basic principles and distinction between enforcement and peacekeeping chapter 3, at 31 *et seq.* See also T. Findlay, *The Use of Force in UN Peace Operations* (Oxford: Oxford University Press, 2002), 3–7 . Recent practice of the UN has seen the blurring of the lines between expanded ‘wider’ or ‘robust’ peacekeeping and peace enforcement. For commentary see Findlay, *The Use of Force*, 5–6.

⁴ *Capstone Doctrine*, chapter 2, ‘The Evolving Role of United Nations Peacekeeping Operations’, 17–29; Findlay, *The Use of Force*, 4.

⁵ *Capstone Doctrine*, 24. See also SC Res. 1674 (2006) on the protection of civilians in armed conflict.

⁶ *Ibid.* 14.

⁷ *Ibid.* 18–19; Findlay, *The Use of Force*, 5–6 and 375–81.

⁸ Findlay, *The Use of Force*, 14–19; *Capstone Doctrine*, 34–5.

⁹ See commentary para. 2 to this Section. See also Sections 5.01 and 5.02.

¹⁰ Bothe, ‘Peace-keeping’ in Simma et al., *The Charter of the United Nations*, 1171 *et seq.*; White, *Keeping the Peace*, 199–206.

¹¹ *Capstone Doctrine*, chapter 2, ‘The Evolving Role of United Nations Peacekeeping Operations’, at 17 *et seq.*

¹² Simma et al., *The Charter of the United Nations*, 1185–7 . See also D.W. Bowett, *United Nations Forces* (New York: Frederick A. Praeger, 1964), 274 *et seq.* and White, *Keeping the Peace*, 199 *et seq.*

¹³ Simma et al., *The Charter of the United Nations*, 1174 *et seq.*; White, *Keeping the Peace*, 199–206. *Capstone Doctrine*, 13–14. It should be pointed out that while peacekeeping has been traditionally associated with Chapter VI, the Council’s practice is not to refer to specific provisions of the Charter and no mandate has ever been explicitly based on Chapter VI.

¹⁴ L. Goodrich, E. Hambro, and A.P. Simons, *Charter of the United Nations* 3rd rev. edn (New York: Columbia University Press, 1969), 157–65 .

¹⁵ The ‘Uniting for Peace Resolution’, GA Res. 377 (V) 3-11-1950 was originally intended by the then predominant Western States within the General Assembly to serve as a basis for enforcement action. Although this was largely abortive, it did play a role in the establishment of several early peacekeeping operations, notably those in Suez (UNEF I) and the Congo (ONUC), leading to the abovementioned constitutional and financial crisis and commented upon in the sources cited in the previous note. The ICJ’s Advisory Opinion on *Certain Expenses* (ICJ Reports, 1962, 155 *et seq.*) determined that both the Suez and Congo operations were not enforcement operations and were not ‘unconstitutional’. However, the solution was found in the political compromise referred to earlier whereby the Security Council reasserted its predominant role. See also Simma et al., *The Charter of the United Nations*, 1176–7.

¹⁶ See also White, *Keeping the Peace*, 127–35.

¹⁷ See Simma et al., *The Charter of the United Nations*, 1174 *et seq.*; White, *Keeping the Peace*, 199–206. *Capstone Doctrine*, 13–14.

¹⁸ For example, the DPKO has worked, and still works closely with, *inter alia*, the African Union, the European Union, NATO, the Organization for Security and Cooperation in Europe (OSCE), and

the Organization of American States in a variety of missions and has been instrumental in helping to set up the African Standby Force and works closely with the AU in Sudan and Somalia. For facts and figures see <<http://www.unrol.org/article.aspx?n=dpko>>.

19 See e.g. Simma et al., *The Charter of the United Nations*, 1484–7 and Goodrich et al., *Charter of the United Nations*, 364–7.

20 *Capstone Doctrine*, Part II: Planning United Nations Peacekeeping Operations, 47 *et seq.* See also sub-Chapters 6.4 and 6.5 in this Handbook, relating to ROE and the Application of Force and Authority, Command, and Control in UN Peace Operations.

21 *Ibid.*

22 Of 6 August 1999 (ST/SGB/1999/13).