NYU International Law Course (Kingsbury)

UNIT 7: THE USE OF FORCE

User's Guide

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A. Framework

The theoretical framework usually used to address military issues is *Realism.* The realist logic supports the introduction of law to minimize war: states in aggregate don't gain from the use of force; wars are costly and a legal regime is desirable to the extent it provides alternative channels to war and creates incentives to abstain from recourse to force. The two competing logics of *Cosmopolitanism* and *Institutionalism* challenge the *Realist* logic primacy in designing the doctrine and explaining the practice in this field. Following a cosmopolitan approach, some perceive the Charter as operating beyond the realist logic to constitute a constitutional legal order. Indeed, the UN Charter regime on the Use of Force presents an attempt to move away from inter-state relations based on each state's pursuit of its interests towards a blended inter-state and global regime that provides guidance and rules for the use of force. However, the extent to which we can conceive the regime constituted by the Charter as a constitutional legal order is critically examined throughout this unit. The Cosmopolitan logic further informs new interpretations of the Charter Regime as providing legal basis for humanitarian intervention and the state responsibility to protect. The logic of *Institutionalism* underlies competing approaches to the foreign office model utilized the UN and member state to address novel features of armed conflict.

As in previous units, the features of the foreign office model co-exist with those of global governance. The materials in this unit illuminate the changing and evolving interpretation of international law on the use of force in light of changing geo-political circumstances (e.g. colonialism, the cold war, globalization, the war on terror) and with the development and empowerment of international organizations and agencies.

B. Trajectory

The discussion in this Unit is divided to *two* main parts:

The first part of the Unit is dedicated to the changing and developing *doctrine of international law* on the Use of Force. The presentation of the doctrine runs through a historical timeline in order to illuminate the *context* in which it was developed and their *genealogy*. The discussion begins by introducing the modern international law rejection of just war theory. The analysis then turns to consider the attempts to institutionalize the law on the Use of Force in light of this paradigmatic shift away from just war theory. The failure of the utopian League of Nations collective framework led the drafters of the UN Charter towards a more nuanced approach that privileges the rule of non-intervention and state sovereignty. At the same time the Charter embodies a restrictive rule on the use of force that limits it to a narrow right for self defense and allows collective international action in accordance to Chapter VII. The analysis of the possibilities to react and regulate the Use of Force within this foreign office regime is critically discussed by examining its tension with international legal custom, its limitations and its historical contingency. The end of the Cold War is often considered a watershed that led towards greater acceptance of the UN as engaging in Global Governance posture The unit focuses on two aspects of this shift: institutional and conceptual. *Institutionally*, the U.N. evolving doctrine and practice of *peacekeeping operations* is critically analyzed. *Conceptually,* the debate over humanitarian intervention is examined. This debate yet again struggles with the tension between state sovereignty and human rights. The discussion is dedicated to the concepts of humanitarian intervention and responsibility to protect and their critique. As we close the conceptual circle, the discussion on humanitarian intervention raises further normative questions on the revival of a modern just war theory.

In *The second part* of the Unit we move from *doctrine* to *practice*. This part is dedicated to the changing *practice of armed conflicts*. It is aimed to present and problematize what constitutes an armed conflict and critically examine the answers developed to address its changing features. At the center of this analysis is the involvement of children in armed conflict, weapons of mass destruction and the war on terror. The mechanism designed by the United Nations to address the new modalities of armed conflict have led to the establishment of global governance monitoring regimes (e.g., *Watchlist* in the context of children in armed conflict and the *CTC* in the context of the war on terror).

Structured primarily to *manage* and *solve* the problem of information gathering, listing and enforcement they present serious Global Administrative Law and Human Rights concerns.

C. Away from a Just War Theory

Just War Theory is historically the most influential theory of law that governs war and peace. A systematic theory on the instances in which states may have moral justification for resorting to armed force was introduced by Saint Augustine (354-430 C.E), Saint Thomas Aquinas (1225-1274), Francisco de Vitoria (1486-1546), Alberico Gentili (1552-1608) and Hugo Grotius (1583-1645). The difficulty of third party adjudicatory power to determine what constitutes a just cause to wage war gradually led to a theoretical shift of focus from just *causes* to wage war to a just *form* of conducting war. The distinction developed in these theories between three sets of issues *Jus ad Bellum (*the law of going to war); *Jus in Bello* (the law in wartime) and *Jus Post Bellum* (the law of peace agreements and the termination phase of war) remains essential to the regulation of war today. In this section we focus primarily on the ***Jus ad Bellum***.

The contemporary law of *Jus ad Bellum* organized as a practice during the late 19th century. One of the early and prominent institutional embodiments of the idea that the use of force of one state against another is in itself a violation of the legal order is the League of Nations Covenant. The Covenant emerged from the Peace Conference in Paris in 1919. Its objective was "to promote international co-operation and to achieve international peace and security." Indeed, the Covenant set forth some provisions intended to limit the right of states to wage war but it did not prohibit war altogether. The Covenant required states to abstain from using force as long as a dispute is considered by the League's Council. However, the failure of such 'consideration' allowed states "to take such action as they shall consider necessary for the maintenance of right and justice." (Article 15 (7) of the Covenant). Indeed, the Covenant empowered the League to impose collective sanctions on states resorting to war in violation of the requirements to seek peaceful settlement and obliged states to act individually or collectively through the Council to defend victims of aggression. However, the conditions which allow such measures were narrowly drafted and failed to constitute a ban on resort to armed force.[1] In the Inter-War period, a series of multilateral treaties attempted to reinforce the new rule against war. The ***Kellogg-Briand Pact (1928)*** which

[1] THOMAS M. FRANCK, RECOURSE TO FORCE: THREATS AND ARMED ATTACKS, 9-10 (2002).

became effective on July 24, 1929 is considered the most important one. The parties to the Pact, also known as *The Pact of Paris,* "declare in the name of their respective peoples that they condemn the recourse to war for the solution of international controversies, and renounce it, as an instrument of national policy in their relations with one another."[2] In article 2 the contracting parties agreed to settle their disputes only by pacific means.

The system established during the Inter War period was overwhelmed and eventually collapsed by the Japanese invasion of Manchuria in 1931, Italy's occupation of Ethiopia in 1936, Russia's attack on Finland in 1939 and Nazi Germany's annexations of its neighboring states.

B. The Security Council: Evolution and Basic Documents

The inability of the system of the League to prevent the outbreak of the Second World War led the architects of the United Nations to focus their attention on *states* as the actors upon which a new public order is based. The underlying normative rationale informing the new order was the Weberian definition of the state as "that human community which (successfully) lays claim to the *monopoly of legitimate physical violence* within a certain territory...."[3] Within the territory of the state, the state preserves non-violence by monopolizing the legitimate use of physical force. The UN legal order is established to promote the sovereignty of each state and the rule of non-intervention of one state in the internal affairs of another state. This new order is aimed at ensuring peace and security by prohibiting the use of force as a state policy and creating a system of collective security.

Article 1 of the United Nations Charter defines the purposes of the United Nations. It conveys a mixed vision of the UN as both inter state order and a global order; something greater and of special quality than any other inter-state legal order.

Article 2(4) requires *"All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations.*" The Weberian idea is embodied in the prohibition on the threat or use of force against the territorial integrity and political independence of any states. The threat and use of force is further prohibited if it is inconsistent with the purposes of the Untied Nations. This prohibition animates the idea of the state *Responsibility to Protect.* If a state fails to protect its population it is a breach of

[2] Article 1, The Kellogg-Briand Pact, August 27, 1928, 46 Stat. 2343, 94 L.N.T.S. 57.
[3] MAX WEBER, POLITICAL WRITINGS, 310-311 (Peter Lassaman and Ronald Speirs eds., 1994).

international law that requires the UN to respond. One could further interpret it as prohibiting attacks against particular populations or national liberation movements operating within states. Similarly, the 1977 protocols to the 1949 Geneva conventions envisage potentially international legal reach to regulate the armed activity of such groups. Non-state actors could adhere to the principles of the protocols and benefit from them.

The important exception to the prohibition on the Use of Force is defined in ***Article 51***. The right of individual or collective self-defence is *inherent* and not given by the Charter. The structure envisioned in the article suggests states have the right to defend themselves; if the Security Council steps in to help maintain and secure the situation other states should refrain from acting independently. Could states be required to refrain from defending themselves? Is the inherent right of self defense subordinated to the operation of the Security Council? Given the blend between an inter-state foreign office model and a global legal order there is a difficulty in concluding the UN regime and rules occupy the entire field. While there is an attempt to restore peace and security through the United Nations, the system could collapse, or remain irresponsive. Such undesired scenarios were part of the League of Nations experience. The new system thus maintained an inherent right of self defense.

According to ***Article 39*** the determination of the existence of either the threat to peace, breach of the peace or an act of aggression by the Security Council is required before it could make recommendations or decide what measures should be taken to maintain or restore international peace and security. The Security Council is the one which determines the conditions for its further operation in order to prevent itself from being corralled to operate. Following the Security Council's determination, recommendations or decisions it is needed that the members of the United Nations agree to accept and carry out the decisions of the Security Council in accordance with the present Charter (***Article 25***).

Article 40 provides the Security Council to call upon the parties concerned to comply with provisional measures it deems necessary or desirable before making recommendations or decisions as provided in Article 39. While not stating the provisional measures are obligatory it is stated in Article 40 that "The Security Council shall duly take account of failure to comply with such provisional measures." According to ***Article 41***, the Security Council may decide what non forceful measures are to be employed to give effect to its decisions; and it "may call upon Members of the United Nations to apply such measures…." The language chosen – 'may call upon' – doesn't reflect the obligatory nature most states attach to the Security Council sanctions. Indeed, the need to limit such sanctions or constrain

them in light of their conflict with other norms is raised in various contexts of the Security Council operations (see, e.g. the Yusuf decision).

If the measures provided for in Article 41 are inadequate or prove to be inadequate the Security Council could take action by air, sea or land forces as may be necessary to maintain or restore international peace and security (***Article 42***). ***Article 43*** defines the system which envisaged putting states power at the disposal of the UN. Chapter VI deals with pacific settlement of disputes. Authorization of peacekeeping forces to have *coercive* capacity that is greater than the maintenance of peace is often considered to be authorized by Chapter 6 1/2, a practice which involves elements of both chapter VI and VII. The UN in itself doesn't deploy forces but authorized member states to use force. A dominant example is the Security Council decisions following Iraq's invasion to Kuwait. The Security Council determined that Iraq's actions constituted a breach of the peace (***Resolution 660***) to which a collective military response was warranted (***Resolution 678***). ***Article 53*** envisaged the possibility of regional arrangements such as ECOWAS, ECOMOG, OAS, and AU.

The institutional elements established by the Charter don't occupy the whole field of the international legal order. Nevertheless, some scholars perceive it as establishing a constitutional legal order. Should the UN invite a more constitutional posture of interpretation? As the discussion thus far suggests there are features in the Charter system that seem to resonate a constitutional order while others run against a constitutional understanding. This tension would continue to occupy our attention in the following sections.

C. Regulating the Use of Force

(i) Basic Legal Doctrine

The discussion on the regulation of the Use of Force by the post-1945 international legal regime in this unit begins with the decision held by the ICJ in ***the Corfu Channel Case (UK v. Albania, 1949)***. This decision embodied the Court's attempt to curb the British colonial power and state the rules on the use of force as codified in the UN Charter. It emphasized the need to depart from the rule of the powerful which governed international law in the past.

Almost forty years later, in the ***Nicaragua Case (Nicaragua v. United States, ICJ 1986)*** the Court was required to address a different geopolitical structure of power, that of the Cold War. The analysis in Nicaragua is based upon customary international law rather than the Charter itself. The Court observed that the UN Charter doesn't cover the whole area of the

regulation of the use of force in international relations. "The areas governed by the two sources [the Charter and customary international law] thus do not overlap exactly, and the rules do not have the same content." The Court held that the United States violated the principle prohibiting recourse to the threat or use of force by laying mines in Nicaraguan internal or territorial waters and by attacking Nicaraguan ports, oil installations and a naval base. The US argued that its activities could be justified as an exercise of the right of collective self-defence. The Court didn't accept this argument. It held that the right for collective self defense couldn't be invoked unless the victim state declared itself to be a victim of an armed attack and without its request for assistance. The Court held that some of the United States activities in relation to the *contras* fall short from constituting an armed attack. However, it was further held that the support given by the US to the activities of the contras constituted a clear breach of the principles of non-intervention which derives from customary international law. The potential response open to such violation is necessary and proportionate counter measures on the part of the state which had been the victim of these acts. They could only be exercised by the victim state itself; there is no right for collective counter measures.

The discussion over the legality of countermeasures was further elaborated in the ***Oil Platforms Case (ICJ, 2003)***. Following its conclusion that the Iranian attacks did not constitute an armed attack on the United States, the ICJ turned to examine whether the American countermeasures were necessary and proportionate. The Court held that the attacks on the platforms weren't necessary to respond to the incidents (the damage suffered by the United States was not connected to the Oil Platforms). However, had the Court found the attack on the oil platforms necessary, some attacks could be considered proportionate.

In ***Nicaragua*** the Court considered the issue of *attribution* of the actions committed by the *contras* to the United States. It answered this question in the negative;[4] using the test of *effective control*: "it would in principle have to be proved that that State had effective control of the military or paramilitary operations in the course of which the alleged violations were

[4] "The Court has taken the view…that United States participation, even if preponderant or decisive, in the financing, organizing, training, supplying and equipping of the *contras,* the selection of its military or paramilitary targets, and the planning of the whole of its operation, is still insufficient in itself, on the basis of the evidence in the possession of the Court, for the purpose of attributing to the United States the acts committed by the *contras* in the course of their military or paramilitary operations in Nicaragua. All the forms of United States participation mentioned above, and even the general control by the respondent State over a force with a high degree of dependency on it, would not in themselves mean, without further evidence, that the United States directed or enforced the perpetration of the acts contrary to human rights and humanitarian law alleged by the applicant State." Nicaragua v. the United States, paragraph 115.

committed."[5] The Nicaragua test was later rejected in 1999 by the ICTY Appeals chamber in Tadić[6] for determining *whether an armed conflict was international*. The Court in Tadić suggested the broader *overall control* test. In the Genocide judgment (***Bosnia v. Servbia, ICJ 2007***) the ICJ discussed the question whether the acts of Genocide carried out at Srebrenica by Bosnian Serbs armed forces must be attributed to the Federal Republic of Yugoslavia (FRY).[7] It applied the *effective control* test set out in Nicaragua and reached a negative conclusion. Are these decisions consistent? Some argue that the question of whether it is or isn't an international armed conflict is broader than the question of state responsibility and thus one could apply the broader *overall control* test to determine the former while not attributing each conduct in the international conduct to the state concerned based upon the latter test. Others challenge the consistency of these decisions.

(ii) Beyond Self Defense

In the concluding paragraphs of the excerpt of the ***Nicaragua Case*** the ICJ rejected the American argument that the threat or use of force could be used as a legal response to the *violation of human rights*. This statement seems to neglect the additional route of reaction – the option of operating through the Chapter VII regime. *Could* ***Chapter VII*** *be utilized for the purpose of protecting human rights?* **The Security Council Resolution 688 (1991)** ordered a humanitarian intervention to assist the Kurdish people and other groups who were brutally assaulted by the Saddam Hussein regime. Indeed, article 24 of the Charter authorizes the Members of the United Nations "confer on the Security Council primary responsibility for the maintenance of international peace and security, and agree that in carrying out its duties under this responsibility the Security Council acts on their behalf."

In addition to the Security Council, ***the General Assembly*** could act and authorize measures against human rights violations. Historically, such resolution was passed in 1956. In the wake of an intensifying conflict in the Suez Canal the General Assembly passed a resolution that established the first Untied Nations Emergency Force (UNEF) and agreed to deploy armed units. A similar force, based on a General Assembly resolution was sent to Zaire by the UN in the early 1960's. The task of the UN Operation in the Congo (UNOC) was to help the Congolese government restore and maintain the political independence and

[5] *Id.*, Id.
[6] ICTY, Appeals Chamber, Tadić, 15 July 1999 (Case no. IT-94-1-A). For further discussion of the ICTY, see Unit II.
[7] For further discussion on this decision see Unit IV.

territorial integrity of the country, maintain law and order, and to put into effect a wide and long-term program of training and technical assistance.[8]

What could a state do if neither the Security Council nor the General Assembly is willing to act for its protection? Could we argue for further justification to intervene when jus cogens rights are violated? Or should such theory of humanitarian intervention be rejected because it could be abused and used as a pretext for unjustified use of force? It could be argued that the social and political circumstances in the aftermath of the Second World War explain the reluctance of the Allies to provide a legal basis for humanitarian intervention. The Allies were mostly colonial powers who frequently abused their control of other territories; the Soviet Union was notoriously involved in human rights violations. Reading the exclusion of humanitarian intervention as historically contingent could help us problematize its justification.

The historical cases in which states invited other states to intervene in their affairs (e.g. the American invasion of Grenada in 1983; The United States invasion to Panama, 1989) presented a tension between the right for *Self Determination* and the *consent* embedded in the invitation of a foreign country to intervene. The ***Nicaragua case*** stated a *pluralistic logic* according to which the *people of the state* are to decide the nature of political authority and economic regime they would have. In the 1990's the logic of intervention shifted away from the pluralist/self determination logic towards *Democracy;* arguments in favor of military intervention to safeguard democracy were initially stated by the Organization of American States (O.A.S).

(iii) ***DRC v. Uganda (ICJ, 2005)***: Challenges to the Foreign Office Model

The Challenge of Collecting Evidence is an important challenge the ICJ is confronted with. The case suggests the Court relied upon evidence collected by UN agencies and Special Rapporteurs whose work isn't aimed at providing evidence for a court's ruling. Basing its finding on these sources causes problems both to the UN agents in their work around the world and to the credibility of the Court's findings.

Ungoverned Territories, Non State Actors and the issue of Attribution - in order to accept Uganda's claims for self defense, the Court sought to find whether or not an armed attack

[8] On the reluctance of France and the Soviet Union to cover the expenses of these operations see, the case concerning *Certain Expenses of the United Nations* (I.C.J., *Reports 1962*).

occurred. The armed attacks Uganda suffered from were exercised by the ADF. The Court found that there isn't enough proof to attribute the acts of the ADF to the DRC government ("even if this series of deplorable attacks could be regarded as cumulative in character, they still remained non-attributable to the DRC.", paragraph 146). The Weberian rationale of monopoly over the exercise of violence was not operating successfully in this conflict; this territory, though within the borders of the DRC was ungoverned. While the preconditions for the right of self defense do not exist here, the Court observed that the Ugandan operations hundreds of kilometers away from its border were neither proportionate nor necessary.

The question of attribution was further raised in the context of the relationship between Uganda and the MLC. The Court applies the ILC articles on State Responsibility to conclude that the conduct of the MLC was neither that of "an organ" of Uganda nor that of an *entity exercising elements of governmental authority on its behalf.* Nevertheless, the Court distinguished between attribution of the violation and the violation itself holding that the training and military support given by Uganda to the military wing of the MLC (ALC) violates certain obligations of international law. Finally, while the definition of Aggression is yet contested, the words of the Court in paragraph 164 to describe these violations could be read as a proposed definition of aggression: "The unlawful military intervention by Uganda was of such a magnitude and duration that the Court considers it to be a grave violation of the prohibition on the use of force expressed in Article 2, paragraph 4, of the Charter."

The case thus suggests the challenges of implementing the Foreign Office Model in a situation that doesn't fit the Weberian model, namely that of ungoverned inner-state violence. The disaggregated state is evident in different agents of the state acting without clear relationship and link to the governmental apparatus of the state. The exploitation of the natural resources and the commercial interests involved create alliances between companies, military officials, and governmental officials. The involvement of the Ugandan military, cooperating with commercial actors in such exploitation in this case could have been dealt with by arguing for unjust enrichment of these actors. However, attempts to attribute responsibility along a chain of such operations failed in the past and the UN shifted its attention to a technique of naming and shaming. As the following analysis of such techniques suggests, they riase, in turn, global administrative law (GAL) concerns.

Between a Cease Fire and a Peace Agreement - The *Lusaka Agreement* is defined by the Court as a *modus operandi* for achieving the withdrawal of Ugandan forces in a stable security situation. While providing a structure of operation to the parties, it doesn't change

the legal analysis; it couldn't make an unlawful behavior lawful. The agreement is interpreted in the *context of violence* in which it was drafted. Nevertheless, the risk of coercion or legitimation of illegal conduct through such agreements is in tension with the importance of settling disputes peacefully and the stability required for peace agreements to succeed. The Court is thus facing the challenge of correlating between the rationales underlying the drafting of peace agreements and the law on the use of force.

The Aftermath of the Case and the issue of Damages – the settlement reached during the aftermath of the case didn't address the issue of damages. Absent damages, the case could be regarded as helping the DRC to provide visibility to the conflict, facilitate better control over the leaders of the Ugandan military and most prominently provide an alternative forum to discuss the case and negotiate without being subjected to the structure and constraints of the Security Council. Moreover, a request for damages involves a moral dilemma. Such damages will be collected from the *government* of Uganda (namely the poor population of Uganda) rather than from the persons who benefited from the conflicts.

D. Security Council Responses to Unauthorized Intervention

The cases hereby discussed present the rare occasions in which practices of the use of force are being brought to the consideration of the Court as *legal disputes.* In most instances, however, exercises of use of force are dealt with outside court rooms and at times addressed by other international organizations. An example for the Security Council's involvement in such incident is its Resolution on the ***Osirak Attack 1981.*** A standard view on the Osirak Attack would regard it as unlawful. Israel's attack could only be justified as an act of self defense if an armed attack *occurred.* The acquisition and development of nuclear weapons by Iraq isn't considered in itself a threat to use force. ***The Security Council Resolution 487*** addressed the attack in the context of the law on nuclear weapons and the anti proliferation regime. The main claim conveyed in the Resolution was that the Israeli attack constituted a threat to the IAEA safeguards regime and it called upon Israel to place its nuclear facilities under IAEA safeguards. On September 2007 Israel bombed what was later disclosed to be a Syrian nuclear facility. The lack of international reaction against the attack could be attributed to the silence on the part of Syria on the matter. It nonetheless raises the question whether there is a growing legitimation for such constrained use of force to prevent future attacks. Does it signify an erosion of the law on the use of force? Could it be justified? Another move away from a straight forward condemnation of the use of force and

intervention in another state's affairs is apparent in the case of ***Ethiopia's involvement in Somalia in 2006***.

G. Peacekeeping

(i) The Mandate

Article 2(7) of the UN Charter determines the only exception to the rule of non intervention in the internal affairs of states ("Nothing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state or shall require the Members to submit such matters to settlement under the present Charter;") is Chapter VII ("but this principle shall not prejudice the application of enforcement measures under Chapter Vll "). Most of the peacekeeping operations have been authorized by the Security Council, but the resolutions creating them usually don't invoke the Council's Chapter VII enforcement powers.[9] Indeed, there is no explicit authorization for peacekeeping operation under the Charter. Nevertheless, the ongoing interpretation of the Charter and the practice of the UN inferred the authority to establish such operations from Article 33, in Chapter VI (Pacific Settlement of Disputes) of the Charter. The Security Council could call upon the parties to settle their disputes by, *inter alia*, peaceful means which are interpreted to include peacekeeping missions. As noted earlier, some peace keeping operations are assigned with tasks that involve them in combat operations and thus are commonly said to be authorized by "Chapter 6 1/2". This concept is considered very useful by scholars who perceive it as filling a wide lacuna[10] between the use of collective *force* to restore and maintain peace (Articles 39, 42) and the recourse to pacific measures of persuasion (Chapter VI).

(ii) Doctrinal, Epistemological and Normative Challenges

Peacekeeping operations embody a move away from a foreign office model to the global governance of armed conflicts. As such, they raise intriguing challenges to the applicability and interpretation of international law to their operation (see, e.g. the lack of clarity in the applicability of the law of armed conflict (*Jus in Bello*) to UN peacekeeping operations in ***Bialke's article)***. An example of the problem is provided in Amnesty International's pledge to ensure that peace-keepers comply with international human rights

[9] THOMAS M. FRANCK, RECOURSE TO FORCE: THREATS AND ARMED ATTACKS, 39-40 (2002).
[10] THOMAS M. FRANCK, RECOURSE TO FORCE: THREATS AND ARMED ATTACKS, 39-40 (2002).

and humanitarian law in their operations in Liberia (***Amnesty International urges the Security Council to ensure that Liberia resolution excludes impunity and effectively protects civilians, August, 2003***).

Alongside the doctrinal challenges, these operations raise normative and political questions. Indeed the League of Nations and the UN Charter desire to maintain peace and security were drafted in a context where sovereign independence took precedence over concerns about state's internal political organization. Under this model peace-keeping was envisioned as a *facilitating* effort to assist in the creation and maintenance of conditions conductive to conflict resolution and peace. The move to more robust peacekeeping operations in the years following the Cold War is often associated with a broader set of objectives attached to these operations, most prominently the promotion of liberal democratic governance. Some critics argue these operations use the rhetoric of new global humanitarian conscience to promote a new balance of power in the post-Cold war world. To what extent is the new institutionalized framework facilitating peace and reconstruction of communities self governance and to what extent are they filling the vacuum by their own authority? Whose interests are served in the contemporary perception of peace operations? ***Bellamy and Williams*** argue for a theoretical analysis of peacekeeping operations that moves beyond *the problem solving epistemology* and probelmatizes the assumptions that underpin and inform these operations (for further discussion see ***Alex J. Bellamy and Paul Williams, Introduction: Thinking Anew about Peace Operations, 2004***).

The accountability and responsibility of peace-keepers for violations of international law raises further challenges. Should peace-keepers be subject to the exclusive jurisdiction of the contributing state for all the acts or omissions arising out or related to their peacekeeping mission, if their countries are not yet a party to the ICC (as was decided in **Security Council Resolution 1497 (2003)**)? Human Rights organizations criticized this resolution for providing immunity for peacekeepers serving in Liberia and thus for undermining the ICC Statute, the domestic laws which allow for universal jurisdiction and those which allow passive personality jurisdiction (***Amnesty International, August 2003***; ***Human Rights Watch, August 2003***). The difficulty of recruiting forces for such operations and the unequal burden among states such recruitment often entails raises competing arguments to the normative problem of impunity in this context.

In ***Resolution 1712 (2006)*** the Security Council extended the mandate of the United Nations Mission in Liberia (UNMIL). The shift away from peacekeeping to global

governance and reform is thoroughly described in the Report of the United Nations Missions in Liberia. The Report describes the UN involvement in the reform of the Liberian national police, armed forces and consolidation of state authority. Intriguingly, it introduces a framework of *jus post bellum* – a plan for consolidation drawdown and withdrawal of the peacekeeping operations alongside the rehabilitation and reform of Liberia. This plan includes broad benchmarks to provide further security, governance, rule of law, economic revitalization, infrastructure and basic services to Liberia. While transparent in its indicators for progress and reform GAL concerns remain unsettled; it is unclear from the report to what extent the local communities affected by these policies are involved in their design and whether the UN mission and its personnel is held accountable to their own involvement and conduct (***Report of the United Nations Mission to Liberia, December 2006***).

Alongside the need to subject the governance of UN operations to GAL standards there is a need to design a framework to address criminal violations of UN personnel. The problem of sexual abuse and exploitation in peacekeeping personnel is an example for the gravity of lack of accountability in this context. The existing measures to prevent misconduct and to enforce UN standard of conduct fall short of providing comprehensive strategy that would tackle the challenges embedded in this problem. Should such strategy involve an *internal* complains mechanism? How could such allegations be effectively monitored and reviewed and by whom? - are a few of the challenges such global governance operations should tackle (***Presentation by Jean Marie Guéhenno, April 2005)***.

E. Human Security

(i) Competing Concepts for Human Security Challenges: Humanitarian Intervention and The Responsibility to Protect

Law on the *Use of Force* as embedded in the UN Charter regime is focused on State security. **The *United Nations Report on Threat Challenges and Change (2004)*** addresses novel understanding of collective security to address contemporary challenges. The challenges introduced in the report are three fold: First, current threats don't always recognize national boundaries though they are often connected to regional and national levels of operation; Second, states cannot independently protect themselves from contemporary

security threats. Last, it cannot be assumed that every state will be able, or willing to meet its responsibility to protect its own people and not to harm its neighbors.

This section provides a deeper analysis of two concepts developed in light of these challenges: *Humanitarian Intervention* and *"The Responsibility to Protect."* These concepts appear more pervasively in the international discourse in the years which follow the Cold War. A tragic example of the approach and political structure prevalent in UN during the Cold War is the Security Council engagement with the humanitarian crisis in Kampuchea in the 1970's. The four years of Khmer Rouge's atrocious rule in Kampuchea, during which they committed mass murderess and heinous crimes met with no international reaction. These atrocities were halted with the invasion of Vietnam to Kampuchea in 1978. Ironically, it was this invasion that led the Security Council to react and draft a Resolution which called for "the preservation of the sovereignty, territorial integrity and political impendence of Cambodia and for 'all foreign forces… to withdraw…". Similar to other incidents in this period this resolution was vetoed, blocking the Security Council from operating (***excerpt, Vietnam in Kampuchea***).

The 1990's allegedly introduced new opportunities for international operations and a growing acceptance to the *Humanitarian Intervention* doctrine. United Nations' traditional involvement in the humanitarian and other needs of Somalia was transformed in April 1992 with the Security Council's establishment of UNOSOM I to monitor a ceasefire in Mogadishu, the capital. In August 1992, UNOSOM I's mandate and strength were enlarged so as to protect humanitarian convoys and distribution centers throughout Somalia. In December 1992, after the situation in Somalia had further deteriorated, the Security Council authorized Member States to form a Unified Task Force (UNITAF) to ensure the safe delivery of humanitarian assistance. UNITAF worked in coordination with UNOSOM I to secure major population centers and deliver supplies (***Security Council Resolution 794 (1992)***.[11] A far less responsive was the UN reaction to the deteriorating conflict in Rwanda. The UN assistance mission for Rwanda (UNAMIR) wasn't provided with sufficient assistance and response. The limited capacity and reach of the assistance offered by the UN could be sensed from the restrictions and time line presented in ***Security Council Resolution 929 (1994)***. Most of the UN peacekeepers in Rwanda during the genocide were withdrawn (after the death of 10 Belgian soldiers). In 2000 the Security Council explicitly

[11] http://www.un-somalia.org/UN_Somalia/index.asp

accepted responsibility for failing to prevent the 1994 genocide in Rwanda in which an estimated 800,000 were killed.

The United Nations intervention in Somalia and its failure to intervene in the genocide in Rwanda present both the potential and shortcomings of the UN system to respond to humanitarian crisis. The failure to act to prevent the mass killings in *Bosnia* is another troubling example. ***The NATO bombing of Yugoslavia in 1999*** was a humanitarian intervention *outside* the UN regime and thus often regarded as a formal breach of the UN Charter. Some scholars argue the intervention was morally necessary and thus essentially lawful. Others argue it was formally illegal but morally necessary. The moral justification to act doesn't necessarily meet the *political* capacity to engage in a legal humanitarian intervention. While the *legal legitimacy* of the NATO action in Kosovo was contested, the inaction of the UN in light of the atrocities in Rwanda poses a grave challenge to the *moral legitimacy* of the Charter system. This tension between morality and law is at the core of the debate over humanitarian intervention.

The shortcomings of the terms "the right of humanitarian intervention" led to a competing approach to intervention on human protection grounds: ***The Responsibility to Protect***. The critique which led to this terminological shift was three fold: the critique over focusing the attention on the claims and rights of the potentially intervening states, the *act* of intervention (rather than the preventive effort or follow up assistance) and the tendency to delegitimize dissent as anti-humanitarian. The *Responsibility to Protect* shifts back the attention to the state. It requires the *state* to take responsibility for the protection of its people; it emphasizes the need to conceive *sovereignty* as *responsibility*. The international responsibility to protect arises where (a) a population is suffering a serious harm, as a result of internal war, insurgency, repression or state failure; (b) similar to the idea of complementarity, the state in question is *unwilling* or *unable* to halt or avert it. When a state is either unwilling or unable to protect its population, advocates of the *Responsibility to Protect* doctrine suggest its interpretive potential to Chapter VII; they argue for an emerging norm of the wider international community responsibility to protect; the international responsibility spans along a continuum, embracing the responsibility to prevent the crisis, react and to rebuild. Similar to the critiques raised in the context of humanitarian intervention, some developing countries perceive the *Responsibility to Protect* as yet another concept used by certain powers to pursue their political agenda under the pretext of

humanitarian intervention and protection (***Some Developing Countries Statements on the Responsibility to Protect, 2005***).

(ii) Unilateralism and its Critiques

In its concluding remarks on the idea of Responsibility to Protect, India's Statement argued that "in the case of genocide and gross human rights violations, no amount of sophistry can substitute for the lack of political will among the major powers." The lack of political will on the part of the U.S, Europe and the U.N to react in prevention of the mass killings in Bosnia and Rwanda resonates with **Samantha Power**'s harsh critique in ***A Problem from Hell, 2002***. In her analysis of the United States and other powers refusal to rescue foreign victims from humanitarian catastrophes Power argued that powerful nations look first to their economic and strategic interests, embarking on rescue missions only rarely and unreliably. Furthermore, the principles of selection are invariably tainted with the partiality of power-wielders toward themselves and their allies. Power argued that rescue missions are limited to self interest (see, e.g. Vietnam's invasion to Cambodia). ***Stephen Holmes*** critique of Power's book suggests that Power's and others' support of unilateralist intervention outside the UN framework during the 1990's unintentionally paved the way to the Bush Administration unilateral policies in Iraq. Holmes critique focuses on the lack of political will on the part of the *intervening states*. He argues that without domestic support for intervention the morality of intervention is ephemeral at best. Similar to the *State Responsibility to Protect* idea, he suggests that Human rights cannot be reliably protected unless a locally sustained political authority is in place. Experience in Kosovo suggests that the moral clarity which initiates interventions could become ambiguous as political forces on the ground change agenda and policy; similarly intervention in another state requires a willingness to engage in rebuilding endeavors which is rarely understood and thought through in advance. The troubling experience in Iraq, Holmes argues, problematizes the potential and promise of humanitarian intervention.

The 2005 General Assembly Resolution on *States Responsibility to* held nations responsible for shielding their citizens from mass atrocities and established the right of international forces to step in if this responsibility wasn't fulfilled. Critics argue it did not survive its first test: ***Darfur***. The United Nations and the African Union peacekeeping operations proved inadequate and were severely blocked by the Sudanese authorities.

Despite the legal basis for intervention provided in the Resolution and the commitment of UN agencies to its implementation, lack of political will is yet a great obstacle preventing the concept from being translated to effective policy in real time crisis ***(Warren Hoge, NYTimes, January 20, 2008)*** Further criticism is raised by ***David Chandler*** who suggests the right of intervention discourse and its application in practice reflects the new balance of power in the international sphere since the end of the Cold War. Similar to the pre-Cold War era interventionist policies, the concepts used for justifying intervention policies merely provide a justification framework to be utilized by and in accordance with political interests.

(iii) Children and Armed Conflict

The aforementioned discussion focused on the development of different legal concepts to address armed conflict in international law. The following discussion is concerned with the changing nature of armed conflicts in the last decades and the international legal responses which are developed to address them. Most conflicts are fought by armed groups within national boundaries, most casualties are civilians. This section is dedicated to one aspect of the changing nature of contemporary conflicts: the recruitment of children into armies and militias. In the ***2006 Security Council Report*** stated that there are reportedly 300,000 child soldiers in more than thirty countries around the world. In 1991 ***Resolution 1261*** identified the issue of children and armed conflict as a global priority to be addressed by the *Security Council* rather than by national or regional entities. In the Security Council Resolutions that follow the special features of the problems were identified to require an *international* response and moved the Security Council to establish a *global governance model* to address it.

Recognizing the Problem: ***Resolution 1261 (1999)*** **and** ***Resolution 1314***, ***2000*** highlighted the particular problems and needs arising from children's involvement in armed conflicts. **Resolution 1261** focused on the need to protect children from sexual abuse during armed conflict, acknowledged the linkage to small arms proliferation and the need to include children in disarmament and peace processes. **Resolution 1314** highlighted the need to protect refugees and displaced persons introducing provisions for children's protection in UN peacekeeping mandates.

Changing Policies towards a Global Governance Model ***Resolution 1379 (2001)*** introduced *a naming and shaming* initiative requesting the Secretary General to attach to his

report a list of parties to armed conflict that recruit or use children in violation of international law. The limited impact of this policy led the Secretary General to call for an "era of application" in ***Resolution 1460 (2003)***. Frustrated with the lack of compliance and systematic enforcement, the Security Council moved in ***Resolution 1612 (2005)*** to create a *monitoring and reporting mechanism* and *a Working Group* of the Council on children and armed conflict. The monitoring mechanism is a formal procedure for collecting, organizing and verifying the information that goes to the Working Group. The data is primarily collected by United Nations field teams operating in countries where children and armed conflict is an issue. ***Resolution 1612*** also asked for an independent review of the implementation of the monitoring and reporting mechanism. ***Resolution 1539 (2004)*** led to the design of an ***Action Plan for the establishment of a monitoring, reporting and compliance mechanism (2005)*** which elaborates in detail what violations should be monitored and the standards that constitute the basis for monitoring. Some attempts to adhere with GAL standards are stated in the report, e.g. the definition of clear and specific standards. However the plan is primarily focused on defining the violations that should be monitored, the standards that constitute the basis for monitoring and how to implement them. It pays little attention to the GAL concerns arising from such a monitoring and reporting mechanism. An analysis of the impact of this mechanism is provided in the materials on the influence of ***Watchlist in the DRC***.

F. The War on Terror

On September 12, 2001 the Security Council stated in ***Resolution 1368, 2001*** that the terrorist attacks which took place on 11 September 2001 are regarded "like any act of international terrorism, as a threat to international peace and security." It thus answered the potential question of whether terrorist attacks constituted an armed conflict that threatens international peace and security in the affirmative. In ***Resolution 1373, 2001*** the Security Council, acting under Chapter VII of the Charter, decided on a series of counter-terrorist measures that oblige all UN Member States. The Resolution created a new entity called the Counter Terrorism Committee (hereinafter: *CTC*), which oversees its implementation. It mandated that governments report to the CTC within ninety days and periodically after that on measures taken to implement the resolution. ***Resolution 1540, 2004*** followed a similar line of calling for international cooperation in the attempt to prevent non-state actors from

trafficking weapons of mass destruction. States were requested to report on the steps they have taken or intended to take to implement the resolution (see, ***Report of the Committee established pursuant to Resolution 1540 (2006)***). ***Resolution 1673, 2006*** extended the mandate of the ***1540 Committee*** for a period of two more years and decided that it shall intensify its efforts to promote the full implementation states with all aspects of ***Resolution 1540, 2004.***

The turn to global governance of terror to fight the proliferation of weapons of mass destruction and terrorism suggest a change in the logic underlying the Security Council operations from realism to institutionalism. Similar to the concerns raised in the context of the Watchlist mechanism these too are criticized for failing to abide with GAL standards of sufficient review, voice, accountability and adherence to due process safeguards and human rights standards (see, ***In the Name of Counter-Terrorism: Human Rights Abuses World Wide, 2003***).