

# **The Forgotten Chapter: The Legality of Peacekeeping, Peace Enforcement, and Military Intervention under Chapter VIII of the UN Charter**

*Brandt Chu*

## **I. Overview**

This article will address the potential legal implications of authorizing United Nations (UN) peacekeeping operations and peace enforcement measures exclusively under Chapter VIII of the UN Charter. Chapter VIII states that “regional arrangements” may take “appropriate” regional action to deal with “matters relating to the maintenance of international peace and security.”<sup>[1]</sup> While the UN Security Council does not have to cite any Chapter of the UN Charter to authorize a peacekeeping mission or enforcement action, it has explicitly invoked Chapter VIII in conjunction with Chapter VII in the past to authorize the use of force.<sup>[2]</sup>

While the legal aspects of Chapter VII UN peacekeeping and peace enforcement have been explored extensively,<sup>[3]</sup> there remains little in-depth research into the legal implications of authorizing UN peacekeeping missions or peace enforcement measures solely under Chapter VIII. Chapter VII of the UN Charter states that the UN Security Council may take any action “necessary to maintain or restore international peace and security” which includes the use of force.<sup>[4]</sup> Chapter VII authorizations provide a “constitutional carte blanche”<sup>[5]</sup> which grant the Security Council broad discretion in designing the legal mandates of peacekeeping and peace enforcement activities. Activities authorized under Chapter VII have ranged from missions with extensive military mandates (e.g., the establishment of an International Security Assistance Force in Afghanistan in 2001) to strictly non-military ones (e.g., the three-month deployment of UN unarmed military observers to Syria in 2012).<sup>[6]</sup>

In contrast, the few peacekeeping operations and peace enforcement measures that have been authorized or endorsed invoking Chapter VIII have been much more limited in their military scope and have, for the most part, only been authorized in cases where all the major parties involved consent to the activities.<sup>[7]</sup> Furthermore, whereas Chapter VIII activities are carried out and led by “regional arrangements,”<sup>[8]</sup> activities authorized under Chapter VII can be led by either the UN directly or regional arrangements.<sup>[9]</sup>

The ultimate objective of this article is to provide an analysis of the legal implications that may result from authorizing UN peacekeeping missions or peace enforcement activities solely under Chapter VIII. It will examine the history of Chapter VIII in the context of UN peacekeeping and peace enforcement and a potential legal “consent requirement” that may arise when conducting

peacekeeping operations or peace enforcement activities that interfere with a state's domestic jurisdiction or territorial integrity.

This article has two sections. The first will provide a chronological overview of Chapter VIII in the context of peacekeeping and peace enforcement, outlining its three principal uses historically: (1) to authorize the use of force in conjunction with Chapter VII, (2) to reinforce UN Security Council resolutions that commend the activities of regional arrangements, and (3) to legally justify the independent peacekeeping actions of a regional arrangement. The second section will outline the legal consent argument – the proposition that a grant of authority from the UN Security Council exclusively under Chapter VIII cannot derogate from the prohibition against the use of force without state consent.

## **II. A Brief History of Chapter VIII Peacekeeping and Peace Enforcement**

Chapter VIII, Art. 52(1) of the UN Charter recognizes the ability of “regional arrangements” to take “appropriate” regional action to address “matters relating to the maintenance of international peace and security.”<sup>[10]</sup> Such actions must be “consistent with the Purposes and Principles of the United Nations.”<sup>[11]</sup> Chapter VIII, Art. 53(1) states that the UN Security Council may further utilize regional arrangements for “enforcement actions” under its authority and that regional arrangements may not carry out any enforcement actions without UN Security Council authorization.<sup>[12]</sup> Chapter VIII, Art. 54 states that the Security Council must “at all times be kept fully informed of activities undertaken or in contemplation under regional arrangements. . . for the maintenance of international peace and security.”<sup>[13]</sup>

Despite the term “regional arrangements” or “regional agencies” having no agreed definition, it has been used by the UN Security Council to refer to organizations such as the Economic Community of West African States (ECOWAS),<sup>[14]</sup> the African Union (AU),<sup>[15]</sup> and the North Atlantic Treaty Organization (NATO).<sup>[16]</sup> Organizations such as NATO have tried to explicitly avoid being characterized as regional arrangements in order to avoid having to report the activities of its member states, contemplated or undertaken, for the maintenance of international peace and security to the UN Security Council.<sup>[17]</sup>

While the UN Security Council can grant regional arrangements the right to carry out enforcement action, Dan Sarooshi states “a delegation of powers to a regional arrangement does not mean that the organs of that arrangement can exceed the powers they have been given by their constituent instrument.”<sup>[18]</sup> The internal structure of a regional arrangement may preclude it from exercising powers granted to it by the UN Security Council.<sup>[19]</sup>

In practice, authority delegated to regional arrangements tends to be exercised by a few leading states within a regional arrangement, rather than regional arrangements themselves. For example, while the UN Security Council delegated its powers to maintain and restore peace and security to the Economic Community of Western African States during the civil wars in Liberia and Sierra Leone, in practice “those powers were exercised by Nigeria and a handful of other regional states

acting under and within the framework of that regional arrangement.”[\[20\]](#) Similarly, while Russia argued that the Commonwealth of Independent States’ peacekeeping operation in Georgia in 1993 was a legal activity under Chapter VIII, in reality the entire peacekeeping force was composed solely of Russian soldiers.[\[21\]](#)

An important distinction exists between two closely related concepts: peacekeeping and peace enforcement. Peacekeeping refers broadly “to the deployment of national or, more commonly, multinational forces for the purpose of helping to control and resolve an actual or potential armed conflict between or within states.”[\[22\]](#) The United Nation’s “Capstone Doctrine” defines peacekeeping as “a technique designed to preserve the peace. . . and to assist in implementing agreements achieved by peacemakers.”[\[23\]](#) It is a “complex model of many elements – military, police, and civilian – working together to help lay the foundations for sustainable peace.”[\[24\]](#) The Doctrine states that “[t]here are 3 essential elements to UN peacekeeping that continue to set United Nations peacekeeping operations apart as a tool for maintaining international peace and security: (1) the consent of the main parties to the conflict, (2) impartiality, and (3) the non-use of force except in self-defence and the defence of the mandate.”[\[25\]](#)

In contrast, peace enforcement is “the use of military assets to enforce a peace against the will of the parties to a conflict when, for instance, a ceasefire has failed.”[\[26\]](#) Trevor Findlay states that the consensus among Western militaries is that peace enforcement is a political strategy that “aims to ensure the implementation of a peace agreement or arrangement. . . through the judicious application of incentives and disincentives, among them the robust use of force.”[\[27\]](#) Peace enforcement can involve the application of a range of coercive measures, of which the use of force is only one.[\[28\]](#)

The distinction between peacekeeping and peace enforcement is not always clear in practice,[\[29\]](#) yet the distinction is important from the standpoint of international law. While peacekeeping may involve the use of force at the “tactical” level with the approval of the UN Security Council and the consent of the main parties to the conflict, it is only peace enforcement activities or enforcement action authorized by the UN Security Council that may derogate from the principle of the non-use of force.[\[30\]](#) Peace enforcement thus allows for the legal use of force without obtaining the consent of the target state, while the legal use of force in peacekeeping always requires state consent.

In the context of peacekeeping and peace enforcement, Chapter VIII has had a relatively short and controversial history. Chapter VIII was invoked extensively throughout the early-1990s but fell into disuse by the mid-2000s. The general practice of the UN Security Council today is to not invoke Chapter VIII by name, but to authorize the activities of regional arrangements carried out to advance international peace and security under Chapter VII.[\[31\]](#)

As of December 2015, there are no active peacekeeping or peace enforcement activities authorized under Chapter VIII.[\[32\]](#) No UN peacekeeping operation or peace enforcement activity has ever been authorized exclusively under Chapter VIII of the UN Charter. The doctrinal limits and legal implications of peacekeeping and peace enforcement activities authorized exclusively under Chapter VIII by the UN Security Council thus remain unexplored.

Historically, Chapter VIII has been invoked to serve diverse ends: (1) to authorize the use of force by regional organizations in conjunction with Chapter VII, (2) to commend the military interventions of regional arrangements that began with questionable legal authority, and (3) as an independent basis of legality to justify a regional arrangement-led peacekeeping operation.

Chapter VIII was first invoked in the peacekeeping context when it was “recalled” by the UN Security Council in a resolution authorizing the first UN peacekeepers in Bosnia (1992-95).[\[33\]](#) Shortly after, the UN Security Council explicitly authorized the use of force invoking its authority jointly under Chapters VII and VIII. Acting under Chapters VII and VIII, the Security Council in Resolution 787 called upon its member states to enforce a UN arms and trade embargo against the former Yugoslavia.[\[34\]](#) The resolution authorized participating states to “use such measures. . . as may be necessary. . . to halt all inward and outward maritime shipping. . . to insure strict implementation of” the arms and trade embargo imposed by the UN Security Council against the former Yugoslavia.[\[35\]](#)

Resolution 787 coincided with the beginning of NATO Operation Maritime Guard. Operation Maritime Guard was the first use of force by NATO in support of a UN Resolution.[\[36\]](#) While Resolution 713 had authorized the embargo on September 25, 1991, the earlier resolution did not explicitly authorize the use of force. Instead, it encouraged all parties to settle their disputes peacefully through negotiations.[\[37\]](#)

Perhaps more peculiarly, Chapter VIII has been invoked in UN Security Council resolutions to commend military interventions retroactively. In 1990, ECOWAS sent an “intervening force” called the Economic Community of West African States Monitoring Group (ECOMOG) to Liberia in order to help facilitate an end to the First Liberian Civil War. While the operation did not begin with explicit UN authorization, the UN Security Council “commended” the activities of ECOWAS two years later.[\[38\]](#) In UN Security Council Resolution 788, Chapter VIII was “recalled,” ostensibly reinforcing the legitimacy, if not the legality, of ECOWAS’ initial military intervention.[\[39\]](#)

Whether ECOWAS’ initial intervention in Liberia was in fact permissible under international law is questionable. While Liberia was a member of ECOWAS, its recognized national government did not consent to the ECOWAS intervention nor did ECOWAS’ constitution provide a clear basis for military-humanitarian intervention.[\[40\]](#) Eboe Hutchful states that the intervention exposed divisions between the members of ECOWAS, stating that the secretive origins of the mission:

**[L]ed to bitter legal wrangling and questions about the legitimacy of the ECOMOG initiative. Some countries felt that adequate consultations had not been undertaken before the force was deployed. More fundamentally, they questioned what they saw as an illegal extension of the mandate of ECOWAS from economic issues, as enshrined in its charter, to military concerns.[\[41\]](#)**

By obtaining *ex post facto* approval from the UN Security Council, ECOWAS arguably legitimized its past actions, even if the resolution did not make the organization’s military intervention legal under international law. While there is nothing to prevent the UN Security Council from invoking Chapter VII in resolutions to grant *ex post facto* “approval” for the unconsented military actions of regional arrangements, given that there is clear precedent for

granting *ex post facto* approval supported by Chapter VIII, Chapter VIII may be the preferred Chapter to cite when granting such retroactive approvals to regional arrangements in the future.

Notwithstanding ECOWAS' questionable legal mandate at the onset of its military intervention in Liberia, there was considerable enthusiasm with regards to the inclusion of Chapter VIII in UN Security Council Resolution 788. Pursuant to the resolution, the UN Secretary-General described ECOWAS' actions in Liberia, in particular its assistance to recently arrived UN peacekeepers and observers, as "a good example of systematic cooperation between the United Nations and a regional organization, as envisaged in Chapter VIII of the Charter."[\[42\]](#)

Outside of UN Security Council resolutions, Chapter VIII has been invoked as an independent source of legal authority to justify a peacekeeping operation. At the 3398th meeting of the UN Security Council on June 30 1994, the Permanent Representative of Russia invoked Chapter VIII as the legal basis for the presence of Commonwealth of Independent States peacekeepers in Georgia in the aftermath of the 1992-3 Georgian-Abkhaz War. Despite already having the formal consent of the belligerent parties, the Russian Permanent Representative stated at the meeting that "[T]he members of the Commonwealth of Independent States, acting on the basis of the provisions of Chapter VIII of the Charter of the United Nations. . . took the decision to introduce a collective force into the conflict zone for a period of six months. . . the Security Council will be kept fully informed, in accordance with Article 54 of the Charter, of the size of such a force and of its activities."[\[43\]](#)

The last major discussion by the UN Security Council of whether Chapter VIII should take a more operative role in UN resolutions was at a meeting to discuss the adoption of UN Security Council Resolution 1564. Acting under Chapter VII, the Security Council declared that Sudan had not met its commitments and obligations to restore security in the Darfur region and threatened economic sanctions against Sudan in the event of future non-compliance. The resolution further expressed support for the scaling-up of the African Union's monitoring mission in Darfur.[\[44\]](#)

Benin and Brazil, two rotating member of the UN Security Council at the time, expressed regret that Chapter VIII was not invoked in the resolution. Benin stated that it would have "liked the resolution to refer to Chapter VIII of the Charter in order to highlight the cooperation and consultation necessary between the United Nations and the regional organizations."[\[45\]](#) More forcefully, Brazil stated that while it welcomed the resolution, it believed that "the Council should have gone further by basing the appropriate paragraphs of the resolution on Chapter VIII of the Charter. . . it would have provided a steadier political and legal basis for the budding cooperation between the United Nations and the African Union in this particular instance."[\[46\]](#) Brazil was critical of approving the operative paragraphs of the Resolution under Chapter VII, stating that the "excessive use of Chapter VII as an umbrella. . . runs the risk of misleading all parties concerned. . . that the pacific settlement of disputes. . . were not among the options considered by the Council."[\[47\]](#)

The last significant mention of Chapter VIII in the peace enforcement context was in Resolution 1973. The resolution authorized the NATO-led "no-fly" zone over Libya during the 2011 Libyan Civil War.[\[48\]](#) Acting under Chapter VII, the UN Security Council authorized "Member

States. . . acting nationally or through regional organizations or arrangements. . . to take all necessary measures” to protect Libyan civilians and enforce a No Fly Zone over Libya while specifically “excluding a foreign occupation force of any form.”<sup>[49]</sup> Also acting under Chapter VII, the UN Security Council “recognized” the role of the League of Arab States in the region and “bearing in mind Chapter VIII,” requested the member states of the League of Arab States to cooperate with any states protecting Libyan civilians.<sup>[50]</sup>

Perhaps the principal reason that Chapter VIII has fallen into disuse in UN Security Council resolutions is that it often appeared in UN Security Council resolutions that failed to resolve their underlying conflicts. The first mention of Chapter VIII in the peacekeeping or peace enforcement context was in the UN Security Council resolution that established the UN Protection Force in Bosnia (UNPROFOR).<sup>[51]</sup> To this day, UNPROFOR’s legacy endures for its failure to prevent the 1995 Srebrenica Massacre.<sup>[52]</sup> In the aftermath of the 2008 Georgian-Russo War, the European Union’s fact-finding report found that Russian-CIS peacekeepers in the Abkhazian region actively assisted the Abkhazian side in the conflict, the report stating that “it is clear that Russian peacekeeping forces, deployed under the CIS mandate, were not performing their function and to the contrary, were supporting the proxy regimes.”<sup>[53]</sup> The ECOWAS-led peacekeeping operation in Liberia in the 1990s did not lead to long-term stability and was followed by the Second Liberian Civil War shortly after. Given its tenuous history, it may be some time before Chapter VIII is once again so openly embraced and invoked.

## **III. A Potential State Consent Requirement**

### **A. Overview**

Whether state consent would be required under a Chapter VIII authorization is at the heart of its ambiguity. It is unclear whether peacekeepers operating under Chapter VIII authority would need to obtain the consent of impacted states. If such a legal consent requirement exists, peacekeeping or peace enforcement activities authorized exclusively under Chapter VIII would have less legal rights than those authorized under Chapter VII, irrespective of the language of their mandates. While Chapter VIII authorizations could for example include operative language such as “all necessary means,” such language would have to be qualified by what is legally permissible under a Chapter VIII authorization.

There are two ways in which a state consent requirement could emerge. Firstly, a Chapter VIII authorization may not provide any new powers to regional arrangements or their member states. Sarooshi argues that Chapter VIII creates no additional powers, but provides a method for delegating Chapter VII powers to regional arrangements. Sarooshi states that “Article 53(1) only gives the council the competence to delegate Chapter VII powers to regional arrangements. . . there are no additional rights to use force which States derive by virtue of their membership in a regional arrangement.”<sup>[54]</sup> In other words, peace enforcement action authorized by the Security Council exclusively under Chapter VIII without mentioning Chapter VII may not grant any additional legal authority to regional arrangements. Without additional legal authority, it is generally accepted that regional arrangements are not permitted to use force without state consent except in individual or collective self-defence.<sup>[55]</sup>



Secondly, even if Chapter VIII provides additional legal rights, a state consent requirement may also emerge from the interrelation of Chapters VIII and I. Chapter VIII states that regional arrangements may take appropriate “regional action” to deal with matters related to the maintenance of international peace and security provided that their activities are “consistent with the Purposes and Principles of the United Nations.”<sup>[56]</sup> When such regional actions amount to “enforcement action” such as the use of force without state consent, the authorization of the UN Security Council is required.<sup>[57]</sup> Under Chapter VIII, the UN Security Council must be kept “fully informed” of all activities undertaken or contemplated by regional arrangements for the maintenance of international peace and security.<sup>[58]</sup>

The “Purposes and Principles” of the UN Charter found in Chapter I which are relevant to the peacekeeping and peace enforcement context include (1) the prohibition on the threat or use of force against a state’s territorial integrity or political independence<sup>[59]</sup> and (2) respect for state sovereignty over matters which are essentially within a state’s domestic jurisdiction.<sup>[60]</sup> Unless otherwise authorized under the UN Charter, it has been argued that the prohibition on the use of force in inter-state relations and respect for state sovereignty over matters of domestic jurisdiction are peremptory norms of international law.<sup>[61]</sup>

The UN Charter may simply not allow regional arrangements to conduct activities inconsistent with these two principles. Although Chapter VIII, Art 53(1) states that the UN Security Council shall grant authority to regional arrangements to carry out “enforcement action” where “appropriate,” such action would arguably still require compliance with Art 52(1) which states that the activities of regional arrangements must be consistent with the “Purposes and Principles of the UN Charter.”<sup>[62]</sup>

More problematic for Chapter VIII authorization is the principle of non-interference in matters of “essentially” domestic jurisdiction. While Art 2(7) of the UN Charter recognizes the principle of non-interference with matters essentially within the domestic jurisdiction of any state, the article explicitly states that the principle will “not prejudice” the application of “enforcement measures” under Chapter VII. However, there is no similar exemption in the UN Charter for those authorized under Chapter VIII.<sup>[63]</sup> Therefore, even if the UN Security Council explicitly authorized a regional arrangement to carry out an enforcement action under Chapter VIII, such a grant of authority would arguably not include the right to conduct actions that interfered with any states’ “domestic jurisdiction.”

Conversely, given the ambiguous and permeable nature of the UN Charter, there are compelling arguments that no legal consent requirement may in fact exist. While Chapter VIII, Art 52(1) states that the activities of regional arrangements must be “consistent with the Purposes and Principles of the United Nations,” the grant of authority for UN Security Council approved “enforcement actions” is found under a different article of Chapter VIII, specifically Art 53(1). Chapter VIII, Art 53(1) states that the Security Council “shall, where appropriate, utilize regional arrangements or agencies for enforcement action under its authority.”<sup>[64]</sup>

Meanwhile, one reading allows that irrespective of which Chapter explicitly invoked in a UN Security Council resolution, it may be the case that enforcement actions authorized by the Security Council pursuant to Chapter VIII would not be an authorization of the regional

arrangement's regional action under Art 52. Rather, such authorizations irrespective of the Chapter cited would constitute an implicit delegation of the UN Security Council Chapter VII powers from which the Security Council derives its general authority over matters of international peace and security.<sup>[65]</sup> If a Chapter VIII authorization were held merely as a delegation of the UN Security Council's Chapter VII authority, such authorization would have the same legal force as if they were done so under Chapter VII. This reading would accordingly allow regional arrangements to carry out actions without compliance with Chapter I, Art 2(4)(7), respecting of course the overall language of the resolution.

Similarly, a narrow interpretation of the principle of non-interference could further counteract a legal consent argument. Art 2, Paragraph 7 states matters that are "essentially" within a state's domestic jurisdiction are subject to the principle of non-interference. It is arguably the case that matters requiring the intervention of regional arrangements are not matters "essentially" within a state's sole domestic jurisdiction but matters of international peace and security.

Such a narrow interpretation would be consistent with the increasingly narrow interpretation given to what constitutes domestic jurisdiction under Art 2 Paragraph 7.<sup>[66]</sup> For example, in Resolution 688, the UN Security Council forced Iraq to permit humanitarian organizations to enter the country in order to protect Iraq's minority Kurdish population.<sup>[67]</sup> It has been argued that the resolution narrowed the scope of Art 2(7) in the context of international human rights law.<sup>[68]</sup>

Since no UN enforcement action by a regional arrangement has yet been authorized exclusively under Chapter VIII, it is unclear whether a legal consent argument would be persuasive. Admittedly, the UN Security Council has made extensive use of regional and sub-regional arrangements to carry out enforcement actions in the name of international peace and security in the past. However, the general practice of the UN Security Council has been to provide authorization for their activities invoking Chapter VII, either alongside Chapter VIII or exclusively under Chapter VII.<sup>[69]</sup>

Ultimately, it is important to recognize that there is no organization with the sole authority to adjudicate and interpret the UN Charter, a deliberate part of the design of the UN.<sup>[70]</sup> There was strong opposition at the San Francisco Conference to the prospect of the International Court of Justice having any singular control over the legitimacy or legality of acts passed by the United Nations and the UN Charter.<sup>[71]</sup>

On the other hand, Constance Schwindt states that while the UN lacks a sole adjudicative body, there are multiple bodies and organizations with limited authority interpretive authority over it.<sup>[72]</sup> According to Schwindt, the decisions and actions of such bodies, in particular those of the UN Security Council in its resolutions, have precedential value.<sup>[73]</sup>

Despite there being no overarching authoritative adjudicative body for interpreting the UN Charter, the manner in which the use of force is exercised is also important from the standpoint of international political legitimacy. In order to maintain its legitimacy, Thomas Franck states that the UN Security Council must maintain the public perception that its powers are "being



exercised in accordance with the Charter's applicable defining rules and standards.”<sup>[74]</sup> As principled interpretations of international law provide these “rules and standards,” Sarooshi states that international law “contributes to the maintenance of legitimacy in the process of a delegation by the Council of its Chapter VII powers.”<sup>[75]</sup>

Similarly, the legitimacy of a state's use of force can be measured by its perceived compliance with international law.<sup>[76]</sup> States may be cautious when exercising the use of force, even if authorized by the UN Security Council, if the authorization does not have clear lines of demarcation. Given that a UN Security Council resolution purporting to grant authority to a regional arrangement exclusively under Chapter VIII would be novel, such a regional arrangement and its member states may be reluctant to test the boundaries and ambiguities of such an authorization.

## **B. Case Example - African Union Multinational Joint Task Force in Nigeria, Lake Chad Region**

The legal consent argument could be employed by a state to provide a legitimate legal basis for restricting a regional arrangement's military activities. The case of the African Union Multinational Joint Task Force (MNJTF) is illustrative. The African Union MNJTF is a multinational military force authorized by the African Union to combat the UN-designated terrorist organization Boko Haram in Nigeria's Lake Chad region.<sup>[77]</sup> The task force operates under the umbrella of the Lake Chad Basin Commission (comprised of Nigeria, Chad, Niger, and Cameroon) with support from Benin.<sup>[78]</sup> The MNJTF's mandate is (1) to establish a “safe and secure environment” in the areas affected by Boko Haram “in order to significantly reduce violence against civilians and other abuses, including sexual- and gender-based violence,” restore state authority in affected areas and facilitate the return of Internally displaced persons, and (3) “facilitate, within the limit of its capabilities, humanitarian operations and the delivery of assistance to the affected populations.”<sup>[79]</sup>

While the task force is headquartered in Nigeria and led by a Nigerian military commander, there has been considerable legal and political infighting over the extent to which non-Nigerian forces should be allowed to engage in combat operations on Nigeria's territory.<sup>[80]</sup> Nigeria remains protective of its territorial sovereignty, as it has engaged with border disputes in the past with many of the states participating in the task force.<sup>[81]</sup> Perhaps reinforcing Nigerian fears, Chadian forces in the months prior to the task forces' authorization entered into Nigeria's territory to fight Boko Haram forces on a number of occasions without Nigeria's explicit consent.<sup>[82]</sup> Even though it agreed to the creation of the task forces, the Nigerian government continues to remain “reluctant to allow foreign intervention on its territory, and still aims to retain ownership and exert its leadership in any attempt to combat the terrorist group.”<sup>[83]</sup>

No UN Security Council resolution has been passed in support of the task force due to divisions between Nigeria and Chad over whether such a resolution should invoke Chapter VII of the UN Charter.<sup>[84]</sup> While the UN Security Council is prepared to support the African Union by providing its approval with a UN Security Council resolution, the Council will only do so once a consensus is reached among the relevant affected states over the nature of such a resolution.<sup>[85]</sup>

While a UN Security Council Presidential Statement was issued in support of the mission,<sup>[86]</sup> as Presidential Statements have no legal force, the MNJTF currently operates without explicit UN authorization,<sup>[87]</sup> instead relying on a mix of bilateral agreements between the task force participants and the consent of Nigeria.<sup>[88]</sup> Without UN authorization, Nigeria can at any time legally rescind these agreements and therefore the rights of non-Nigerian forces to use force on its territory.

In an effort to reach consensus, it is possible that as a compromise position, Nigeria and Chad could agree to a UN Security Resolution authorizing the task force under Chapter VIII. While such a move may bring the UN Security Council towards a consensus resolution, a UN Security Council resolution authorizing the task force's mandate under Chapter VIII would have considerable legal ambiguity and provide Nigeria with an opportunity to apply the legal consent requirement argument.

A significant complication could arise if Nigeria were to unilaterally restrict the task force from carrying out elements of its mandate while in Nigerian territory. While Chapter VIII has been "recalled" in the context of commending a regional organization's unconsented military intervention in a non-participating state,<sup>[89]</sup> it has never been invoked to condone military activities conducted in the territory of a state participating in the operation without its consent.<sup>[90]</sup> Theoretically, Nigeria could argue that if the task force continued its operations in disregard of its demands, the activities of the task force from that point onward would be in contravention of Articles 2(4)(7) and 52(1) of the UN Charter and, therefore, illegal under international law.

In all likelihood, the task force would not be stopped by Nigeria merely raising a legal consent argument. From a legal standpoint, the UN Security Council could always re-authorize the peacekeeping operation under Chapter VII. However, such an argument could be used by Nigeria as legally justified grounds for taking greater control over the direction and pace of the task force's activities. Furthermore, Nigeria could use the argument to assert greater legal authority over the African Union-approved operation, only consenting to limited interventions in certain geographical regions while restricting activities in others. In order to avoid having to go through the arduous process of obtaining re-authorization under Chapter VII, the African Union and other participant member states participating in the intervention may, for the sake of avoiding complication, accede to Nigeria's demands.

## **C. Ambiguity as Strength?**

Despite its precarious legal foundation, Chapter VIII authorization may serve a useful purpose in advancing international peace and security. While providing for clarity and certainty is often a key purpose of international law, in the case of Chapter VIII it is unclear that demarcations serve as its strength.

As it is unclear whether Chapter VIII authorizations can permit the use of force without state consent, Chapter VIII could be employed as a halfway measure in cases where there is reluctance to invoke the full force of Chapter VII, but where there is still sufficient support for a UN mandate with strong language. Chapter VIII authorizations could thus bridge the gap between

affected states that do not want the use of force without state consent as a possibility and those who want the possibility for using such force to remain open.

UN Security Council Resolution 2249 is illustrative of how legal ambiguities can be used to reach consensus. Passed in the aftermath of the Islamic State attacks in Paris and Beirut in November 2015, Operative Paragraph 5 (“OP5”) of Resolution 2249 “calls upon Member States that have the capacity to do so to take all necessary measures, in compliance with international law, in particular with the United Nations Charter. . . on the territory under the control of ISIL also known as Da’esh, in Syria and Iraq.”[\[91\]](#)

Whether Resolution 2249 authorizes the use of force in Syria and Iraq without state consent is unclear even from the perspective of its drafters. For instance, Mathew Rycroft, the Permanent Representative of the United Kingdoms at the United Nations, stated that the message provided a “clear, unambiguous message that there will be no respite from our collective efforts to stop, suppress and destroy ISIL.”[\[92\]](#) However, Rycroft’s statement did not mention whether the resolution provided legal force for such intervention, only that it provided UN Security Council support.[\[93\]](#) Writing for the Russian government financed news agency Russia Today (RT), Sharmine Narwani states that “[t]he lack of Chapter 7 language in the resolution pretty much means that ‘*use of force*’ is not on the menu unless states have other means to wrangle ‘*compliance with international law*.’”[\[94\]](#)

Analyzing the language of the resolution and the competing legal theories for intervention in Syria including state consent, self-defense, and collective security, Ashley Deeks finds that it is precisely the ambiguity of OP5 that allowed for its passage in the UN Security Council. While OP5 lacks many elements of a traditional authorization of the use of force by the UN Security Council such as invoking Chapter VII, it includes other elements such as the “all necessary means” language that usually appears in use of force authorizations by the Council.[\[95\]](#) Deeks concludes that:

OP5 neither rejects nor accepts the legitimacy of any particular legal theory. Instead, it indicates approval for states to use force in Syria and Iraq as long as that force is consistent with the UN Charter. That allows states to continue to rely on their existing theories for using force—which each state asserts is consistent with the Charter—without having to resolve the legal dispute between Russia and the other states using force.[\[96\]](#)

How could Chapter VIII be used in a similar fashion? Authorizations under Chapter VIII could give parties the aggressive language they desire in a UN mandate, language that allows for “all necessary means,” while simultaneously providing enough breathing room for reluctant parties by giving them a legal basis for opposing the use of force without state consent. Chapter VIII could thus provide a level of international legitimacy, if not clear legality for peace enforcement activities carried out by regional arrangements and their constituent states where there is dispute over whether state consent should be required. In this manner, authorizing peace enforcement measures under Chapter VIII may also facilitate consent based military intervention by regional arrangements as participating states may not wish to test the international legal waters.

## IV. Conclusion

Chapter VIII may play a useful, albeit secondary, role in the maintenance of international peace and security. In an era where consensus is increasingly difficult to build in the UN System, Chapter VIII authorizations may allow the Council to reach consensus in difficult circumstances, to grant regional arrangements some degree of authority to conduct peacekeeping and peace enforcement activities without providing wholesale endorsement.

The legal limits of a Chapter VIII operation are untested. Neither analyzing precedent usages nor the text of the Charter clearly answers whether obtaining the state consent of all relevant parties would be required. The ambiguities of an authorization exclusively provided for under Chapter VIII would thus invite kaleidoscopic interpretation – allowing it to mean all things to all parties. Without a clear legal mandate, however, peacekeeping forces may perhaps be more likely to negotiate with relevant state parties and more cautious when using force without explicit state consent.

[1]U.N. Charter art. 52, ¶ 1.

[2]See S.C. Res. 1464, ¶ 9 (Feb. 4, 2003).

[3]See e.g., Dan Sarooshi, *The United Nations and the Development of Collective Security: The Delegation by the UN Security Council of its Chapter VII Powers* (1999); David Schweigman, *The Authority of the Security Council under Chapter VII of the UN Charter: Legal Limits and the Role of the International Court of Justice* (2001).

[4]U.N. Charter art. 42.

[5]Jared Schott, *Chapter VII as Exception: Security Council Action and the Regulative Ideal of Emergency*, 6 Nw. J. Int'l Hum. Rts. 24, 24 (2008).

[6]S.C. Res. 1386, ¶ 1 (Dec. 21, 2001); S.C. Res. 2043, ¶ 5 (Apr. 21, 2012).

[7]See Permanent Rep. of the Russian Federation to the U.N., Letter dated June 21, 1994 from the permanent Rep. of the Russian Federation to the United Nations addressed to the Secretary-General, U.N. Doc. S/1994/732 (June 21, 1994); S.C. Res. 937 (July 21, 1994).

[8]U.N. Charter art. 52, ¶ 1.

[9]See Schott, *supra* note 5.

[10]U.N. Charter art. 52, ¶ 1.

[11]*Id.*

[12]*Id.* art. 53, ¶ 1.

[13] *Id.* art. 54.

[14] *See* S.C. Res. 788 (Nov. 19, 1992).

[15] U.N. SCOR, 59th Sess., 5040th mtg. at 252, U.N. Doc S/PV.5040 (Sept. 18, 2004).

[16] Sarooshi, *supra* note 3, at 252.

[17] *Id.* at 251 n. 13.

[18] *Id.* at 252.

[19] *Id.* at 253.

[20] *See* Charles Riziki Majinge, *Regional Arrangements and the Maintenance of International Peace and Security: The Role of the African Union Peace and Security Council*, 48 Can. Y.B. Int'l L. 97,107-08 (2010).

[21] *See* Konstantin Korkelia, *The CIS Peace-Keeping Operations in the Context of International Legal Order* 34 (1999), <<http://www.nato.int/acad/fellow/97-99/korkelia.pdf>>.

[22] Richard Caplan, *Peacekeeping/Peace Enforcement*, *Encyclopedia Princetoniensis*, <https://pesd.princeton.edu/?q=node/259>.

[23] U.N. Dep't of Peacekeeping Operations & Dep't of Field Support, United Nations Peacekeeping Operations: Principles and Guidelines, at 18 (2008).

[24] *Id.*

[25] *Id.* at 31.

[26] Caplan, *supra* note 22.

[27] Trevor Findlay, *The Use of Force in UN Peace Operations*, 376 (2002).

[28] U.N. Dep't of Peacekeeping Operations, *supra* note 23.

[29] *See* Caplan, *supra* note 22.

[30] *See generally*, U.N. Dep't of Peacekeeping Operations, *supra* note 23, at 19.

[31] *See* S.C. Res. 1973 (Mar. 17, 2011).

[32] *See generally*, UN, *Current Peacekeeping Operations*, (2016), <http://www.un.org/en/peacekeeping/operations/current.shtml>.

[33]S.C. Res. 743, ¶ 5 (Feb. 21, 1992).

[34]S.C. Res. 787, ¶ 11 (Nov. 16, 1992).

[35]*See generally, Id.*, at ¶¶ 11-12 .

[36]James Sperling & Mark Webber, *From Kosovo to Kabul* 85:3 Int'l Affairs 491,494 (2009).

[37]S.C. Res 713, ¶ 5 (Sept. 25, 1991).

[38]S.C. Res. 788, *supra* note 14.

[39]*See* Sarooshi, *supra* note 3 at 7.

[40]Mark Malan, ed., Monograph 36: *Whither Peacekeeping in Africa?* Institute for Security Studies, <https://www.issafrica.org/research/monographs/monograph-36-whither-peacekeeping-in-africa-edited-by-mark-malan>.

[41]*Id.*

[42]

[43]U.N. SCOR, 49th Year, 3398th mtg. at 2-3, U.N. Doc.S/PV.3398 (June 30, 1994).

[44]*See generally*, S.C. Res. 1564, ¶ 2 (Sept. 18, 2004).

[45]U.N. SCOR., *supra* note 15, at 8-9.

[46]*Id.* at 10.

[47]*Id.*.

[48]S.C. Res. 1973, *supra* note 31.

[49]*Id.* at ¶ 4.

[50]*Id.*

[51]S.C. Res. 743, *supra* not 33 at ¶ 2.

[52]Cedric Ryngaert & Nico Schrijver, *Lessons Learned from Srebrenica Massacre: From UN Peacekeeping Reform to Legal Responsibility*, 62:2 Neth. Int'l L. Rev. 219, 220 (2015).

[53]*See generally* 2008 O.J. (L 323/66) (concerning an independent international fact-finding mission on the conflict in Georgia); E.C. (Vol. III), at 188, *Independent International Fact-Finding Mission on the Conflict in Georgia*, (Sept. 2009).



[54]Sarooshi, *supra* note 3, at 248-9.

[55]U.N. Charter, *supra* note 1, arts. 51, 52, ¶ 1; For an analysis outside the scope of this article on anticipatory self-defence, *see* Leo Van den hole, *Anticipatory Self-Defence Under International Law* 19:1 Am U Int'l L. Rev. 70, 105 (2003).

[56]U.N. Charter art. 52, ¶ 1.

[57]*Id.* art 53, ¶ 1.

[58]*Id.* art. 54.

[59]*Id.* art. 2, ¶ 4.

[60]*Id.* art. 2, ¶ 7.

[61]Natalino Ronzitti, *Rescuing Nationals Abroad Through Military Coercion and Intervention on Grounds of Humanity* 87 (1995); *see* John-Mark Iyi, *The AU/ECOWAS Unilateral Humanitarian Intervention Legal Regimes and the UN Charter*, 21:3 Afr. J. Int'l & Comp. L. 489,496 (2013).

[62]U.N. Charter, *supra* note 1 arts. 52, ¶ 1, 53, ¶ 1.

[63]*Id.* art. 2, ¶ 7.

[64]*Id.* art. 53, ¶ 1.

[65]*Id.* art. 39.

[66]Jose Alvarez, *Judging the Security Council*, 90 Am. J. Int'l L. 1, 22 (1996).

[67]*Id.*

[68]*Id.*

[69]Sarooshi, *supra* note 3, at 248-253.

[70]*See* Benedetto Conforti, *The Law and Practice of the United Nations* 14-15 (1996).

[71]*Id.* at 15.

[72]Constance Jean Schwindt, *Interpreting the United Nations Charter: From Treaty to World Constitution*, 6:2 U.C. Davis J. Int'l L. & Pol'y 193,194 (2000).

[73]*Id.* at 201.

[74] Thomas M. Franck, *The Security Council and "Threats to the Peace": Some Remarks on Remarkable Recent Developments in Peace-Keeping and Peace-Building: The Development of the Role of the Security Council* 85 (René-Jean Dupuy ed., 1993).

[75] Sarooshi, *supra* note 3 at 7.

[76] *See id.*, n. 23.

[77] Press Release, Security Council, Security Council Al-Qaida Sanctions Committee Adds Boko Haram to Its Sanctions List, U.N. Press Release SC/11410 (May 22, 2014); African Union, Peace and Security Council, Communiqué of the 484th Meeting at the Level of Head of State and Government, PSC/AHG/Comm.2 (CDLXXXIV) (Jan. 29, 2015).

[78] *Id.* at ¶ 11.

[79] *Id.*.

[80] Thomas Fessy, *Boko Haram: Can Regional Force Beat Nigeria's Militant Islamists?* BBC (Mar. 3, 2015), <http://www.bbc.com/news/world-africa-31695508>.

[81] *Id.*

[82] Simon Allison, *THINK AGAIN: Chad Rides to the Rescue in Nigeria, but Which Chad?* Institute for Security Studies (Jan. 27, 2015), <https://www.issafrica.org/iss-today/think-again-chad-rides-to-the-rescue-in-nigeria-but-which-chad>.

[83] Lori-Anne Théroux-Bénoni, *The Fight Against Boko Haram Tangled up in Nigerian and Regional Politics*. Institute for Security Studies (Feb. 10, 2015), <https://www.issafrica.org/iss-today/the-fight-against-boko-haram-tangled-up-in-nigerian-and-regional-politics>.

[84] *See*, Security Council Presidential Statement on Boko Haram, WhaturiIn The Blue (Jul. 28, 2015, 9:07 AM), <http://www.whatsinblue.org/2015/07/security-council-presidential-statement-on-boko-haram.php>.

[85] *Id.*

[86] U.N. President of the S.C., Statement at the meeting of the S.C., Jul. 28, 2015, U.N. Doc. S/2015/14 (Jul. 28, 2015).

[87] Jeremy Matam Farrall, *United Nations Sanctions And The Rule Of Law* 21 (2007).

[88] Allison, *supra* note 82.

[89] S.C. Res. 743, *supra* note 33.

[90] *See*, Majinge, *supra* note 20 at 107.

[91] S.C. Res. 2249, ¶ 5 (Nov. 20, 2015).

[92] Mathew Rycroft, Ambassador of the UK Mission, Statement to the UN Security Council at the Adoption of Resolution 2249 on ISIL (Nov. 20, 2015) (transcript available at <https://www.gov.uk/government/speeches/today-we-sent-a-clear-unambiguous-message-that-there-will-be-no-respite-for-our-collective-efforts-to-stop-suppress-and-destroy-isil>).

[93] *See id.*

[94] Sharmine Narwani, *Breaking International Law in Syria*, RT, (Nov. 25, 2015), <https://www.rt.com/op-edge/323396-unsc-isis-syria-us/> (emphasis in original).

[95] Ashley Deeks, *Threading the Needle in Security Council Resolution 2249*, Lawfare (Nov. 23, 2015, 3:25 PM), <https://lawfareblog.com/threading-needle-security-council-resolution-2249>.

[96] *Id.*