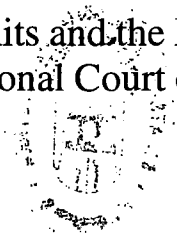


A 350582

The Authority of the Security Council under Chapter VII of the UN Charter

Legal Limits and the Role of
the International Court of Justice



by

David Schweigman



KLUWER LAW INTERNATIONAL

THE HAGUE / LONDON / BOSTON

Contents

Note by the Series Editor	v
Preface	vii
Abbreviations	ix
Introduction	1
The Problems Addressed in this Work	4
The Structure of the Work	5
1. The Interpretation of Treaties	7
1.1 The Need for and Purpose of Interpretation	8
1.2 Doctrinal Approaches to Interpretation	10
1.3 The Vienna Convention on the Law of Treaties	12
1.4 The United Nations Charter as a Constitution	14
1.5 The Approach towards Interpretation Adopted in this Work	19
2. The Authority of the Security Council under the UN Charter	25
2.1 Introduction	25
2.2 The Establishment of the United Nations	25
2.3 Functions and Powers of the Security Council	26
2.3.1 Articles 24 and 25 of the Charter	27
2.3.2 Chapter VI: 'Pacific Settlement of Disputes'	33
2.3.3 Chapter VII: 'International Peace and Security'	33
2.4 The Exception: Self-Defence	42
2.5 Relationship with other Organs	43
2.6 Composition and Procedure of the Council	45
2.7 Summary	49
3. Subsequent Practice: The Council's Application of its Powers	51
3.1 South Africa 1960-1994	52
3.1.1 Factual Background	52

3.1.2 Security Council Action concerning South Africa	53
3.1.3 Summary	56
3.1.4 Analysis: The Application of Chapter VII by the Council	56
3.2 Southern Rhodesia 1963-1979	57
3.2.1 Factual Background	57
3.2.2 Security Council Action concerning Southern Rhodesia	59
3.2.3 Summary	61
3.2.4 Analysis: The Application of Chapter VII by the Council	62
3.3 Libya and the Lockerbie Incident 1988-2000	63
3.3.1 Factual Background	63
3.3.2 Security Council Action concerning Libya	64
3.3.3 Summary	66
3.3.4 Analysis: The Application of Chapter VII by the Council	67
3.4 Iraq 1990-2000	67
3.4.1 Factual Background: The Invasion of Kuwait	68
3.4.2.1 Condemnation and Sanctions	68
3.4.2.2 The Authorization to Use Force to Liberate Kuwait	71
3.4.2.3 The Cease-Fire and Resolution 687 (1991)	72
3.4.2.3.1 The Iraq-Kuwait Boundary	73
3.4.2.3.2 Disarmament	75
3.4.2.3.3 Iraqi Reparations	78
3.4.2.3.4 Continuing Sanctions	80
3.4.2.4 The Kurds in Iraq	81
3.4.3 Summary	82
3.4.4 Analysis: The Application of Chapter VII by the Council	82
3.5 Liberia 1990-1997	87
3.5.1 Factual Background	87
3.5.2.1 Establishment of a Weapons Embargo	88
3.5.2.2 Action through Regional Arrangements	89
3.5.3 Summary	92
3.5.4 Analysis: The Application of Chapter VII by the Council	93
3.6 Former Yugoslavia 1991-2000	93
3.6.1 Factual Background: The Break up of Yugoslavia	94
3.6.2 Security Council Action concerning former Yugoslavia	97
3.6.2.1 The Establishment of Embargoes	97
3.6.2.2 The Establishment of Peacekeeping Operations	98
3.6.2.3 Humanitarian Assistance and the Embargo on Military Flights	100
3.6.2.4 The Establishment of 'Safe Areas'	101

3.6.2.5 Cooperation with Regional Arrangements	103
3.6.2.6 The Termination of Hostilities	106
3.6.2.7 The International Criminal Tribunal for former Yugoslavia	108
3.6.3 Summary	110
3.6.4 Analysis: The Application of Chapter VII by the Council	111
3.7 Angola 1991-2000	111
3.7.1 Factual Background	111
3.7.2 The Imposition of Sanctions	112
3.7.3 Summary	116
3.7.4 Analysis: The Application of Chapter VII by the Council	116
3.8 Somalia 1992-1995	117
3.8.1 Factual Background	117
3.8.2 Security Council Action concerning Somalia	118
3.8.3 Summary	124
3.8.4 Analysis: The Application of Chapter VII by the Council	124
3.9 Rwanda 1993-1996	125
3.9.1 Factual Background	125
3.9.2.1 The Establishment of an Arms Embargo	126
3.9.2.2 The Authorization of a Multilateral Intervention	127
3.9.2.3 The International Criminal Tribunal for Rwanda	131
3.9.3 Summary	134
3.9.4 Analysis: The Application of Chapter VII by the Council	135
3.10 Haiti 1993-1996	136
3.10.1 Factual Background	136
3.10.2 Security Council Action concerning Haiti	136
3.10.3 Summary	139
3.10.4 Analysis: The Application of Chapter VII by the Council	139
3.11 Sudan 1995-2000	140
3.11.1 Factual Background	140
3.11.2 Security Council Action concerning Sudan	141
3.11.3 Summary	142
3.11.4 Analysis: The Application of Chapter VII by the Council	143
3.12 Sierra Leone 1997-2000	143
3.12.1 Factual Background	143
3.12.2 Security Council Action concerning Sierra Leone	144
3.12.3 Summary	145
3.12.4 Analysis: The Application of Chapter VII by the Council	146
3.13 Afghanistan 1998-2000	146

3.13.1 Factual Background	146
3.13.2 Security Council Action concerning Afghanistan	147
3.13.3 Summary	148
3.13.4 Analysis: The Application of Chapter VII by the Council	149
3.14 Ethiopia-Eritrea 1998-2000	149
3.14.1 Factual Background	149
3.14.2 Security Council Action concerning Ethiopia-Eritrea	150
3.14.3 Analysis: The Application of Chapter VII by the Council	150
3.15 Categorization and Analysis of Functions Assumed by the Council	150
3.15.1 Causes of Security Council Action	151
3.15.1.1 Humanitarian Concerns	151
3.15.1.2 Extradition of Alleged Terrorists	153
3.15.1.3 Preventive Measures	154
3.15.1.4 Quasi-Judicial Determinations	155
3.15.2 The Modalities of Chapter VII Measures	156
3.15.2.1 Determinations under Article 39	157
3.15.2.2 Measures under Article 41 of the Charter	158
3.15.2.2.1 Sanctions	158
3.15.2.2.2 The Establishment of Subsidiary Organs	159
3.15.2.3 Measures under Article 42	160
4. Sources and Content of the Legal Limits to the Council's Powers	163
4.1 Introduction to the Problem	163
4.2 Charter-based Constraints	165
4.2.1 Purposes and Principles of the United Nations	167
4.2.1.1 Article 1(2): Self-Determination	169
4.2.1.2 Article 1(3): Respect for Human Rights	171
4.2.1.3 Article 2(1): Sovereign Equality	172
4.2.1.4 Article 2(2): Good Faith	173
4.2.1.5 Article 2(7): Domestic Jurisdiction	178
4.2.1.6 Articles 1 and 2 Generally: International Humanitarian Law	179
4.2.1.7 Interim Conclusions	181
4.2.2 Procedural Limits: Articles 27(3), 31 and 24(3) of the Charter	182
4.2.3 The provisions of Chapter VII	184
4.2.3.1 Seizure by the Council Under Article 39	184
4.2.3.2 Measures Under Articles 41 and 42	189
4.2.3.3 Article 51: Self-Defence	192
4.2.4 Miscellaneous Charter Provisions	193

4.3 Extra-Charter Constraints	193
4.3.1 Treaty Law	194
4.3.2 Customary International Law	195
4.3.3 General Principles of Law	201
4.4 Conclusions	202
5. Illegal Council Decisions: Consequences and the Remedies Available	205
5.1 Who Determines whether Council Decisions are <i>ultra vires</i> ?	205
5.2 The Right of Member States to Challenge Council Decisions	206
5.3 Review by the International Court of Justice	210
5.3.1.1 The Jurisdiction of the Court in Contentious Proceedings	211
5.3.1.2 Jurisdiction of the Court in Advisory Proceedings	213
5.3.1.3 The Court's <i>Compétence de la Compétence</i>	215
5.3.1.4 Preliminary Objections to the Exercise of Jurisdiction	216
5.3.2.1 The Principle of Litispendence	217
5.3.2.2 Origins of the Principle	217
5.3.2.3 Litispendence in International Law	218
5.3.2.4 Classification of Litispendence as a Preliminary Objection	220
5.3.3.1 The World Court's Case law relevant to Litispendence	220
5.3.3.2 The League of Nations and the Permanent Court	220
5.3.3.3 The Permanent Court on Litispendence: Polish Upper Silesia	223
5.3.3.4 The League Council and the Court Concurrent Jurisdiction	226
5.3.3.4.1 Settlers of German Origin	227
5.3.3.4.2 Rights of Minorities in Upper Silesia (Minority Schools)	228
5.3.3.4.3 Interpretation of the Statute of the Memel Territory	229
5.3.3.5 Conclusions: The Permanent Court on Litispendence	230
5.3.4.1 Concurrent Jurisdiction within the United Nations	231
5.3.4.2 The International Court of Justice on Concurrent Jurisdiction	232
5.3.4.2.1 The Aegean Continental Shelf Case	232
5.3.4.2.2 United States Diplomatic and Consular Staff in Tehran	235
5.3.4.2.3 The Nicaragua Case	238
5.3.4.2.4 The Bosnian Genocide Case	242
5.3.4.3 Interim Conclusions	244
5.3.4.4 The Lockerbie case	244
5.3.4.4.1 The 1992 Order on Provisional Measures	246
5.3.4.4.2 Libya's Rights under the Montreal Convention	247
5.3.4.4.3 Resolution 731 (1992) and the Court Proceedings	247

5.3.4.4.4 Concurrent Jurisdiction between the Council and the Court	248
5.3.4.4.5 The Pre-eminence of Resolution 748 (1992)	251
5.3.4.4.6 Jurisdiction of the Court alongside Resolution 748 (1992)	252
5.3.4.4.7 The 1998 Judgment on Preliminary Objections	255
5.3.4.4.8 Assessment of the Lockerbie case	256
5.3.4.4.9 The Lockerbie case and Litispence	258
5.3.4.5 Conclusions: the World Court on Litispence	260
5.3.5 The 'Political Question Doctrine'	261
5.3.6 Judicial Review by the Court of Security Council Decisions	267
5.3.6.1 Judicial Review in Contentious Cases	267
5.3.6.2 Judicial Review in Advisory Opinions	271
5.3.6.2.1 Competence of the GA for the Admission of a State	272
5.3.6.2.2 Certain Expenses of the United Nations	273
5.3.6.2.3 Legal Consequences (South-West Africa)	274
5.3.7 <i>De lege lata</i> Conditions and Consequences of Judicial Review	276
5.3.7.1 Advisory Proceedings	277
5.3.7.2 Contentious Proceedings	281
5.3.8 The Court's Determinations of Illegality	282
5.3.9 Legal Consequences of the Court's Determination of Illegality	283
6. Enhancing the Council's Legitimacy	287
6.1 Introduction	287
6.2 Reform and Effectiveness of the Security Council	288
6.3 Composition	289
6.4 The Right of Veto	293
6.5 Transparency	295
6.6 Conclusions	297
Conclusions	299
List of References	307
Table of Cases	343
Index	349