

**ODUMUNC 2010
Issue Brief for the
GA Sixth Committee, Legal**



The Legal Ramifications of Establishing UN Enforcement Organs

**by Cody Zimmerman
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One of the most powerful tools in the hands of the UN General Assembly is the responsibility to make rules determining how the UN intervenes in the world. Enforcement of United Nations policy and resolutions is a problematic issue that has plagued the organization ever since its inception in 1945. The single biggest hurdle to UN enforcement is state sovereignty. Codified in *Chapter 1, Article 2* of the UN Charter, state sovereignty is one of the founding principles of the UN, and means that states have ultimate authority over their internal affairs. Within the UN, only resolutions passed by the Security Council are legally binding, the violation of which allows the Council to take recourse through the authorization of sanctions, force, or any number of actions it deems appropriate and/or necessary. However, even after the Council authorizes enforcement action, it then becomes necessary to enforce the execution of that action, which is a second hurdle all to itself. As has often been said before, the UN is only what member states make of it.

How to make the UN more effective? The traditional solution is consensus decision-making, insuring that all states support its decisions. But this often requires diluting the strength of resolutions to something acceptable to all, weakening their practical impact. The alternative is developing actual UN enforcement capability. This raises the idea of *collective security*—uniting the international community to act against specific nations that refuse to accept its rules—a long standing goal for international governance.

UN enforcement falls into two broad categories: enforcement of peace and enforcement of policy. *Peace enforcement* primarily originates in the Security Council and involves the authorization of force to settle an armed conflict. This differs from *peacekeeping* – in which the two parties in conflict have reached a settlement and the UN steps in to make sure both abide by that settlement – in that no settlement has been reached and thus at least one of the parties is opposed to outside intervention. Peacekeeping is not mentioned in the UN Charter, but emerged as a widely supported development of *Chapter VI*, with promotes peaceful settlement of disputes. In peacekeeping, use of force is generally only authorized for self-defense by the peacekeepers, whereas in peace enforcement, the use of force is a necessary component of the policy as the interveners attempt to obstruct or destroy the parties' abilities to fight, and thus force them to the negotiating table.

As a result, peace enforcement is inherently problematic given the UN's stated respect and support for state sovereignty. Although the actual use of force is anticipated under *Chapter VII* of the UN Charter, it has only been used under peculiar circumstances, most spectacularly in the 1950 authorization for intervention in Korea. There is a tendency, seen in situations like Somalia

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and the former-Yugoslavia, for UN missions to start as pure peacekeeping and gradually become more enforcement. Commentators sometimes in jest call these Chapter 6 and-a-half missions.

Peace enforcement by its nature violates state sovereignty since at least one of the warring parties is opposed to intervention from outside. Moreover, peace enforcement performed by or authorized by the UN can be problematic after the conflict is settled, as peace enforcement turns into peacekeeping. Since at least one party is necessarily opposed to outside involvement, the UN violates the principle of neutrality if it involves itself in peace enforcement. The loss of the legitimacy and credibility often earned by remaining neutral puts the UN in a difficult position when it transitions to peacekeeping, as any party that opposed its intervention will question its judgment and policies, making the keeping of the peace that much harder.

Some states insist that even if the UN were able to develop an accepted, legal rationale for the violation of state sovereignty to perform peace enforcement, it would lose its single greatest asset during subsequent peacekeeping operations; the perception that it is neutral, legitimate, and credible as a third party broker. Others believe, however, that failure to act in the face of grotesque provocations, such as unjustifiable attacks on other states or genocidal attacks on civilians, is much worse. Failure to act, they maintain, threatens to make the UN system meaningless.

Enforcement of policy can also originate in the Security Council, but can also stem from other UN organs. In the latter case, resolutions passed by the Human Rights Council or the General Assembly, for example, or international conventions such as those on torture and the rights of the child, as some more examples, are expected to be implemented and enforced by all UN member-states (or at least those that sign the agreement, as the case may be). However, they are not legally binding and there is no institutional body or mechanism to ensure that member-states enforce the agreements. Moreover, the enforcement of these policies by the UN is obstructed by state sovereignty just as much as Security Council resolutions, if not more so. At least the Council's resolutions are legally binding and it can use its responsibility to ensure international peace and security to justify a number of actions that may not perfectly comport with respect for state sovereignty. Many of the policies put forth by bodies outside of the Security Council, on the other hand, involve quality of life issues or purely internal matters – like human rights issues –, neither of which legally justifies the violation of state sovereignty for enforcement purposes. Just like peace enforcement, enforcement of policy is not likely to be established without a widely accepted, legal justification to impinge on a state's ultimate authority over its internal affairs.

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The rules governing peace enforcement are developed by the General Assembly, and applied by the Security Council. Enforcement of policy put forth by the Security Council is where enforcing the enforcers becomes an issue. For example, arms embargoes are a common tool of coercion employed by the Security Council. However, resolutions authorizing such actions are all but voluntary because there is no body or mechanism that ensures that all member-states obey the arms embargoes. In this case at least, since Security Council resolutions are legally binding, states that violate arms embargoes are in violation of international law, and thus recourse is justified. However, never has the Security Council sanctioned a state for violating sanctions, and without a UN force to prevent such violations – a force like the Proliferation Security Initiative, the members of which interdict ships suspected of carrying illicit nuclear materials – there is little hope that the UN can enforce these resolutions. The legal rationale for such is already there, however, so all the UN needs is a system to implement it.

The countries typically most willing to support limitations on sovereignty are those who already have encouraged its limitation. The countries of the European Union have been at the forefront of this process, reducing their sovereignty in order to maximize welfare, communications and shared understanding. They usually are supported by other countries from Europe, Latin America, Canada, Australia, New Zealand, and some of Africa. The countries most jealous of traditional sovereignty include the Arab Middle East, South and East Asia. The United States has been seen wavering over the years.

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Background information:

Under Chapter VII of the UN Charter, the UN Security Council may take measures to deal with threats to peace, breaches of the peace and acts of aggression. On several occasions, the Security Council has authorized Member States to use all necessary means-including force-to achieve a stated objective. Consent of the parties is not necessarily required.

With such Security Council authorization, Member States have formed coalitions to take joint military action as in the Korean conflict in 1950, and more recently, following Iraq's invasion of Kuwait, in Somalia and Rwanda, to restore the legitimate government of Haiti, in Bosnia and Herzegovina, in Albania and in East Timor.

When a nation ratifies a treaty it undertakes both negative obligations (to refrain from actions that violate human rights) and positive obligations (to take affirmative actions to guarantee that human rights are protected). In order to ensure that governments are fulfilling both negative and positive obligations, the United Nations system includes a variety of enforcement mechanisms.

Enforcement mechanisms are usually categorized by the type of UN body that receives communications or carries out the monitoring process. There are three broad categories of enforcement mechanisms: (1) charter-based mechanisms, such as the UN Commission on the Status of Women; (2) convention or treaty-based mechanisms, such as the Committee on the Elimination of Discrimination Against Women; and (3) mechanisms contained in UN specialized agencies, such as the International Labor Organization or the World Health Organization. Each of these bodies monitors either a specific human rights issue or particular treaties.

The classification of enforcement mechanisms into these categories clarifies the workings of the UN structure. For women's rights advocates, however, it is generally more useful to understand the type of *procedure* available under each of the UN enforcement bodies, rather than the structural aspects of the mechanism.

Individuals or non-governmental organizations (NGOs) can bring information about human rights violations, or non-compliance with human rights obligations, to the UN bodies mentioned above through two procedures: *complaint mechanisms* and *reporting/ monitoring mechanisms*. Each procedure has its own requirements, limitations and outcomes. In choosing to seek enforcement of human rights obligations, advocates should carefully evaluate, first, the mechanisms available to them based on the treaty ratification of their national government, and,

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second, the desired remedy or outcome for the victims of human rights violations. There are also specific differences between the procedures, such as whether the communication remains confidential, that must also be considered.

Advocates should consider the remedies available at the international level, under the UN, as part of a larger strategy to combat violence against women. For many reasons, the international enforcement mechanisms should only be addressed after attempting to obtain redress through the national legal system.

First, the UN enforcement bodies that accept direct complaints require **exhaustion of domestic remedies** before a case can be considered admissible. Secondly, and perhaps more importantly, the remedies available under international law may not always be advantageous to the individual victim. The UN mechanisms are often very slow and time-consuming and confidentiality of the complainant cannot always be ensured. Victims of violence may have limited resources in which to invest in a lengthy procedure. Furthermore, safety for the victim should be a paramount concern, and the UN is limited in its ability to intervene and protect individual victims of human rights violations.

“**Special procedures**” is the general name given to the human rights investigative and reporting mechanisms established by the **United Nations Commission on Human Rights** (the “Commission”). Although their mandates can vary, Special Procedures examine, monitor, advise, and publicly report on human rights situations in specific countries or territories, known as “country mandates”, or on major human rights issues or violations worldwide, known as “thematic mandates.” Special Procedures undertake various activities, including responding to individual complaints, conducting studies, providing technical assistance, and engaging in general promotional activities.

During the existence of the UN Commission on Human Rights, leading democratic member states criticized the Commission for having an agenda that politicized the process of identifying and reprimanding human rights violators. Formal inquiries into the human rights records of individual countries were made via country-specific special procedure mechanisms. Often, a block of countries consisting of the most egregious human rights violators relied upon the special procedures process to investigate and publicly shame isolated countries engaged in activities that, while politically and socially unpopular in certain circles, often did not rise to the level of human rights abuses. This partisanship abuse of the human rights investigative and reporting process prompted the United States and other democratic countries to press for the restructuring

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of the Commission. This effort resulted in the formation of the Human Rights Council (the “Council”) in 2006.

One way that the new **Human Rights Council** attempts to address the problems of selectivity and politicization is by allowing for a “**universal periodic review**” (UPR) mechanism. Under this new process, during a four-year cycle, all 192 UN Member States will be reviewed, rather than simply focusing on a select few chosen by the Council. The **mandate** of the mechanism is to “undertake a universal periodic review, based on objective and reliable information, of the fulfillment by each State of its human rights obligations and commitments in a manner which ensures universality of coverage and equal treatment with respect to all States.” This mechanism is to “complement and not duplicate” the work of other UN treaty bodies.

A Working Group, consisting of 47 member states and chaired by the President of the Council, conducts the state reviews. Three rapporteurs from among the Council members (a “troika”), help conduct the individual reviews and prepare the report that follows. Each periodic review includes an interview lasting three hours, during which “interactive dialogue between the country under review and the Council” takes place. Observer States may participate in this interview portion of the review. Each member state will be reviewed according to the human rights obligations stipulated in the **Charter of the United Nations**, the **Universal Declaration of Human Rights**, any human rights instruments to which the state under review is party, any “voluntary pledges and commitments” made by the state in question, and any applicable international humanitarian laws.

In order to prepare for the review, member states are asked to prepare a “national report” according to guidelines established by the Council, and containing any other information that may be relevant to the evaluation of human rights of the state under review. In addition, the **Office of the High Commissioner for Human Rights** must submit a compilation of any UN documents pertaining to the human rights record of the country under review, including treaty reports, special procedures and observations, and comments by the state. Finally, “other relevant stakeholders” are encouraged to provide information regarding the state in question.

Following the review session, the Working Group must issue a report for each member state which summarizes the proceedings of the review, states the conclusions and recommendations made by the working group, and lists the recommendations that the state under review as accepted or refused. The report must then be offered for adoption at a plenary session of the Human Rights Council.

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After the dissolution of the Commission, in addition to creating the universal periodic review mechanism, the Human Rights Council assumed the Special Procedures mechanisms. The Council solicits the help of human rights experts to assist it in the task of examining specific situations or human rights themes. These mandates may focus on reporting on violations, on analyzing a problem, on assisting in the provision of technical assistance, or on a combination of one or more of these features. The adopted resolution of the former Commission and the Council set forth the mandates given to the Special Procedures experts. The relevant resolution can provide for the appointment of a mandate-holder by the Chairperson of the Council, by the **Secretary-General**, or by the **High Commissioner**.

The mandate-holders are prominent human rights figures from various walks of life. They include current and former holders of high judicial office, academics, lawyers and economists, former and current members of non-governmental organizations, and former senior staff members of the United Nations. They come from all regions. In recent years, more effort has been made to select women experts. There are currently 10 women experts. Special Procedures experts all enjoy the same legal status and fall within the same structure.

The **International Court of Justice (ICJ)** is the judicial arm of the United Nations. Established in 1945 by the Charter of the United Nations, the ICJ is charged with settling legal disputes between states using international law. It can also give advice to other UN organizations and agencies in regards to legal questions.

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