

The UN Security Council and International Law

The UN Security Council and International Law explores the legal powers, limits, and potential of the United Nations Security Council, offering a broadly positive (and positivist) account of the Council's work in practice. This book aims to answer questions such as when are Council decisions binding and on whom, what legal constraints exist on Council decision-making, and how far is the Council bound by international law? Defining the controlling legal rules and differentiating between what the Council can do, as opposed to what it should do as a matter of policy, this book offers both a tool for assessment of the Council as well as realistic solutions to address its deficiencies, and, most importantly, evaluates its potential for maintaining international peace and security, to the benefit of us all.

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Preface

This book is an updated and expanded version of the Hersch Lauterpacht Memorial Lectures on *The UN Security Council and International Law* given by Michael Wood at the University of Cambridge's Lauterpacht Centre for International Law, 7–9 November 2006.

The text of the three lectures remains available on the Centre's website, and so it is possible to see what has remained constant and what has changed over the last fifteen years. While inevitably there have been many developments over a busy (if not entirely positive) decade and a half of Security Council activity (including some important court pronouncements), the main points made in the lectures remain largely valid. At the same time, Michael is greatly indebted to his co-author for agreeing to join in this publication and for contributing much up-to-date information and introducing some new thinking.

The lectures drew on Michael's experience of Security Council matters while working at the United Kingdom Mission in New York between 1991 and 1994, as well as following the Council closely while in the Foreign and Commonwealth Office between 1994 and 2006. The lectures are rooted in practice, with even, dare one say, a bit of common sense. The many additions and updates have been made together with Eran Sthoeger, who brought a fresh view from his time working for Security Council Report between 2010 and 2020 and thereafter teaching United Nations law. Both authors benefited greatly from their association with the excellent volume *The Procedure of the UN Security Council* by Loraine Sievers and Sam Daws (currently in its 4th edition; Oxford University Press, 2014), with its associated website.

This is a book about the law, not policy. The focus is on what the Security Council can and cannot do as well as its practice over time, not what it should or ought to do with its powers and authority. Unless there are obvious legal issues, we have tried to avoid (except briefly in the

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conclusions) policy debates such as the eternal questions of Security Council reform, whether concerning the veto or the composition of the Council.

We have sought to retain a style appropriate to lectures: brevity, clarity, and a certain lightness of touch. The text does not aim to be comprehensive or learned; it does not include extensive theoretical digressions or lengthy footnotes.

The authors wish to thank all those working at Cambridge University Press for their assistance with this project. A particular word of thanks is due to Finola O'Sullivan for her great publishing skills, good humour, and patience.

Conclusion

The Security Council is a highly politicized body, but that does not mean that the law is irrelevant to its work. As the principal organ of the United Nations with primary responsibility for the maintenance of international peace and security, it is of course bound by the Charter, from which its functions and powers derive.

The work of the Security Council is followed and scrutinized closely, for good reason given its extensive powers (in a limited – albeit expanding – field). But observers – whether practitioners or academics, and whether looking at the Council from within or without – should not advocate for what it should be doing, not doing, or doing better without a correct understanding of the legal framework within which the Council acts. Otherwise, states generally are unlikely to take their views seriously. This applies also to international lawyers who critique the Council.

We have sought in this book to make the legal nature of the Security Council more readily understood. To do so, we have sought to adopt a straightforward approach to the legal aspects of a very practical body, focusing on what concerns the main actors in international law, states. We have focused on the text of the Charter and how the Council and the member states have understood and applied the provisions relating to the Security Council in practice over the years.

Just as the ICJ is not the world's adjudicator, despite being dubbed the 'World Court', so the Security Council is not the international community's executive body. Its decisions may, at times, resemble those of an executive body, legislator, or judicial body, but, as we have seen, despite a natural inclination to categorize them within familiar legal constructs, they are none of these. As

stated in the Charter, the Security Council is the UN organ with the primary responsibility for the maintenance of international peace and security. Its decisions are those that it itself deems necessary to achieve that purpose.

Its binding decisions are usually found in resolutions adopted under Chapter VII, though this is not out of legal necessity. When it seeks to adopt binding decisions, the Council often uses terms like 'decides' or 'authorizes' to convey binding obligations. Nonetheless, sometimes the Council may make binding 'demands' of parties and, on occasion, even seemingly non-binding language such as 'calling upon' states to take or refrain from action may be considered binding, having regard to all the circumstances. Thus, while the Council's practice provides some guidance as to when the Council creates binding obligations and for whom, a case-by-case approach, based on a careful reading of the Council's outcome documents in context, is always necessary.

Under the Charter, the Council can make recommendations or adopt decisions that are binding on member states. The Council's practice from its early days demonstrates that it is of the view that it can also impose binding obligations on other actors, an approach that finds support in the jurisprudence of the ICJ.

The Charter grants the Council wide discretion in its decision-making. The Council enjoys wide discretion in determining whether a situation is a 'threat to the peace', which allows it to move forward to adopt enforcement measures under Chapter VII. The Council has utilized its discretion to expand the scope of this term and apply it to a variety of situations. Similarly, the Council enjoys wide discretion in deciding what measures are necessary to maintain or restore the peace in such situations. This is true whether the Council is adopting provisional measures under Article 40, measures not involving the use of force under Article 41, or, if necessary, collective security measures involving the use of force under Article 42.

This wide discretion in determining the nature of the situation and deciding on the necessary measures to address it is not unbound by law. But, as lawyers, it is important to be precise: the law applicable to the Council is first and foremost the UN's constituent instrument, the Charter. Many also view the Council as subject to the small yet important set of *jus cogens* norms.

These limitations may seem weak. Indeed, in practice, as we have seen, it is hard to envisage a situation where it can reasonably be argued that the Council has exceeded its discretion and stepped beyond its legal powers, particularly its discretion in identifying a threat to the peace under Article 39 or adopting measures under Chapter VII.

At the same time, some judicial bodies, such as the ECtHR and the CJEU, have sought to constrain the Council, applying stricter legal limitations to its actions. But these approaches overlook the basic structure of international law in the UN era, that of the priority of obligations under the Charter, including for Council decisions and authorizations, over all other international obligations.

Understandably, to allow the Security Council – the composition of which reflects the power dynamics of 1945 – such a wide discretion may make judges, lawyers, diplomats, and students of the Council uneasy. But, fundamentally, the powers of the Council and its wide discretion set forth at San Francisco lie at the heart of the Council's very existence.

The Council's effectiveness and success in maintaining international peace and security and in preventing and stopping disasters and atrocities are dependent on these unique powers. Learning the hard lessons from the failure of the League of Nations, the Council was purposely granted in the Charter the mandate to go beyond that which states can do unilaterally: the extraordinary power to impose legal obligations on member states and the extraordinary powers to authorize the use of force, even when there exists no right of self-defence for a state. Combined with the priority given to Charter obligations over other international obligations, the Council can authorize and even oblige states to do what would otherwise be illegal, irrespective of their other obligations. And, as stated in Article 24(1) of the Charter, when the Council acts, it acts on behalf of all of the member states.

Though the Council has not infrequently failed the international community, the minimal legal constraints on the Council in terms of the timing of its actions, their scope, and their nature are precisely why it has been able to adopt innovative measures, adapt to new types of conflict and situations over the years, and match reality with equally unique measures. Without such discretion and flexibility, the Council could not have established the ICTY and the ICTR;

administered territory in order to protect local populations; authorized the use of force to end mass atrocities; ensured that all states appropriately criminalize acts of terrorism and the financing of terrorism, and so on.

This adaptability results from the open-ended nature of the text of the Charter and is reflected in the actual practice of the Council, rather than from wishful thinking and idealism, or criticism dressed up as law but in fact based on policy. But, it should be borne in mind, this approach necessitated by the Charter and carved out in practice also places legal limitations on the Council. For example, staying true to the nature of the Charter as a treaty among the member states, rather than a constitution of the international community, means that other international organizations are not necessarily bound by Council decisions. Thus, the ICC (as opposed to the states party to the Rome Statute) is not necessarily bound by Council resolutions aiming at carving out its jurisdiction over certain nationals.

Most importantly, as is often the case, politics are more important than the law. We have seen that, despite the limited legal constraints on the Council, the main 'check' on the Council continues to be political. The Council is, ultimately, entirely reliant on others to carry out its decisions. Its authority and effectiveness depend on whether states will carry out its decisions or not, notwithstanding their legal obligations under the Charter. This is, in reality, the ultimate test for the authority of the Council. That is how it should be. Member states gave the Council its extensive powers in the Charter and, ultimately, they are the ones that can determine how it exercises its powers.

The Council, we have seen, is at the heart of the UN collective security system and, for that purpose, enjoys extraordinary powers, including authorizing the use of force. There are only two exceptions to the prohibition on the use of force: collective security measures authorized by the Council and the inherent right of individual or collective self-defence against an armed attack. The law on the use of force develops in practice mostly on a case-by-case basis, and discussions in the Council, as well as Council decisions, play a role in that process. Generally speaking, in a field of law where action is so consequential, and disagreement on particular doctrines such as humanitarian intervention persists, the exceptions to the prohibition should be applied stringently. It may be

better to accept the occasional breach to serve valid interests (such as the interventions in Kosovo in 1999 and Syria in 2018) than to relax the rules to such a degree that they invite abuse.

As with states, which are often inconsistent in their views and are reluctant to take principled positions for political reasons, so the Council – after all a political body – has been inconsistent and uneven in approaching instances of the use of force. Nevertheless, the Council has contributed to the development of the law in its field of operation, for example towards recognizing a right to self-defence against non-state actors, in the face of a threat of an imminent attack.

We have also examined, in the context of the use of force, the relationship embodied in Chapter VIII of the Charter between the Council and other international organizations. These cannot engage in the use of force against external threats or their own members except in collective self-defence or if authorized in advance by the Council. Interpretations or views in support of doctrines like *ex post facto* authorizations or consent-based regional collective security mechanisms (as some view Article 4(h) of the AU Constitutive Act) may well undermine the balance achieved in the Charter and the authority of the Council.

Undoubtedly, with these extraordinary powers allotted to the Council comes great responsibility. Has the Council been able to meet expectations and maintain international peace and security or restore it when need be? The answer to this question is inevitably dependent on the varying subjective expectations of each person. It can be said that the Council has been successful in implementing the mandate given to it by the member states in some instances, and failed miserably at other times. As more crises erupt and long-standing ones continue to linger, so will views of the Council continue to evolve.

The Council may be the organ with the primary responsibility for the maintenance of international peace and security and central to the UN collective security system, but it is by no means the only relevant actor. The current and future success of the system is dependent on the effectiveness of the UN as a whole, including the General Assembly, the Secretary-General, and the ICJ. With respect to the ICJ, and despite the various points for potential interaction envisaged in the Charter, it remains underutilized by the Council.

The success of the UN collective security system is also dependent on co-operation between the Council and the member states which implement its decisions, whether independently or through their membership in other international organizations, as recognized in Chapter VIII of the Charter.

But one thing is certain: without an effective Security Council, there cannot be an effective UN collective security system. And, with Security Council reform unlikely in the near future, it is incumbent upon us all to remember that it is the only Security Council we have. The common goal should be the effectiveness of the Council. We hope that this book contributes to that end.