Kushtrim Istrefi (2019), *European Judicial Responses to Security Council Resolutions – A Consequentialist Assessment*, Brill Nijhoff, 203 pp. ISBN: 9789004345256

Kushtrim Istrefi's *European Judicial Responses to Security Council Resolutions – A Consequentialist Assessment* is a welcome addition to the vast and still growing literature assessing the wide-ranging implications of the Security Council Resolutions (SCRs) on human rights. In the last two decades, legal scholarship on the issue has mostly focused on the ambit of the Security Council (SC)'s duty to abide by international human rights law and has therefore often been simplistic. Istrefi's book, based on his doctoral thesis, takes the issue a step further by bringing together many threads of theory and practice. Notably, it offers a new taxonomy of the judicial responses of the European courts to the SCRs and uses a *consequentialist* assessment to investigate and outline the multiple effects of such judicial engagement. These two characteristics are arguably the most significant features of the book, which I consider crucial for understanding and contributing to the existing literature.

Essentially, Istrefi's analysis in the book revolves around three broad questions. First, how do the European courts approach to the SCRs affect fundamental rights? Second, what normative and policy considerations guide the European courts? Third, what are the legal effects of the European courts' cases? In particular, did they ensure the realization of human rights, encourage the SC due process reform, limit the use of indefinite detentions authorized by the SC or effect implementation and enforcement of the UN Charter at the national and regional orders?

The structure and argumentation are well suited to this ambitious goal. After setting out the *raison d'être* of the book in the first chapter, Chapter 2 explores the areas where the SCRs affect individual rights and the processes through which such interferences occur. In subsequent sections, two particular areas come to the fore, namely targeted sanctions in countering terrorism and security detentions in military operations. While these two areas appear different in many ways, they also correspond to the fields where the SC has been particularly active insofar as they relate to its *credo*, namely the maintenance and the restoration of international peace and security as enshrined in Articles 1 and 24 of the UN Charter. In this regard, choosing these two fields appears to be an effective approach to analyse and dissect the actual extent of the often-ambiguous responsibilities of the SC.

Istrefi then engages in a detailed assessment of the (un)intended human rights consequences of State practices regarding targeted sanctions and security detentions. He concludes that these measures interfere, or come into conflict with a panoply of human rights including the right to a fair trial, the right

to property, the right to privacy and family life and the right to liberty. Despite serious human rights concerns, review mechanisms at the UN level have not been forthcoming. He explores how these concerns have changed the UN's current human rights agenda. This has been further encouraged by the Group of Like-Minded States' active role in setting standards, leading to the incorporation of a human rights clause in SCRs, the due process reform and the establishment of new organs such as the Office of the Ombudsperson and the UN Working Group on Arbitrary Detentions.

Despite these developments, in practice, genuine human rights concerns remain and the institutional avenues at the UN level to review complaints are still limited. States continue to justify targeted sanctions and security detentions by deferring to the binding nature of the SCRs. These actions often result in the displacement and limitation of States' human rights obligations as a direct consequence of Article 103 of the UN Charter (stating obligations stemming from the Charter shall prevail over other obligations). This requires a normative inquiry into the interaction of the UN Charter with other legal regimes, particularly, with the European legal order. Istrefi devotes the entirety of Chapter 3 to this highly complex issue. After analysing the normative value of SCRs and the place of the UN Charter in Member and non-Member states including the European Union, he maintains that the effects of the decisions of the SC are to be observed and respected by the international community as a whole (p.76). This does not mean, however, that the SC vested with a higher and special force under Article 103 of the UN Charter has received no resistance. When the claim to universality had to trump obligations in the EU legal order, for example, the practice of European courts reveals a strong backlash. Istrefi argues that the concept of EU autonomy and supremacy has been presented as a possible justification for conditional observation of the UN Charter (p.76).

Against this backdrop, in Chapter 4, Istrefi zooms in on how the European national and regional courts tackle the complex human rights questions that arise from the SCRs on targeted sanctions and security detention. The strong analysis occupying this chapter is quite novel in its approach as it develops a taxonomy of modes of engagement by identifying four judicial approaches of the European courts – namely 'subordination', 'detachment', 'resistance through national dualism', and 'harmonization' (p.77). To Istrefi, the subordination approach arises when 'courts understand their role as limited to rubber-stamping' SCRs (p.81). This is so because courts consider that Article 103 of the UN Charter gives primacy to SCRs even at the expense of fundamental rights under national constitutions or any other human rights instruments. As Istrefi examines in detail, the House of Lords' *Al-Jedda* case, the Swiss Federal Tribunal's *Nada* and *Al-Dulimi* cases, and the General Court of EU's earlier *Yusuf* and

Kadi cases provide salient examples for the subordination approach. In examining the merit of such an approach, Istrefi argues that ‘the courts looked at the terms of conflicting obligations in clinical isolation without any attempt to seek “regime compatibility” or harmonization between the Security Council obligations in relation to international peace and the protection of fundamental rights in the European or domestic legal order’ (p.89). This obviously runs at odds with the international law’s strong presumption against normative conflict.

The detachment from UN supremacy based on a narrow understanding of Article 103, is a reserved approach to subordination. This approach is particularly peculiar to the EU legal order, as the Court of Justice of the EU (CJEU) pronounced in the *Kadi* case that ‘the constitutional framework created by the EC Treaty as a wholly autonomous legal order, [is] not subject to the higher rules of international law – in this case the law deriving from the Charter of the United Nations’ (p.99). Istrefi underlines that ‘the CJEU’s position in omitting the binding effects of the Security Council appears to be justified because the EU is not a party to the UN Charter’ (p.98).

This position, however, has not been uniformly accepted by EU Member States. Some domestic courts have utilised different techniques to confront the level of arbitrariness that emanate from SC obligations. The UK Supreme Court’s approach in the *Ahmed* case is in point. The case concerns five British citizens who were subject to asset freezes under two UK orders (Terrorism Order of 2006 and the Al-Quida and Taliban Order of 2006) adopted pursuant to the UK’s United Nations Act of 1946, but without Parliamentary approval to give effect to the SCRs related to the sanctions regime on Al Quida (in particular, Resolutions 1267 and 1373). The UK Court, in its judgment, quashed the two executive orders as being *ultra vires*. In particular, the Court held that freezing assets on the grounds of ‘reasonable suspicion’, which was not envisaged in Resolution 1373, and the absence of judicial review for listed individuals represent ‘a clear example of an attempt to adversely affect the basic rights of the citizen without the clear authority of the Parliament’ (p.101). According to Istrefi, this case qualifies for the ‘national resistance’ approach.

In the meantime, courts’ endless ‘search for solutions to allow the existence of Security Council resolutions and fundamental rights’ (p.106) gives rise to, what Istrefi classifies as, the harmonization approach. In light of the *Al-Jedda*, *Nada* and *Al-Dulimi* cases of the European Court of Human Rights (ECtHR), he shows how treaty interpretation tools have been used to ‘ease the ever-growing tension between the SCRs and the human rights protected by international conventions and national constitutions’ (p.106). In *Al-Jedda*, for example, the ECtHR had to address whether the UK’s security detention practices, based on

the terms of Resolution 1546 were in line with its obligations under Article 5 of the European Convention on Human Rights (ECHR). The ECtHR developed its reasoning by emphasizing that Resolution 1546 lacked an explicit binding requirement to use internment in obligations deriving from the UN Charter and that internment was just 'an example of the broad range of tasks which the UK (as part of the Multi-National Force) stood ready to take' (p.112). By doing so, as Istrefi argues, the ECtHR 'managed to refrain from a mechanical debate on the hierarchy of norms and treaty conflicts through the means of treaty interpretation' (p.113) and thus, 'sought to mutually accommodate the human rights provisions of both legal orders' (p.114). This indeed represents a successful judicial application of Article 31.3.c of the Vienna Convention on the Law of Treaties that urges states to take into account 'any relevant rules of international law applicable in the relations between the parties' together with the context. Similarly, the International Law Commission (ILC) notes in its Report on Fragmentation of International Law of 2014 that conflicting provisions should always be 'read as compatible with each other ... within an overall obligation to cooperate' – a concept defined as the systematic integration in the literature. In sum, Istrefi's new taxonomy in this chapter helps readers to analyse how the European Courts addressed many fundamental issues of international law, including, the normative value of the UN Charter and the universal reach of SCRs, the coordination of legal regimes (or the lack thereof) and the quest to balance competing norms and values.

Chapter 5 evaluates the considerations outlined earlier, and thus requires more attention. He uses a *consequentialist* perspective to examine the multiple effects of European courts decisions with regard to Security Council targeted sanctions and security detentions. At the most fundamental level, he notes that the level of mode of engagement in Europe reveals the European courts have the courage to challenge the implementation of certain obligations under SCRs that interfere with fundamental rights. Correspondingly, this plausible attitude raised awareness of the importance protecting human rights in challenging security issues and in times of crisis – a phenomenon described as 'a wave of judicial droit- de- l'hommisme' (p.135). This is plausible because during such times and when dealing with such issues, the general approach of courts often reflects a self-imposed custom of judicial deference to the government's discretionary exercise of power (or, that of an international organisation) and resulting deficient scrutiny. He then explores whether European jurisprudence has made any contribution to ensuring real and practical respect for the human rights of those subject to targeted sanctions or security detentions. He particularly looks at the aftermath of European court decisions to verify whether they have been implemented. He finds that what resolved

the majority of the cases was not external judicial intervention by the EU courts, but the UN's own institutions namely the Ombudsperson thus drawing conclusion that courts are 'dependent on other national authorities to ensure real and practical respect for human rights for the petitioners' (p.169). In assessing the impact of such intervention by European court on due process reform, he notes that they have been able to encourage the SC when supported by their executives and legislatures (p.169). Another effect he examines is whether the European courts have restricted the arbitrary use of the UN authorized security detentions. According to Istrefi, 'the Strasbourg Court in *Al-Jedda* clarified that prolonged detentions ... resolutions do not displace human rights' by 'applying a restrictive interpretation of the terms' of SCRs (p.171). Finally, he underlines that the judicial responses cannot be considered as having the effect of diminishing the primacy of the UN Charter (p.171).

A brief remark on a crucial question that Istrefi partially addresses in the book: The question built on the uneasy and often-dispositive link between the SC's exceptional mandate under Chapter VII and the concept of emergency. One part of this question concerns, *legally speaking*, whether the application of the SC powers under Chapter VII triggers a state of emergency allowing for derogations from human rights obligations or whether the SC has the ability to derogate. This is a relatively easy task as one could perfectly argue that the global threats to international peace and security might constitute a public emergency within the meaning of Article 4 of the International Covenant on Civil and Political Rights -and Article 15 ECHR (see *inter alia*, SC Resolution 2249 of 20 November 2015, fourth and seventh preambular paragraphs). As regards this part, Istrefi also acknowledges that the SC *de facto* derogates from its human rights obligations when acting to uphold or restore international peace and security. More specifically, he notes that some of the SCRs on targeted sanctions and security detentions may be understood as providing 'explicit or implicit legal authorisations to limit or derogate from human rights' (p.52).

However, there is a more thorny part of this question. While the Appeals Chamber of the International Criminal Tribunal for the Former Yugoslavia in the *Tadic* case remarked that the SC is subjected to certain constitutional limitations under the UN Charter, there is an obvious difficulty in imposing legally binding checks and balances on the SC. Although the SC is not *legibus solutus* (above the law), the political considerations and necessity is often more prevalent than legal precision in its work. Against this backdrop, Istrefi's book could have benefited from more *conceptual* inquiries on the SC's powers under the Chapter VII regime and restraints upon it. At the end, one could but agree with the strong argument that approaching the SC's Chapter VII powers, as a form

of emergency powers is perhaps the best conceptual model to illuminate the role that non-legal restraints can play in curbing its power (See, Devon Whittle, "The Limits of Legality and the United Nations Security Council: Applying the Extra-Legal Measures Model to Chapter VII Action" (2015) 26.3 *European Journal of International Law* pp. 671–698).

In conclusion, Istrefi's monograph is invaluable from both the informative and research perspectives. The conclusions and suggestions drawn in the book are instrumental for a broader audience. The range and depth of the analysis makes the book a very good read for scholars and students from a wide range of fields including human rights law, constitutional law and comparative law.

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