Book Review


The legitimacy of the UN Security Council has been extensively debated over the past few years, but the merit of this contribution lies in its aim ‘to provide a comprehensive overview of the legal questions and complexities involved’.

The recent tendency to bypass the Security Council in resorting to non-authorized unilateral (including regional) action may appear to have made the early 1990s debate over Security Council activism irrelevant. But many of the Council’s resolutions continue to be operative and tend to perpetuate themselves in time – the Iraqi sanctions are into their twelfth year. Their effects are far-reaching and in some cases irreversible, although sanctions are intended to be, in principle, temporary, not punitive, measures, and they have had severe consequences for the population of target states, as well as affected the economies of implementing States and the individual rights of their citizens. The recent Security Council resolutions on terrorism in response to the September 11 attacks, which impose far-reaching obligations on States outside conventional obligations to take measures against terrorism in their domestic law, have created tensions with human rights law in raising questions of due process and rekindled the debate over the limits to the powers of the Security Council. Notwithstanding the fact that the Security Council does not possess general legislative powers, its resolutions (and even non-resolutions, such as rejection of the Russian draft resolution over NATO’s action in Kosovo) may have an impact on the development of international law to the extent that they are relied on as precedents, in some cases despite their contested legal basis (as in the case of the extensive reparations regime on Iraq, or the ICTY and ICTR).

With the aim of examining the rules of international law that could act as limits to the Council’s powers under Chapter VII, and premised on the philosophy of the ‘rule of law’ in international relations, the book poses two operative questions, which are distinct, though interrelated and often confused. The first concerns the existence of legal limits to the Council’s powers under Chapter VII of the Charter; the second, the existence of third party determination of these limits, in particular the role of the International Court of Justice and the related classic question of judicial review. Before addressing these two questions, however, David Schweigman lays the groundwork by examining the authority of the Council under the UN Charter and the Council’s application of its powers in practice.

A preliminary chapter is devoted to the rules of Charter interpretation in the light of Treaty law. After all, the Charter is a multilateral treaty, ‘albeit a treaty having certain special characteristics’, as the Court stated in the Expenses case. The author reaches the not unexpected conclusion that in interpreting the UN Charter the object and purpose of the organization should be given prevalence. This follows from the dynamic nature of the Charter as both
constituent instrument and ‘constitution’ (‘supreme law’ of the organization or ‘constitution for the world community’ – or, in view of its universality, is the question now redundant?), in which the ‘principle of contemporaneity’ is less relevant. As Justice Holmes of the US Supreme Court once said (Missouri v. Holland (1920)): ‘a constituent instrument will call into life a being the development of which could not have been foreseen completely by the most gifted of its begetters’. One need only reflect on the changes since 1945 to the environment within which the United Nations operates. Surprisingly, no mention is made in this context of the doctrine of implied powers, a distinct, though closely related principle to that of effet utile which Schweigman discusses in connection with a teleological approach, nor of the development of this doctrine in the case law of the ICJ (Reparations, Expenses, Effect of Awards . . .).

To be fair, the implied powers doctrine is briefly alluded to in the following chapter on the Charter powers of the Council, in which David Schweigman opts for an interpretation which recognizes broad powers to that organ: general powers under Article 24(1), further powers for the exercise of its responsibilities on the basis of implied powers and the competence to adopt binding decisions outside of Chapter VII of the Charter. Yet without arguing for a static approach to Charter interpretation, one should be clear about the limits to the application of a teleological approach. The judges of the ICTY opted for the more limited view that implied powers should flow from a grant of express powers in their carefully crafted decision in the Tadic Appeals decision (see also Judge Hackworth’s dissenting opinion in the Expenses case): they drew the power of the Security Council to establish a judicial tribunal from the express powers granted to it under Article 41 of the Charter, on the basis that this provision was non-exhaustive, rather than from broad powers to be found outside of Chapter VII as argued by the ICJ in its 1971 Namibia opinion. Recent attempts to justify unauthorized enforcement action by a regional organization on the basis of a residual or secondary responsibility for peace maintenance which would be activated by the paralysis of the Security Council, have underlined the limits to an extended interpretation of the Charter, for a power cannot be implied if it goes against an express prohibition in the Charter, such as the ones embedded in Article 2(4) or in Article 53(1). It is also important to bear in mind the raison d'être of a teleological interpretation that was used in the past for the purpose of expanding the collective competence of the United Nations in the face of restrictive assertions of sovereignty by member states.

Schweigman also briefly discusses the Council’s wide discretion in determining what constitutes a threat to the peace and reviews the measures that it can resort to under Chapter VII. Citing the Expenses case, the author concludes that the taking of enforcement action by the Council is not dependent on agreements concluded under Article 43, though the inclusion of the latter ‘does provide for an important limitation on the Council’s power to apply force under Article 42. Such application depends on the consent of member states’ and hence can only be voluntary.

Over 100 pages are devoted to a chapter on the practice of the Security Council under Chapter VII. Though somewhat repetitively structured, it gives a useful overview of 12 case studies involving enforcement action, including the factual background of each case, a summary of Council action and the relevant articles on which the Council has based this action. The cases studies illustrate the innovative ways in which the Council has used its Chapter VII powers – to authorize humanitarian assistance, to create ‘Safe Areas’ and criminal tribunals, and to set up new cooperative ventures with regional organizations. The author covers two sets of objections that can be made to the Council’s handling of these cases. The first relates to the competence of the Council to deal with the situation, raising the issue of the legitimacy of the Council’s determinations under Article 39 of the Charter. The second relates to the form and consequences of the measures taken by the Council, that is those under Articles 41 and 42. In