

The UN Security Council and International Law. By Michael Wood and Eran Sthoeger. Cambridge, UK: Cambridge University Press. 2022. Pp. xx, 213. Index.
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Writing this review of *The UN Security Council and International Law* on Day 291 of the Russian “military operation” in Ukraine, it is hard not to have the gap between theory and reality at the front of one’s mind. The United Nations Regional Information Centre for Western Europe publishes on its website a useful note with the heading: “Everything you need to know about the UN response to the war in Ukraine.”¹ The content is much as readers of this *Journal* might expect, as is the role of the Security Council in that response. Under the heading “Aggression against Ukraine” it records the launch of the Russian military offensive on the night of February 23–24, 2022, and the immediate action taken by the UN secretary-general, who on February 25 appointed Amin Awad as assistant secretary-general to serve as the United Nations crisis coordinator for Ukraine. On February 28, the prosecutor of the International Criminal Court opened an investigation; and on March 2, the UN General Assembly adopted a resolution deploring the “aggression” committed by Russia against Ukraine, by 141 votes to 5 with 35 abstentions. In the following days, the UN Human Rights Council and the International Court of Justice (ICJ) engaged with the matter, human rights experts were appointed, and the General Assembly (of which, more anon) again acted. And then, in the words of the UN website, “the UN Security Council adopted a statement on 6 May 2022 in which it strongly supports the Secretary-General’s efforts to achieve a peaceful solution in Ukraine. The Secretary-General welcomed the fact that for the first time the Security Council is speaking with one voice for peace in

Ukraine.”² That was the contribution of the Security Council, of which Michael Wood and Eran Sthoeger write: “[a]ccording to the Charter, the Security Council is the principal organ of the UN upon which, in order to ensure prompt and effective action, the Members have conferred primary responsibility for the maintenance of international peace and security” (p. 10).

There is never any shortage of voices to criticize the United Nations in general and the Security Council in particular. The composition of the Council, with its five permanent members, including two western European states, freezes an eighty-year-old political view that reflects current geopolitical realities no more than does the presence of the Pontifical Swiss Guard in the Vatican. The availability of a veto for each of the P5 has always straddled the spheres of realpolitik and of the absurd, but now has the added patina of anachronism. Certainly, the occupants of the ten non-permanent seats on the Council now routinely include major political and economic powers such as (at present) Brazil and India; but they also routinely exclude others, as major powers stand down in order to give some of the minor powers a turn on the Council—though around one-quarter of UN member states have never been members of the Security Council. If one were conducting an audit of the arrangements for maintaining global peace and security, it seems unlikely that the UN would merit a particularly high score.

If this excellent book has a core message, it is that the UN, and the Security Council in particular, may be little like the finely tuned global political machine that some envisaged when the Charter was first adopted, but it is all that we have got. In the eyes of Wood and Sthoeger, criticisms such as those set out above do not really help. It is better if people understand what the limitations of the Security Council are and how it operates in light of them. Then perhaps we can make better use of whatever this flawed creation can realistically be expected to do. In the words of the authors, “[t]his is a book about

¹ United Nations, *The UN and the War in Ukraine: Key Information* (updated Jan. 9, 2023), at <https://unric.org/en/the-un-and-the-war-in-ukraine-key-information>.

² *Id.*

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” (p. ix).

The two authors of this monograph have a combination of experience of the actual operation of the Security Council that enables them to present just such a knowledgeable and realistic account of what the Security Council can and does do in practice. This is a study written out of that experience, rather than out of book-learning, and it is very much the stronger for it. Michael Wood has over thirty years’ experience as a lawyer in the UK Foreign Office, where he served as principal Legal Advisor from 1999–2006. He has a good deal of experience of the Security Council, and was a lawyer in the UK Mission to the UN from 1991 to 1994. More recently he has been a member of the International Law Commission, and its rapporteur on the identification of customary international law. Eran Stoecker, now an adjunct professor at Brooklyn and Seton Hall Law Schools, worked for almost a decade as a policy analyst for *Security Council Report*. Both authors are now deeply involved in the practice of international law before national and international tribunals.

Their declared aim is to make the legal nature of the Security Council more readily understood by critics of all stripes. That aim may sound platitudinous. But it is not. The authors write in an arresting passage at the beginning of the book that:

Criticism of the Security Council is entirely understandable. Being an organ vested with extraordinary powers, the Council should be closely scrutinized. But, in our view, scrutiny does not serve member states, and the international community at large, if it results in weakening the Council as an institution and undermining respect for the law. Rather, thoughtful criticism, with a proper understanding of the law as it pertains to the Security Council, should aim at improving its efficiency and its ability to carry out its mandate on behalf of the member states. (P. 2.)

The real point being made there is not that criticism or scrutiny of the Security Council should be avoided or suppressed. It is that criticism should proceed from an understanding of what the Security Council actually is and what it can and cannot do in practice, and that understanding comes not from reading the UN Charter alone but from observing what the Security Council actually does.

The book has its origins in the Hersch Lauterpacht Memorial Lectures delivered in Cambridge in 2006, and it retains the direct, concise, and accessible flavor of that original format. The first chapter addresses the ever-present need to recognize the very limited utility of metaphors and analogies drawn from domestic legal orders in describing the international legal system. In particular, speaking of the Security Council acting as a “legislature” or “judicial body” is often more of a hindrance than a help in trying to understand the Council. It is a kind of existentialist approach to international organizations. It says, do not look for the flaws and deviations from the ideal and reach for the repair kit; ask what is the best use that can be made of the Security Council in all its flawed reality. The point was neatly summed up by Churchill, quoted by the authors: “[f]acts are better than dreams” (p. 30).

Successive chapters tackle each of the main legal issues that arise in discussions of the role of the Security Council in relation to international law. The second chapter takes the well-trodden path into the debate as to when Council resolutions are “binding” and on whom. Like the rest of the work, it is presented in a plain, matter-of-fact manner, at the opposite end of the intellectual see-saw from the intense and labored theoretical discussions that have characterized much legal writing in recent decades. Some readers might, at least initially, feel a slight disappointment at the lack of theorizing. For example, in the context of a discussion of the binding nature of Council resolutions, the question of what precisely is meant by “binding” might reasonably be regarded as important, or at the very least, as interesting. Is the concept of a “binding obligation” coextensive with what

might loosely be called the “obligation” under Article 25 of the Charter, which provides that “[t]he Members of the United Nations agree to accept and carry out the decisions of the Security Council in accordance with the present Charter” (p. 31)? Is that an obligation of conduct or of result? What, if any, are the effects and demands of Article 25 within the domestic legal systems of member states? What are the consequences of breaching the obligation? The debates are well known, but as the authors make very clear, this book is not intended to mark out their position on theoretical debates or discussions of policy.

That is not to say that these matters are wholly ignored. Wood and Sthoeger touch upon many such questions, but they do so in the lightest of ways. For instance, on a question that in other hands might have triggered an avalanche of footnotes and a white-out of deconstruction, they write that “[t]here was, and perhaps still is, a divergence of views among states as to whether binding decisions may be taken exclusively under Chapter VII of the Charter,” and then summarily conclude that “[t]he significance of this debate should not be overstated. . . . If it is agreed that a resolution contains legally binding elements, then the question of whether it is a Chapter VII resolution or not is essentially academic” (pp. 33–34). The authors recognize and understand that there are all sorts of legal and logical questions that can be raised about such responses, but that is not their primary concern. The task that they have set themselves is to report back on what they have observed of the actual practice of the Security Council; and the fact is that within the Security Council matters are not handled within a framework of academic analysis and debate. That is not how it operates.

Later chapters in the book further consider the powers and functions of the Council and the potential limits on those powers, including the possibility of control of the Council’s actions by the ICJ and other mechanisms. The powers of the Security Council and what the authors felicitously refer to as the “real or imagined” limitations upon them resulting from the application of Charter provisions such as those referring to

domestic jurisdiction (Article 2(7)) and self-determination (Article 1(2)), and from *jus cogens* norms, are addressed in Chapters Three and Four. The conclusion, that the most effective limitations are the self-restraint of the Council and the possibility of states simply refusing to carry out Council decisions, may lack theoretical elegance but captures the truth of the situation. Chapters Five, Six, and Seven are concerned successively with the Council’s resort to measures not involving the use of force, with legal issues related to the Council’s authorization to use force, and with the relationship between the Security Council and other international bodies in the context of the use of force. Given the anchoring of the Security Council’s role and powers in the concept of international peace and security this is a natural focus, but it does raise questions about the completeness and balance of the Council’s view of the world. The term “threats to peace and security,” as used in the Security Council, has a connotation of immediacy that makes it difficult to see slow-burning phenomena such as climate change as being not only “threat multipliers” exacerbating other threats but as critical threats in their own right. The two final chapters, before the brief conclusion, are devoted to the relationship between the Security Council and the ICJ, and to the contribution of the Security Council to the development of international law.

True to its declared approach, in each of these chapters the book sets out, briefly and clearly, the facts of key episodes that evidence the approach adopted by the Security Council. They raise in the mind of the reader many deep and important questions. Why is it, for example, that the Security Council has never attempted to use the power that the authors say, with characteristic reticence, it “may have” to require states to submit a particular dispute to the ICJ? Why has the Security Council only once (in the 1970 case concerning the *Legal Consequences for States of the Continued Presence of South Africa in Namibia Notwithstanding Security Council Resolution 276*) sought an advisory opinion from the Court, when the General Assembly and other UN agencies have made such requests

on more around twenty occasions? Why has the Council never used its power under Article 94 of the Charter to give effect to an ICJ judgment?

It would have been good to hear more from the authors on such questions. Their answers would have added to the understanding of why the Security Council is as it is, without necessarily taking the authors deep into the weeds of academic debate and conjecture that they are keen to avoid. An additional chapter, on how the members of the Security Council refer to and regard international law while they are engaged in discharging the functions of the Council, would have been a welcome addition to the book and could have offered a valuable overview of how the Council sees its itself and its relationship to international law in broad terms. One wonders, for example, how the members of the Security Council view the need to relate Council actions to the talismanic formula of “international peace and security.” Do they believe that there are any substantive limitations in the applicability of that term to, for example, viruses, or famine, or pollution, or various forms of discrimination? Or do they consider that any issue big enough to make it on to the agenda of the Security Council must by definition be an issue that touches upon international peace and security? Do members see themselves as responsible for upholding international law? Or is their primary goal the brokering of peaceful compromises that may bring an end to episodes of international violence, even if the compromise results in the sacrifice of a state’s rights under international law? Is there a single answer to those questions, or do views vary from member to member, or change over time? And how do relations between the Security Council and the General Assembly affect the matter?

One of the General Assembly’s interventions in the Russia/Ukraine situation listed by the United Nations Regional Information Centre was the adoption by consensus on April 26, 2022 of Resolution 76/262, under which a meeting of the General Assembly will be convened within

ten days of the casting of a veto by one or more permanent members of the Security Council, to hold a debate on the situation as to which the veto was cast. The Assembly is now looking over the shoulder of the Security Council, at how the Council interprets and exercises its power. One can only hope that the authors revisit their subject in a few years’ time and offer their thoughts on how the General Assembly’s move has affected the approach of the Council to the questions that are canvassed in this admirable book.

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BOOKS RECEIVED

Dispute Settlement

Brower, Charles N. *Judging Iran: A Memoir of the Hague, the White House, and Life on the Front Line of International Justice*. New York: Disruption Books, 2023. Pp. xx, 292. Index.

Human Rights

Deftou, Maria-Louiza. *Exporting the European Convention on Human Rights*. Oxford, UK; New York: Hart, 2022. Pp. li, 273. Index.

Treaty Law

Loja, Melissa. *International Agreements Between Non-state Actors as a Source of International Law*. Oxford, UK; New York: Hart, 2022. Pp. x, 230. Index.

Miscellaneous

Klučka, Ján, Lucia Bakošová, and Ľuboslav Sisák. *Artificial Intelligence from the Perspective of Law and Ethics: Contemporary Issues, Perspectives and Challenges*. Prague: Nakladatelství Leges, 2021. Pp. 257.