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Introduction

A former British Permanent Representative to the United Nations (UN) in New York, David Hannay, has referred to the Security Council as 'that most mysterious and misunderstood international body'.[1] We are not sure how mysterious it is. But it is certainly misunderstood. If we can make the Council somewhat less mysterious, and somewhat better understood, at least in legal terms, we shall have achieved our purpose.

With honourable exceptions, many writings about the Council pay little regard to actual practice. They introduce domestic law concepts which simply have no place. They confuse legality with legitimacy. They complicate that which is straightforward. There are even those who, in our view, seek to 'demonize' the Council.[2] For them, the members of the Council are rather like the gods of Ancient Greece: they squabble on Mount Olympus; launch the occasional thunderbolt; and intervene in the affairs of mortals with unpredictable – sometimes disastrous – results.

Of course, the Security Council has shortcomings and a track record that is far from perfect. Its structure and composition are criticized. There are five permanent members (reflecting the political realities of 1945) while the other ten are elected for two-year terms. The permanent members also have veto power over the decisions of the Security Council. With these rights come added responsibilities and it is fair to say that the members of the Council – permanent but also elected – have not always risen to the occasion.

[1] Malone (2004), as quoted on the back cover. See also de La Sablière (2015) 19 ('cet organe essentiel des Nations Unies dont les médias parlent beaucoup mais qui est finalement mal connu').

[2] Wood (2004).

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At times, the Council was silent when action was called for; at other times, its actions fell short or were too late. From time to time the Council preferred the interests of some over those of others, at the expense, perhaps, of its primary responsibility for the maintenance of international peace and security. It lacks consistency.

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.

We shall not deal much with concepts such as 'legitimacy',[3] 'accountability'[4] and 'fairness'.[5] These vague and undefined terms are used rather freely by the Council's critics, but they are general concepts rather than firm legal ones. They are highly subjective notions and can be used to justify almost any conclusion. Nor do we address questions concerning the size and composition of the Council, or the existence of the veto and its use. Discussions on Security Council reform have their place, but involve questions of policy, not law, and are thus outside the scope of this book. This is so even when policy preferences are clothed in pseudo-legal argument (such as the appeal to sovereign equality to oppose permanent membership or the veto). Authors make matters worse by mixing up legal and policy considerations, without making clear which are which.

We cannot, while maintaining the spirit of the Hersch Lauterpacht Lectures, do justice to all the legal issues that relate to the Council. This is in no sense a comprehensive work. We have

[3] Roberts (2008). For other views on 'this rather nebulous term' see Caron (1993) 556. For an early discussion, see Franck (1990). The word 'legitimate' is used by politicians, and even by lawyers, in many ways, sometimes quite nuanced, not to say obscure. As Anthea Roberts (2008, p. 205) has written, '[t]he term "legitimacy" is both overused and under-defined in international law'. One thing seems clear, at least to international lawyers: 'Legitimacy is to be distinguished from legality (lawfulness) . . .' (Wolfrum, 2011, para. 1).

[4] For a consideration of the numerous meanings of this expression, see Tzanakopoulos (2011) 2–6. See also ILA (2004).

[5] Franck (1998).

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selected questions which are of topical interest and which often arise in practice. We do not consider some important questions, such as the legal issues that arise in the international administration of territory, which have been dealt with fully elsewhere.[6] We rarely touch on matters of procedure, which are covered extensively by Sam Daws and Loraine Sievers in their excellent book.[7]

If we occasionally sound dogmatic, this is in part because we have deliberately kept this volume succinct, in the spirit of the original lectures. Sir Hersch Lauterpacht might or might not have approved. He praised the Permanent Court for 'avoiding so far as possible a dogmatic manner in stating the law'.[8] But, equally, he praised a League of Nations study of Article 20 of the Covenant for expressing views that were, in his words, 'unusually definite. . . . The answers [he said] were conceived not as a product of academic deliberation concerned with putting both sides of the difficulty, but as an aid to urgent international action of unprecedented significance.'[9] It is in that spirit that we see this volume.

Just as in 2006, when the original lectures were given, so now, in 2022, there is a pressing need to strengthen multilateralism. In this context it is important to support the central role of the Security Council within the Charter's collective security system. The Council remains the only body within the international legal system that can take lawful measures to uphold international peace and security that would otherwise be contrary to international law. Much that is written about the Council is theoretical, negative, and sometimes plain wrong. In its own way, this can threaten the Council's effectiveness as an important expression of multilateralism. Perhaps partly for this reason some politicians, diplomats, and commentators downplay, or even write off altogether, the function of law in the work of the Security Council. They see the Council as a purely political organ, capable of anything – *legibus solutus* (unbound by law).

***

The book is organized as follows. In Chapter 1 we examine the legal nature of the Security Council, including whether it sometimes acts as a legislature or judicial body, and the priority of Charter obligations under Article 103. Chapter 2 considers legal aspects of

[6] Knoll (2008); Wilde (2008). [7] Sievers and Daws (2014).
[8] Lauterpacht (1934) 27. [9] Lauterpacht (1936) 57.

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Security Council decisions, such as when they are binding and for whom. Then in Chapter 3 we deal in more detail with the powers and functions of the Council. Chapter 4 considers potential limits on those powers, and the various ways in which the Council may be subject to control. Chapter 5 discusses the Council's resort to measures not involving the use of force. Thereafter, Chapter 6 considers legal issues related to the Council's authorizations to use force. Chapter 7 discusses aspects that are particular to the relationship between the Council and international organizations in the context of the use of force. Chapter 8 examines the relationship between the Security Council and the principal judicial organ of the UN, the International Court of Justice. In Chapter 9, we seek to describe ways in which international law may be developed by and within the Council. The book ends with some short conclusions.

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1

The Legal Nature of the Security Council

1.1 Applicable Law

It is not our aim in this chapter to set out the overall legal framework of the UN Security Council, a matter covered throughout the book. But we should say a few words at the outset about the various rules of international law applicable to the work of the Council. Article 38.1 of the Statute of the International Court of Justice is a good place to start:

> The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply:
>
> a. international conventions, whether general or particular, establishing rules expressly recognized by the contesting states;
> b. international custom, as evidence of a general practice accepted as law;
> c. the general principles of law recognized by civilized nations;
> d. subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.

The Security Council is first and foremost governed by the Charter of the United Nations,[1] including the Statute of the International Court of Justice.[2] The Charter was adopted at San Francisco on 26 June 1945 and entered into force on 24 October 1945. As at present (January 2022), there are 193 member states of the UN.

[1] For detailed information on UN law, see Higgins et al. (2017b); Chesterman et al. (2016); Simma et al. (2012); Cot et al. (2005); Goodrich et al. (1969).
[2] Zimmermann et al. (2019).

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The Charter may be amended, though this is not an easy task since the entry into force of amendments requires ratification by all five permanent members.[3] It has been amended three times (1963–5, 1965–8, and 1971–3); the amendments concerned enlargement of the membership of the Security Council (from eleven to fifteen members) and the Economic and Social Council (from eighteen to twenty-seven to fifty-four members). In fact, the law of the United Nations has developed mainly through practice.

Being a multilateral treaty, the Charter falls to be interpreted in accordance with the rules on treaty interpretation reflected in Articles 31 to 33 of the Vienna Convention on the Law of Treaties (VCLT) 'without prejudice to any relevant rules of the organization' (Article 5 of the VCLT).[4]

Acting under Article 30 of the Charter, the Security Council first adopted *Provisional Rules of Procedure* between April and June 1946. They were amended from time to time between 1947 and 1982 (but only occasionally and in minor respects).[5] The Rules continue to be described as 'provisional' some seventy-five years after their adoption. Originally this was because several divisive issues remained outstanding, not least questions related to voting; nowadays perhaps it is also out of a desire to indicate the Council's flexibility on procedural matters.

Since the end of the Cold War much effort has gone into developing the Security Council's working methods;[6] the outcomes are documented in Notes by the President, which since 2006[7] have been consolidated from time to time in '507' documents; at the time of writing, the latest such consolidation is dated 30 August 2017.[8]

It is important to distinguish between meetings of the Council, at which the Council may hold discussions, adopt decisions and make recommendations, and informal meetings of Council members. The latter are not Council meetings and in them Council members

[3] Charter, Arts. 108–9. See Witschel, 'Article 108' (2012); Witschel, 'Article 109' (2012); Winkelmann (2007); Zacklin (1968).
[4] Kadelbach (2012).
[5] S/96/Rev.7, 21 December 1982. On the Provisional Rules of Procedure, see Sievers and Daws (2014) 9–12.
[6] Security Council Report (2007, 2010, 2014, 2017); Sievers and Daws (2014) 12–15, 480–90; Aust (1993); Wood (1996).
[7] Note by the President of the Security Council, S/2006/507, 19 July 2006.
[8] Note by the President of the Security Council, S/2017/507, 30 August 2017.

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do not and cannot act on behalf of the Council. They include informal consultations of the members of the Council ('informal consultations of the whole'), which since the 1980s take place very frequently,[9] and the less frequent 'Arria-formula meetings'[10] and 'informal interactive dialogues'.[11]

As of January 2022, the Security Council has adopted more than 2,600 resolutions, many presidential statements, and various other texts (press releases etc.) that may, in a broad sense, be said to form part of the applicable law. Collectively these may be referred to as Security Council 'outcomes'. The interpretation of Security Council resolutions has been the subject of important pronouncements by the International Court of Justice (ICJ).[12]

In addition, there is a considerable number of international conventions that bear on the role of the Security Council. Among the most significant are the Treaty on the Non-Proliferation of Nuclear Weapons (NPT) and the Rome Statute of the International Criminal Court. The NPT requires states withdrawing from the Treaty to notify the Security Council three months in advance.[13] The Security Council has recognized that it has an integral role of ensuring the maintenance of international peace and security as it relates to the use or threat of use of nuclear weapons[14] and that non-compliance with the NPT may be a threat to international peace and security and warrant Council action.[15] The Rome Statute gives the Security Council the authority of both referral[16] and temporary deferral[17] of situations before the Court, as well as a particular role in situations where the crime of aggression is involved.[18]

In addition to such treaty provisions, the rules of customary international law, as well as general principles of law within the meaning of Article 38.1(*c*) of the Statute of the International

[9] Sievers and Daws (2014) 65–74.
[10] The first Arria-formula meeting took place in 1992, Sievers and Daws (2014) 74–92.
[11] The first informal interactive dialogue took place in 2007, Sievers and Daws (2014) 93.
[12] *Namibia* Advisory Opinion, p. 54, para. 116; *Kosovo* Advisory Opinion, p. 442, para. 94; see also Wood (1998); Wood (2016b); Traoré (2020).
[13] Treaty on the Non-Proliferation of Nuclear Weapons, 1 July 1968, Art. X.
[14] S/RES/984, 11 April 1995. [15] S/RES/1887, 24 September 2009.
[16] Rome Statute of the International Criminal Court, Art. 13(b).
[17] Ibid., Art. 16. [18] Ibid., Arts. 15 *bis* and 15 *ter*.

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Court of Justice, may also play their part in the work of the Security Council.

Judgments and advisory opinions of the ICJ have been important in explaining and developing UN law, including as regards the Security Council,[19] as have those of other international courts and tribunals.[20]

As a further subsidiary means for the determination of the law, writings have sometimes been cited in Council proceedings.

1.2 The Legal Nature of the Security Council

1.2.1 A UN Organ, without Separate Legal Personality

Blokker has written: 'The Charter closely connects the Security Council to other parts of the United Nations. It is far from a loosely embedded "stand-alone" body within the world organization.'[21] And he goes on to affirm: 'An appreciation of the Security Council is incomplete without at least some evaluation of the larger framework of which it is part.'[22]

The Security Council is one of the six principal organs of the UN. The UN itself has international legal personality, distinct from that of its member states, as the ICJ explained in the *Reparation for Injuries* case.[23] The Council, being an organ of the UN and not a separate organization, does not have international legal personality. Its acts are those of the UN. The separate legal personality of the UN has important implications for matters such as the organization's international responsibility[24] and obligations under treaties to which it is

[19] *Lockerbie*, Provisional Measures; *Admission* Advisory Opinion; *Namibia* Advisory Opinion.
[20] *Prosecutor* v. *Tadić* (1995). [21] Blokker (2020) 162. [22] Ibid., 166.
[23] *Reparation* Advisory Opinion, at p. 179 ('the Court has come to the conclusion that the Organization is an international person, . . . it is a subject of international law and capable of possessing international rights and duties, . . .').
[24] See the ILC's Draft articles on the responsibility of international organizations (2011) 40–105. The Articles are annexed to UNGA resolution 66/100, 9 December 2011. Art. 6.1 states that the conduct of an organ of an international organization in the performance of functions of that organ 'shall be considered an act of that organization under international law'. Art. 8 states that the conduct of an organ shall be considered an act of the organization under international law 'even if the conduct exceeds the authority of that organ'. The commentaries to the Articles contain many references to the Security Council.

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a party[25] and – in so far as they may be applicable – obligations under rules of customary international law[26] and under general principles of law within the meaning of Article 38.1(*c*) of the ICJ Statute. Separate legal personality is also important for international dispute settlement,[27] and for the position of UN members, including when acting as members of the Council.[28]

Those who adopt a 'constitutional perspective' towards the Charter, or indeed towards other areas of international law, seek to import into international affairs legal concepts from domestic legal systems. The Charter, however, is a treaty among states, a multilateral treaty, now virtually universal, with 193 parties. It is, of course, the constituent instrument, or constitution, of the organization known as the United Nations, and as such sets out the composition and powers of its organs. But that does not mean that it has – or should have – the same characteristics as a national constitution. The Charter does embody certain principles of international law, including those on the peaceful settlement of disputes and the non-use of force, as well as the right of self-defence.[29] And it provides, in Article 103, that in the event of a conflict between obligations under the Charter and obligations under any other international agreement, the obligations under the

[25] Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations, 21 March 1986 (not yet in force).

[26] The extent to which rules of customary international law (for example, customary international human rights law) apply to international organizations remains uncertain. Contrary to the views of some, it was not greatly clarified by the Court's cautious words in the 1980 *WHO* Advisory Opinion, at pp. 89–90, para. 37 ('International organizations are subjects of international law and, as such, are bound by any obligations incumbent upon them under general rules of international law, under their constitutions or under international agreements to which they are parties.').

[27] A topic on the settlement of disputes to which international organizations are parties has been included in the ILC's long-term programme of work (see the ILC's annual report to the General Assembly for 2016, A/71/10, 387–99) but has not yet been included in the ILC's current programme of work.

[28] The ILC's Draft articles on the responsibility of international organizations also apply to the international responsibility of a state for an internationally wrongful act in connection with the conduct of an international organization (Art.1.1 and Part Five).

[29] UNGA/RES/2625 (XXV), 24 October 1970, The Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in Accordance with the Charter of the United Nations ('Friendly Relations Declaration').

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Charter prevail. Article 103 is the Charter's chief 'constitutional' element.

None of this, however, makes the Charter 'the constitution for the international community'. The term 'constitution' has no particular meaning in international law.[30] The 'international community' (itself a much-misused term) has little in common with society within a state. The Appeals Chamber of the International Criminal Tribunal for the former Yugoslavia (ICTY) rightly referred to a flawed 'domestic analogy', which is inappropriate where 'the international community lacks any central government with the attendant separation of powers and checks and balances', and warned that 'the transposition onto the international community of legal institutions, constructs or approaches prevailing in national law may be a source of great confusion and misapprehension'.[31]

1.2.2 A Political Organ, an Executive Organ, a Legislature, a Judicial Body?

According 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. Its powers and functions – and their limits – are those set out in the Charter, as developed in practice. In the field of international peace and security, the Council has the power to make recommendations, and to adopt decisions binding on the Members of the UN. By virtue of Article 103, obligations imposed by the Council, being obligations under the Charter, have priority over all other international obligations of states.[32] That is all that needs to be said about the nature of the Council, though some seek to go further.

1.2.2.1 A POLITICAL ORGAN?

The Security Council is often referred to as a 'political' organ. That expression is presumably used to distinguish it from 'legal' organs,

[30] Even within national legal systems, the term is used in many different contexts including, for example, the basic document of a barristers' chambers or a golf club.

[31] *Prosecutor* v. *Blaskić*, para. 40.

[32] See Chapter 1.3.

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