

Vesselin Popovski, Trudy Fraser (eds.), *The Security Council as Global Legislator*, Routledge, New York: 2014, pp. 328

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Since the adoption of Resolution 1373 (2001), the Security Council has often been referred to as a world legislator.¹ Put in a wider context, since the end of the Cold War a significant change can be observed in the position of the Council with respect to Chapter VII of the United Nations Charter. It is important to note that in the very beginning the Council did not make use of some of its powers. In fact, during the first 45 years of its existence the Council responded to a threat or breach to international peace and security only twice: in 1966 when it imposed economic sanctions on the regime in Southern Rhodesia, and again in 1977 when it used sanctions against the apartheid regime in South Africa. In the 1990s the situation changed dramatically and since that time the Council has not refrained itself from exercising its Chapter VII responsibilities in a broader way. In particular, the concept of a threat to peace has been significantly extended, gaining a new momentum after the attacks of 11 September 2001 and now also encompassing global threats such as international terrorism and the proliferation of weapons of mass destruction. Such threats may even have no clear temporal or geographical limitations. Although the Council had dealt in the past with abstract issues, such as the protection of children in armed conflicts² or AIDS,³ it had never before described them as threats to international peace and security.⁴ Resolution 1373 has thus been the first one purporting to create general and temporally undefined obligations that bind the members of the United Nations. It marks the beginning of a new stage in the Council taking the lead and carrying out primary responsibility for the maintenance of international peace and security.

The aim of the book under review is to shed some light on the Council's recent legislative activism. Its starting point was a research project carried out at the United Nations University on the global role of the Security Council acting as legislator. Thus as a preliminary matter it is of crucial importance to define "legislation". Legislative acts need to be unilateral in form. They create or modify some elements of a legal norm and,

¹ K. Dicke, *Weltgesetzgeber Sicherheitsrat*, 49 Vereinte Nationen 163 (2001); S. Talmon, *The Security Council as World Legislature*, 99 American Journal of International Law 175 (2005); E. Rosand, *The Security Council as "Global Legislator": Ultra Vires or Ultra Innovative*, 28 Fordham International Law Journal 542 (2005).

² See Security Council resolutions 1261 of 25 August 1999, 1265 of 17 September 1999 and 1539 of 22 April 2004.

³ Security Council Resolution 1308 of 17 July 2000.

⁴ See generally E. De Wet, *The Chapter VII Powers of the United Nations Security Council*, Hart Publishing, Oxford: 2004, pp. 133-77. A groundbreaking Resolution 2177 (2014) asserting that "the unprecedented extent of the Ebola outbreak in Africa constitutes a threat to international peace and security" was adopted by the Security Council on 18 September 2014, already after publication of the reviewed book.

finally, the legal norm is general in nature, i.e. it is directed to indeterminate addressees and capable of repeated application in time.⁵ Normally international legislation is associated with the treaty-making processes. As a matter of fact, in terms of a process, it is the form of law-making by international organizations that comes closest to genuine legislation.⁶

Traditionally, international law doctrine has been skeptical about the legislative powers of the Security Council. As argued by Krzysztof Skubiszewski, its decisions under Chapter VII of the United Nations Charter, though binding, are not law-making because they are individualized and/or specific.⁷ Only a few scholars recognize a legislative function of this organ. For instance, Keith Harper asserts that the Council's authority to determine threats to the peace implicitly confers on it the authority to act legislatively.⁸ Other authors, on the contrary, speak only of "quasi-legislative" functions.⁹ Even Hans Kelsen went only as far as to recognize that a Council decision might create new law for a concrete case.¹⁰ However, recent practice shows that the more extensive, "truer" legislative function may, at least to some extent, also be performed by the Security Council.

As announced in the introductory chapter by one of the editors, Vesselin Popovski, the purpose of the book under review is threefold. First, the book seeks to locate the Council's new thematic developments in the context of international law; then it investigates the "thematic shift" – from primarily a global executive to a global legislator. Finally, the book aims at critical examination of the impact of this new behavior on international peace and security in general (page 4). Popovski then points out the irony of the Security Council being both extremely powerful and extremely weak at one and the same time. Despite the obviousness of such a statement, the analyses contained in the book revolve around these counter-playing elements. The authors adopt different stances, examining the political, institutional and, last but not least, legal factors which presently determine the powers of the Security Council.

The editors are aware of the vast literature on the Council's legislative powers, but note that nonetheless a comprehensive study is lacking with respect to the impact of this activity on the policies of member states and on international peace and security. The intention to fill this gap drove both the editors as well as the individual authors to contribute to "a useful foundational study for the assessment of the thematic resolutions

⁵ E. Yemin, *Legislative Powers in the United Nations and Specialized Agencies*, Sijthoff, Leiden: 1969, p. 6.

⁶ K. Skubiszewski, *International Legislation*, [in:] R. Bernhardt (ed.), *Encyclopedia of Public International Law*, vol. 2, North-Holland, Amsterdam: 1995, pp. 1255, 1261.

⁷ *Ibidem*, p. 1260.

⁸ K. Harper, *Does the United Nations Security Council have the competence to act as court and legislature?*, 27 *New York University Journal of International Law & Politics* 103 (1994), p. 149.

⁹ E.g. J. W. Halderman, *The United Nations and the Rule of Law: Charter development through the handling of international disputes and situations*, Oceana Publications, Dobbs Ferry/NY: 1966, pp. 65, 70.

¹⁰ H. Kelsen, *The Law of the United Nations: A Critical Analysis of Its Fundamental Problems*, Fourth Printing, Praeger, New York: 1964, p. 295.

and their legislative role in the international constitutional system” (page 11). By and large they succeeded in carrying out the task undertaken.

In his chapter, Anthony F. Lang considers the emergence of legislative behavior in the constitutional perspective and argues for balancing the powers within the United Nations. This latter point is also shared by Charles Samford, who makes the argument for a proper distribution and separation of powers. In doing so, the author refers to the famous ruling by Lord Coke that the king could not act as a judge or a legislator. Any comparison of the Council to a monarch is of course a fascinating juxtaposition. The reader (surely aware of many less subtle descriptions or comparisons applied to the Security Council) may be impressed by the insightfulness and balanced character of the argument made by the Samford, which at the same time prepares the reader for the following study by Hugh Breakley, who examines the resolutions of the Security Council in a systematic manner. He offers six dimensions that are crucial for analysis of the normative properties of Security Council resolutions, going well beyond the traditional approach which usually consists of merely underlining the binding and general character of the adopted acts. Particular attention in this regard is paid to “comprehensive legality”, which places the outcome of normative activity in a wider context, thus making it possible to develop interrelations between the different sources of legal obligations. Such a position may be regarded as complementary to the following contribution, whereby Jan Wouters and Jed Odermatt concentrate on the extent of the legislative activity by the Security Council and consider its legal limitations. Finally they analyse in particular the possibility of judicial review by the International Court of Justice.

The second part of the book contains contributions on thematic resolutions, starting from non-proliferation of weapons of mass destruction. Resolution 1540 is subjected to a complex scrutiny by Olivia Bosch. The next chapter, by Monika Heupel, offers an examination of the Council’s reactions to terrorism, and makes a telling argument on the progressive intrusiveness of the measures taken by the Council. The following contributions address the resolutions on piracy in Somalia (Peter Lehr), child soldiers (Noëlle Quénivet), elimination of discrimination against women in peace and security processes as well as of impunity of gender-based violence (Robert Zuber and Melina Lito), protection of civilians (Hugh Breakey) and environmental issues addressed by making reference to climate change (Trudy Fraser). The next two chapters address the Council’s sometimes proactive approach towards international criminal justice, first dealing with the *ad hoc* tribunals (Martin J. Burke and Thomas G. Weiss) and then with the International Criminal Court (Vesselin Popovski). As rightly underlined by the latter author (and editor), the approach by the Security Council is highly selective, which provokes Popovski to argue for more consistency in the Security Council’s actions toward the ICC and for its more constructive engagement.

The concluding chapter, authored by Trudy Fraser, sums up the contents of the book and offers some general remarks, rejecting the fears that the Security Council is assuming purely legislative functions, and discussing its future development.

Without doubt the book's careful and comprehensive analysis of the respective actions taken by the main political organ of the United Nations is timely and much needed. Surely Security Council legislation may be a powerful instrument in maintaining international peace and security, as pragmatically speaking it has the advantages of speed and of the general scope of validity of its decisions, which are binding on all states. Such "legislation" however also involves several serious problems, and these have been competently addressed by the authors who contributed to the book. Herein lies the greatest advantage of the book under review – its combining of different views, backgrounds and underlying assumptions. Naturally the contributions differ in many ways, including formally, but taken together they shed additional, useful insight which can aid in identifying new dimensions of the role presently played by the Security Council as "arbiter of international peace and security".

*Bartłomiej Krzan**

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* Associate Professor of Public International Law at the University of Wrocław, Faculty of Law, Administration and Economics.