

INTRODUCTION

THE FOUNDERS OF THE United Nations (UN) made it clear that the overriding priority of the new international order created in 1945 would be to maintain international peace and security. As the opening words of the UN Charter proclaimed, the “peoples of the United Nations” were above all “determined to save succeeding generations from the scourge of war, which twice in our lifetime has brought untold sorrow to mankind”

If the prevention and resolution of armed conflict is the first essential function of the international system, then the creation of legal authority and mechanisms to assist in this task must be one of the essential functions of international law. The international legal system must provide effective legal tools to assist political leaders in preventing the outbreak of armed conflict and, if such conflict occurs, in ending it on acceptable terms and dealing with its consequences in a manner that will discourage future conflict. This is true whether armed conflict takes the form of hostilities between states, serious fighting between a state and armed insurgents, or large-scale attacks by terrorist groups against a government and the population it serves.

Although legal principles and mechanisms will rarely be the most important element in suppressing armed conflict and dealing

with its consequences, experience shows that uncertainty about the international legal authority for a response to armed conflict can seriously impair that response's political viability, as well as create complications for its implementation by national authorities. Legal debates often come to embody underlying conflicts about power and policy, and an effective answer to legal objections will often help to deal with challenges that are fundamentally political in character. There are a number of specific areas in which the consequences of armed conflict cannot be successfully addressed unless effective legal mechanisms can be put in operation—some obvious examples being the prosecution of crimes, compensation of victims, and the governance of affected communities. Finally, when states or international organizations take actions that have no credible basis in international law, they tend to corrode the integrity and viability of the international order and move international relations away from predictability and rationality toward the arbitrary use of force and economic power.

Some national political leaders naturally prefer to deal with these questions on a unilateral basis, or at least on the basis of joint action by states having similar political and legal systems and priorities. This approach can be simpler and can produce more timely and direct results in some situations. However, in many circumstances, such an approach limits the degree of international support for the effort and may be ineffective if it does not secure the cooperation of other states or international bodies that could make an important contribution. For example, states may find it simplest to try war criminals entirely on the basis of national laws and resources, but in certain situations some form of international prosecution or involvement would be very useful in creating a fair and effective process, encouraging the surrender of accused persons, and building international support. Likewise, it may be easier to initiate and conduct military operations without the complication of seeking a legal mandate from an international or regional body, but doing so may result in the loss of important military and other assistance and may impair the political viability of the effort.

For most of the twentieth century, the international system was remarkably unsuccessful in providing effective legal tools to assist in suppressing armed conflict and dealing with its consequences.

Extensive efforts were made at the beginning of the century to create international arbitration mechanisms that would prevent or terminate conflict, but these efforts collapsed with the outbreak of World War I. Between the world wars, the international community renounced war and attempted to create a new international security system through the League of Nations, but these efforts failed in the face of defiance by the Axis powers.

In 1945, the international community was determined to put in place an effective system for preventing and suppressing armed conflict that would rely on both legal principles and the power of the major Allied nations. To achieve this goal, the UN Charter included a new prohibition against the use of force among states (with certain exceptions) and created a Security Council with sweeping powers to address threats and breaches of international peace and security. In due course, these steps were strengthened by the adoption of a series of declarations and international agreements aimed at elaborating on the prohibition of the use of force and creating new norms for the control of armed conflict.

Nevertheless, this system largely failed during the Cold War because it depended on a community of interests among the major powers that did not then exist. The Security Council, although entrusted with unprecedented authority to control armed conflict, could not act in the face of a veto by any of the five permanent members. This fact essentially excluded it from any effective role in major international conflict situations where the interests of the great powers diverged. As a result, the enormous potential of the Council as a source of authority remained mostly dormant. The international community struggled from conflict to conflict with no other legal basis for action but the inadequate authority of other UN organs, the uncertain authority of regional organizations, occasional authority drawn from specific treaties, and the residual sovereign powers of states.

The fall of the Soviet Union made it possible for the Council to act without being immobilized by the fundamental conflicts of interests and attitudes among its permanent members that had been characteristic of the Cold War period. This circumstance enabled the Council to begin to carry out the role envisioned for it under the UN Charter as the supreme arbiter of international peace and security. It

had the effect of unleashing the dormant legal authority of the Council and turning it into a great engine for the creation of legal obligations and mechanisms for suppressing armed conflict and dealing with its results, many of which would have surprised even the founders of the United Nations.

This new period of UN authority first manifested itself with the Iraqi invasion of Kuwait, which led to important innovations in the application of economic sanctions and the authorization and conduct of military operations by the Security Council. It continued with the imposition by the Council of a comprehensive cease-fire regime to end the first Gulf War, including unprecedented provisions for the resolution of boundary disputes, the control of armaments, and the compensation of victims of the conflict. After a period of indecision, the Council finally began to apply some of the same tools to situations involving the dissolution of a state (Yugoslavia) and to conflicts that were essentially internal in character (for example, Somalia and Rwanda). The applications of authority led in turn to a series of actions to provide for international trial of crimes committed during armed conflict (Yugoslavia and Rwanda) or to provide international involvement in national or “hybrid” trials (for example, Sierra Leone). The Council even found it necessary to take over the governance of entire territories devastated by armed conflict (Kosovo and East Timor). Finally, the Council applied some of these tools to deal with serious terrorist actions that threatened the peace (such as the *Lockerbie* bombing, and the attacks in New York City and Washington, D.C. on September 11, 2001) and with the threat of the proliferation of weapons of mass destruction.

Moreover, the Council’s robust exercise of its authority to address threats to the peace became a powerful engine for international action to serve important collateral objectives—particularly to deal with severe repression of human rights, the overthrow of democratic regimes, and humanitarian crises. The Council did so by substantially broadening the concept of “threats to the peace” to include such internal crises where there was a plausible concern that their continuation might lead to regional and international escalation.

This book reviews these developments, focusing on the Council’s decision in each case to assert new authority and to create new

legal mechanisms, as well as the manner in which they were used in practice. It assesses the objections that were made to the adequacy of the legal basis for the Council's actions. It asks whether those actions are likely to be a useful precedent in other situations, whether the Council could validly assert even greater authority under the Charter should it find it useful to do so, and what legal limits there may be on the Council's authority.

Of course, for political and practical reasons it has not been possible, even during the post-Cold War period, for the Council to act vigorously or to use its authority effectively in all situations. In some instances (such as Rwanda and Sudan), this failure to act had tragic consequences; in other instances (such as Kosovo), states acted, but without the secure legal basis that Council action would have provided. In the recent conflict in Iraq, the differences among the permanent members largely immobilized the Council at the critical point and made a difficult crisis worse. Further, the processes created by the Council have sometimes experienced serious problems, as the recent disclosures about the Iraq Oil-for-Food Program and the conduct of UN peacekeepers has shown. Nonetheless, the precedents established by the Council's action in the post-Cold War period have clearly shown the wide scope and importance of the Council's legal authority, and it is essential that neither the international community as a whole nor the major powers within it lose sight of this fact or underestimate the tremendous potential of the Council as a means for dealing with conflict situations.

Because the expansion in the exercise of authority by the Council has essentially been a pragmatic response to a long series of crisis situations, it is best approached on a historical rather than a theoretical basis. For this reason, the account that follows tracks the historical development of each aspect of the Council's authority in relation to the specific sequence of crises and events that produced it. I have, however, attempted to relate this sequence of events to the main theoretical questions about the Council's legal authority that tend to engage legal scholars. The result is neither a history nor a legal treatise, but an analytical survey that hopefully will be of some interest to not only both policy and legal experts but also to others who have

taken a recent interest in this seemingly ubiquitous player in the arena of international law and politics.

The book begins, rightly, in chapter 1 with a description of the general framework for Council action contained in the UN Charter and the practice of the Council, including its relationship with other UN organs and the rules and practices that shape its decision-making. Chapter 2 considers the jurisdiction and mandate of the Council and, in particular, the development of the Council's perception of its authority under Chapter VII of the UN Charter to deal with threats to the peace. Chapter 3 deals with the Council's use of various types of sanctions, including the problems of enforcing sanctions and of collateral damage to persons and states that are not the object of sanctions. Chapter 4 addresses UN peace operations, from traditional, limited peacekeeping missions to the "second-generation" and "third-generation" operations that have extended to complete governance of territories. Chapter 5 examines the Council's authorization of the use of force by both UN operations and non-UN entities, including states, regional organizations, and coalitions. Chapter 6 describes the new technical commissions that the Council has created, including those dedicated to resolving boundary disputes, providing compensation for victims of armed conflict, and conducting inspections to verify compliance with arms limitations. Chapter 7 considers the ways in which the Council has facilitated the prosecution of criminal offenses, including the creation of ad hoc tribunals and assistance to domestic trials. The book concludes with some thoughts about the significance of the expansion of the Council's legal authority and its relationship to larger policy questions about the Council and the role of the United States in the United Nations.

In the end, legal norms and mechanisms can never be an adequate substitute for effective political decisions and (where necessary) the use of economic and military power in the right cause. Nonetheless, international legal norms and mechanisms can be important in authorizing, supporting, and constraining political, economic, and military action. It is therefore important for both policymakers and lawyers to understand the scope and the limits of international legal authority in this area, and this book aims to contribute to that process of understanding.