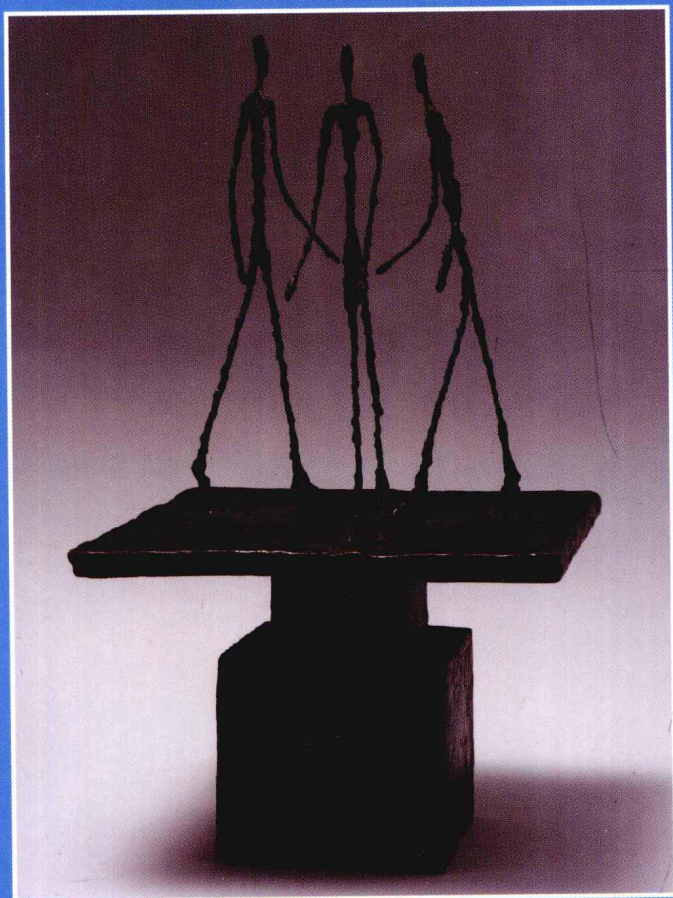


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Securing Human Rights?

Achievements and Challenges of the
UN Security Council



Edited by
Bardo Fassbender

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List of Abbreviations

AMIS	African Union Mission in Sudan
AU	African Union
CAHDI	Committee of Experts of Public International law of the Council of Europe
CFI	Court of First Instance of the European Communities
CTC	Counter Terrorism Committee of the Security Council
CTED	Executive Directorate of the CTC
DRC	Democratic Republic of the Congo
ECHR	European Convention of Human Rights
ECJ	Court of Justice of the European Communities
ECOSOC	Economic and Social Council
ECOWAS	Economic Community of West African States
ECtHR	European Court of Human Rights
EGC	General Court
EU	European Union
GOS	Government of Sudan
HLP	High Level Panel on Threats, Challenges and Changes
HRC	Human Rights Committee
HRC	Human Rights Council
ICC	International Criminal Court
ICCPR	International Covenant on Civil and Political Rights
ICISS	International Commission on Intervention and State Sovereignty
ICJ	International Court of Justice
ICTR	International Tribunal for Rwanda
ICTY	International Tribunal for the former Yugoslavia
IHL	International Humanitarian Law
ILC	International Law Commission
IWG	Informal Working Group on Documentation and Other Procedural Questions
JEM	Justice and Equality Movement
MINURSO	United Nations Mission for the Referendum in Western Sahara
NAM	Movement of Non-Aligned Countries
OAS	Organization of American States
OMPI	Organisation des Modjahedines du peuple d'Iran
PACE	Parliamentary Assembly of the Council of Europe
POAC	Proscribed Organizations Appeal Commission
POC	Protection of Civilians
RPF	Rwandese Patriotic Front
SADC	Southern African Development Community
SIAC	Special Immigration Appeals Commission
SLM/A	Sudan Liberation Movement/Army
SPLM/A	Sudan People's Liberation Movement/Army
UDI	Unilateral Declaration of Independence

UNAMET	United Nations Mission in East Timor
UNAMID	AU/UN Hybrid Operation in Darfur
UNAMIR	United Nations Assistance Mission for Rwanda
UNCIO	United Nations Conference on International Organization
UNITA	Uniao Nacional para a Indipendencia Total de Angola
UNMIK	UN Interim Administration in Kosovo
UNPROFOR	United Nations Protection Force
UNTAET	United Nations Transitional Administration in East Timor
UNTAG	United Nations Transition Assistance Group

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1

Introduction

Bardo Fassbender

Today, a book dealing with the issue of human rights and the UN Security Council does not come as a big surprise. Readers familiar with developments in international law and international relations have become accustomed to a Security Council that tries to promote and protect fundamental human rights in situations of war and internal conflict, as well as to prevent and punish (by means of ad hoc criminal tribunals) grave violations of human rights and international humanitarian law, such as acts of genocide and war crimes.¹ By the same token, it has become a matter of general knowledge that in certain circumstances action taken by the Security Council has given rise to human rights concerns. In particular, the comprehensive economic sanctions against Iraq and the so-called targeted sanctions imposed on individuals in the fight against international terrorism have been sharply criticized as detrimental to the internationally recognized human rights of the affected persons. The ensuing academic discussion resulted in widespread agreement that the Security Council is bound by international human rights, even though authors have used different reasoning to reach this conclusion.

An international lawyer or UN specialist who some 20 years ago had been told about these later developments would have been taken aback. He or she would have wondered: What happened to the concept of domestic jurisdiction, enshrined in Article 2(7) of the UN Charter, which for decades had been invoked by UN member states against involvement of the Organization in human rights affairs? Has the Charter allocation of competences to the different principal organs, according to which human rights remained the business of the General Assembly and Economic and Social Council (ECOSOC) but not the Security Council, been given up? And how can the United Nations, which has not ratified a single human rights treaty, be legally bound by human rights?

Based on the experience of the Hitler regime in Germany and other dictatorships in Europe and elsewhere, the founders of the United Nations regarded national governments and administrations as the main threat to human rights and fundamental freedoms. Accordingly, the preamble of the Universal Declaration of

¹ A first comprehensive record of the Security Council's handling of human rights issues was presented by SD Bailey in his book *The UN Security Council and Human Rights* (1994). See also BG Ramcharan, *The Security Council and the Protection of Human Rights* (2002).

Human Rights of 1948 recalled that 'disregard and contempt for human rights have resulted in barbarous acts which have outraged the conscience of mankind'. The General Assembly proclaimed the Universal Declaration 'as a common standard of achievement for all peoples and all nations'. Article 1(3) of the UN Charter assigned to the United Nations the task 'to achieve international co-operation' among member states 'in promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion'. Human rights was understood as a matter of international economic and social cooperation. For that reason, the subject was placed in Chapters IX and X (see Articles 55 lit. c, 62(2) and 68), whereas the notion of human rights does not appear once in Chapters V, VI, VII, and VIII, which address the Security Council and its functions and powers.

This cautious treatment of human rights in the UN Charter let most governments and international lawyers of the time draw the conclusion that all the Charter was asking for was the voluntary cooperation of states (coordinated by the General Assembly and ECOSOC) with the objective of promoting human rights. However, right from the start some voices in politics and in the legal literature claimed that the provisions of the UN Charter on human rights established binding obligations on both UN member states and the United Nations as an international person. Perhaps the most authoritative and, in view of later developments, influential of those voices was that of Sir Hersch Lauterpacht.² In his book *International Law and Human Rights* of 1950, Lauterpacht rejected the view that the respective Charter provisions were a mere declaration of principle. The provisions of the Charter on the subject of human rights, he wrote, 'figure prominently in the statement of the Purposes of the United Nations'. 'Members of the United Nations are under a legal obligation to act in accordance with these Purposes. It is their legal duty to respect and observe fundamental human rights and freedoms. They were adopted... as part of the philosophy of the new international system and as a most compelling lesson of the experience of the inadequacies and dangers of the old... The legal character of these obligations of the Charter would remain even if the Charter were to contain no provisions of any kind for their implementation.'³ Any construction of the Charter, Lauterpacht added, according to which members of the UN are, in law, entitled to disregard and to violate human rights and fundamental freedoms 'is destructive of both the legal and the moral authority of the Charter as a whole'.⁴

As regards the human rights obligations of the United Nations itself and its organs, Professor Lauterpacht held that the provisions of the Charter 'imply a comprehensive legal obligation upon the United Nations as a whole': 'They not only authorise the various organs of the United Nations to take steps for encouraging and promoting the realisation of that crucial purpose of the Charter... There is

² For a brief account of Lauterpacht's life and work, see Scobbie, 'Sir Hersch Lauterpacht (1897–1960)', in B Fassbender and A Peters (eds), *The Oxford Handbook of the History of International Law* (forthcoming, 2012).

³ H Lauterpacht, *International Law and Human Rights* (1950) 147 *et seq.*

⁴ *Ibid* 149.

laid down here a clear duty of collective action.⁵ Lauterpacht described the General Assembly and ECOSOC as the principal organs of the UN competent to implement the provisions of the Charter in the matter of human rights.⁶ But he also envisaged a role for the Security Council in the protection of human rights, namely in cases 'when the degree and scope of their violation are such as to constitute a threat to international peace and security'.⁷

The Security Council is not the normal instrument of the United Nations in that sphere [of the protection of human rights]. It cannot, as a rule, be concerned with isolated violations of human rights. It is not within its province to frame general policies for implementing that objective of the Charter. But... it constitutes an unlimited reservoir of power—a power not confined to recommendation and not impeded by the reservation of domestic jurisdiction—for the protection of human rights and freedoms when their violation results in situations or disputes which might lead to international friction or endanger the maintenance of international peace and security or constitute a threat to peace. Situations of disputes of this nature may arise in relation to States which by reason of a systematic and flagrant denial of human rights become a source of international friction and of an actual or potential danger to peace; or they may originate in isolated outrages of such magnitude or cruelty as to shock the conscience of civilised mankind and impose an intolerable strain upon peaceful relations... The correlation between peace and observance of fundamental human rights is now a generally recognised fact. The circumstance that the legal duty to respect fundamental human rights has become part and parcel of the new international system upon which peace depends, adds emphasis to that intimate connexion.⁸

However, as Daphna Shrager recalls in her contribution to the present volume, it took a long time for these progressive views to be generally accepted. With the exception of the cases of Southern Rhodesia (1966) and South Africa (since 1977), which were situated in the special context of the fight against colonialism and racial discrimination, action of the Security Council against serious violations of human rights and international humanitarian law had to await the end of the Cold War. '[F]or more than four decades, the Security Council did its best to avoid taking up human rights issues'.⁹ The first monograph about the Security Council and human rights was published as recently as 1994.¹⁰ Yet, since the 1990s, as Shrager points out, the Security Council 'has carved itself a role in the protection of human rights'.¹¹

It was in the same post-Cold War era, and against the background of the Council's new activism after the East–West antagonism had been overcome, that the Security Council was first perceived as a possible threat to human rights. The idea that the work of the UN Security Council could interfere or come into conflict with internationally protected human rights had surely not been contemplated by the founders of the United Nations. If they had seen a relationship at all between the work of the Council and the issue of human rights, it was a positive one: the Council would promote human rights by promoting international peace. That idea was expressed in the first draft of the Universal Declaration, the 'Humphrey

⁵ Ibid 159. See also *ibid* 221.

⁶ Ibid 221.

⁸ Ibid 185 *et seq.*

⁹ Bailey (n 1 above) x.

⁷ Ibid 147.

¹⁰ See Bailey (n 1 above).

¹¹ See D Shrager, in the present volume at 11.

Draft',¹² which suggested that the Declaration's preamble proclaims two related principles—'that there can be no peace unless human rights and freedoms are respected' and 'that there can be no human freedom or dignity unless war and the threat of war are abolished'.¹³ But only the first principle was included in the final text of the Declaration, which opened with the words: 'Whereas recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world.'¹⁴ It was only in 1984, when the General Assembly proclaimed the 'right of peoples to peace', that the second principle was officially declared. 'Life without war', the General Assembly then said, 'serves as the primary international prerequisite... for the full implementation of the rights and fundamental human freedoms proclaimed by the United Nations'.¹⁵

Broadly speaking, the view that the Security Council would almost automatically advance the protection of human rights by maintaining international peace was upheld throughout the years of the Cold War, years in which the Council had little chance to detrimentally affect human rights. It was only after the end of the long stalemate that the Council was considered to be a force with the potential of doing harm to the cause of human rights, or of even violating the rights of concrete individuals. The two principal cases in which this fear arose were, first, the sanctions imposed on Iraq since 1991, which were harshly criticized because of the harm they inflicted on the Iraqi civil population¹⁶ and, secondly, the 'targeted sanctions' directed against the Taliban and members or supporters of the al-Qaida network since the terrorist attacks of September 2001.

The contributions to the present volume, which are based on lectures delivered in the session on human rights law of the Academy of European Law in the summer of 2009, take a closer look at these two sides of the Security Council's involvement in human rights—its efforts to promote and enforce human rights on the one hand, and the imperilling of those same rights by action of the Council meant to maintain or restore international peace and security, on the other hand.

In her chapter 'The Security Council and Human Rights—from Discretion to Promote to Obligation to Protect' Daphna Shrager analyses how the role of the Council in the promotion and protection of human rights has developed since 1945: an organ not endowed with any specific powers in the field of human rights

¹² Named after John Humphrey, a Canadian law professor who in 1946 had been appointed as Director of the Division of Human Rights of the UN Secretariat. In this role he produced a first draft of the Universal Declaration. See MA Glendon, *A World Made New: Eleanor Roosevelt and the Universal Declaration of Human Rights* (2001) 47 *et seq.*

¹³ The text of the draft is reprinted in Glendon, *ibid* 271 *et seq.*

¹⁴ In the same vein, the Security Council declared in 2006: 'The Security Council attaches vital importance to promoting justice and the rule of law, including respect for human rights, as an indispensable element for lasting peace.' See Statement by the President of the Security Council, UN Doc S/PRST/2006/28, 22 June 2006.

¹⁵ Declaration on the Right of Peoples to Peace, UNGA Res 39/11, 12 November 1984, preamble, para 4.

¹⁶ See Fassbender, 'Uncertain Steps into a Post-Cold War World: The Role and Functioning of the UN Security Council after a Decade of Measures against Iraq' (2002) 13 EJIL 273, 282 *et seq.*