ROUTLEDGE RESEARCH IN INTERNATIONAL LAW

International Law in a Multipolar World

Edited by
Matthew Happold

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Routledge
Taylor & Francis Group
LONDON AND NEW YORK

First published 2012
by Routledge
2 Park Square, Milton Park, Abingdon, Oxon, OX14 4RN

Simultaneously published in the USA and Canada
by Routledge
711 Third Avenue, New York, NY 10017

Routledge is an imprint of the Taylor & Francis Group, an informa business

British Library Cataloguing in Publication Data
A catalogue record for this book is available from the British Library

Library of Congress Cataloging in Publication Data
A catalog record has been requested

ISBN 978-0-415-56521-9 (hbk)
ISBN 978-0-203-80312-7 (ebk)

Typeset in Garamond
by Saxon Graphics Ltd, Derby

Printed and bound in Great Britain by the MPG Books Group

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hétérogene' in *Select Proceedings of the European Society of International Law*, Volume 2, 2008; 'Les particularités du développement de l'Etat de droit dans la Communauté des Etats indépendants' in *L'Etat de droit en droit international*: Colloque de Bruxelles/Société française pour le droit international, 2009; 'L'affaire relative à l'application de la Convention internationale sur l'élimination de toutes les formes de discrimination raciale (Géorgie c. Fédération de Russie)', *Journal du CDI*, No 3, 2009; 'Central Asian States and International Law: Between Post-Soviet Culture and Eurasian Civilization', *Chinese Journal of International Law*, vol. 9, 2010; and 'Organisations régionales post-soviétiques et l'énergie', in *Défis énergétiques et droit international*, LARCIER, 2010.

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Contents

Introduction

Matthew Happold

In his *Fragments upon the Balance of Power in Europe*, published in 1806, Friedrich von Gentz, looking back with nostalgia at *ancien régime* Europe, wrote that:

> What is usually termed a balance of power, is that constitution subsisting among neighbouring states more or less connected with one another; by virtue of which no one among them can injure the independence or the essential rights of another, without meeting with effectual resistance on some side, and consequently exposing itself to danger.[1]

Such a system had, in Gentz's view, been destroyed by France, which had imposed its hegemony over Europe; a hegemony which reached its apogee in between the writing and the publication of Gentz's *Fragments* with Napoleon's victory over Austria and Russia at Austerlitz in December 1805.

For international relations theorists, ideas of the balance of power and of multipolarity have been inextricably linked ever since. For many scholars, the existence of multiple sites of power within a system of states has been seen as leading towards a balance of power, as the members of the system enter into and change alliances to prevent any one of them from obtaining a predominance. Multipolar systems have, consequently, been seen as more stable and long-lasting than systems where one or two states predominate. International lawyers, however, have only recently began to consider the implications that multipolarity might have for the international legal system; or, perhaps, it might be more accurate to say that the issue has only recently regained their attention.

Since the creation of the United Nations in 1945, international law has sought to configure itself as a universal system. Yet, despite the best efforts of international institutions, scholars and others to assert the universal application of international law, its relevance and applicability has been influenced, if not directed, by political power. The Cold War saw a concentration on co-

1 Friedrich von Gentz, Fragments upon the Balance of Power in Europe (1806), 55. Originally published as *Fragmente aus der neusten Geschichte des politischen Gleichgewichts in Europa*, 2 vols. (1806). London: Printed for M. Peltier.

existence in a bipolar world, which many argued brought stability (or, perhaps, rather, statis) to the international legal system. The end of 'actually existing Socialism' in Central and Eastern Europe and the dissolution of the Soviet Union was seen as providing an opportunity for a truly universal system – a 'new world order' applicable regardless of power arrangements. However, it quickly became apparent that international law would have to address the dilemmas inherent in regulating a system dominated by a single global power: the USA. Over the past decade discourse has tended to focus on the implications for international law of a unipolar world, characterized by US hegemony and 'exceptionalism'.

At present, however, the international system appears to be experiencing a tendency towards multipolarity, with various sites of power able to exert a telling influence on international relations and international law. Events in recent years such as Russia's excursion into Georgia, the breakdown of the Doha round of trade negotiations, the USA's questionable actions (and even more questionable successes) in its 'war on terror', the prominence of emerging nuclear powers, China's assertions of its own interests on a global scale, and the rise of regional trading blocs all pose significant questions for international law and the international legal order. The perceived novelty of the current situation has meant that, at least among Western scholars, it has been seen largely as a threat rather than as an opportunity: as heralding the fragmentation of international law in an increasingly divided world. Can 'universal' international law exist in the absence of a global hegemon? To what extent can sovereign equality persist in a world of competing 'great powers' and 'spheres of influence'? What relevance will the United Nations retain? Is there an 'international community' and, if so, does it exist on a multilateral or a regional level? The fear has been of a move away from global international law administered by international organizations with universal or near-universal membership to discrete regional subsystems, and of the renewed privileging of state sovereignty and non-intervention over multilateralism and human rights.

To an extent such fears are unsurprising. The move towards multipolarity in global politics is a result of a growth in power of a number of non-Western states (in particular China and India), whose increasing economic, political and military clout threatens Western interests and presumptions. However, they cannot just be seen as originating from anxieties about a change in circumstances but also derive from current views about the structure and role of the international legal system, which multipolarity is thought to threaten. Indeed, the features of multipolarity which its proponents have exulted in are precisely those which many international lawyers now depreciate. Although not a static system, the balance of power is supposed to tend towards equilibrium. It is not a progressive system tending towards some higher goal. Rather, it serves to preserve a status quo, and the status quo which it seeks to preserve is the sovereignty (in fact and in law) of existing states. International law within such a system is a law between states, serving to smooth their

interactions and permitting them better to pursue certain common aims. Such a view of international law is far from that held by many international lawyers today. Instead, international law is seen as based on institutions, reflecting community values and reaching into states to constrain their conduct internally. This is, of course, not the only narrative (there are many others) but it is an influential one, particularly as regards how international law is taught and in Western states. Recent events, however, have indicated how great a resonance ideas of sovereignty and independence continue to have for many states in the world today. And it may be, moreover, that a multipolar system has perhaps unappreciated advantages in terms of safeguarding international stability and the ability of individual states to pursue their own interests unhindered.

The chapters in the book seek to examine the implications of a more multipolar world for the international legal system. The majority of them originate in papers presented at the 2009 spring conference of the British Branch of the International Law Association, hosted by the University of Hull Law School in April 2009, with others commissioned to complete the selection. The chapters are written from a variety of perspectives. Some seek to bring to the issues insights derived from other disciplines – international relations, history or political theory (Lechner, Orakhelashvili, Pareja-Alcaraz, Švarc, Chapters 8, 6, 11 and 4); others argue for a rigorously legal approach (Kammerhofer, Chapter 7). Some look at the role of global organizations, in particular the United Nations, in the world today (Joyner, Roele, White, Chapters 3, 2, 1), others at regional organizations and regional groupings of states (Draghici, Pareja-Alcaraz, Samuel, Sari, Tkatova, Chapters 14, 11, 13, 15 and 12). Several look at particular incidents or areas of law (d'Aspremont and de Brabandere, Pippan, Summers, Chapters, 9, 10 and 5). Unsurprisingly, given their different backgrounds and approaches, the contributors come to a variety of conclusions. What can be said, however, is that together they provide valuable food for thought for those pondering the future of international law and international relations. The issues they cover are ones of real and pressing importance, not just to academics and commentators but to activists and policy makers.

I am grateful to the contributors, who kept to deadlines and responded generously to my suggestions, making my job as editor surprisingly easy. I am also grateful to Karen Grudzien Baston, Ph.D. candidate at the University of Edinburgh School of Law, for her expert editorial assistance. While organizing the conference which led to this publication, I was much assisted by my then-colleagues at the University of Hull Law School, in particular Richard Barnes, Richard Burchill and Lindsay Moir, as well as our School administrators Angie Mortimer and Ann Sweeney and Sarah Carter at the Wilberforce Centre for the Study of Slavery and Emancipation. I am also grateful to the British Branch of the International Law Association for giving us the opportunity to host the conference, and to our sponsors FCO Legal Advisers and Herbert Smith LLP, who provided much-needed financial assistance in a wintry economic climate.

1 The Security Council, the security imperative and international law

Nigel D. White

1.1 Introduction

The United Nations Security Council plays various roles on the international stage, which makes it difficult to prescribe the legal framework within which it should operate. It is wrong, however, to see the Council either as untrammelled by international law, or to see it as judge, jury and executioner – effectively a law unto itself. Its primary function according to the UN Charter is the maintenance of international peace and security. Just as governments act to protect the security of states from threats, so the Security Council performs a similar role in relation to the international order. Its constitution means that the Council's security function is both erratic and inconsistent; but that should not detract from its competence in tackling situations which threaten the security of states, groups or individuals. In so doing it may use powers that are mandatory, coercive and give rise to supreme duties, but the question this chapter addresses is whether this places the Council outside the international legal order, or whether it must, as a matter of law, still respect principles of the UN Charter and international law. Further, as a political organ that is central to the international legal order, its legitimacy is dependent upon it respecting the law. If it acts outside the international legal order, or its resolutions are susceptible of being interpreted in such a way, then the Security Council will be a divisive actor rather than a force for unity; its actions will be a cause of fragmentation and unilateralism rather than a source of cohesion and integration.

1.2 The many roles of the Security Council

Paul Kennedy in his recent work on the UN concludes that 'even if the world body is constitutionally one organism, there are in practice many UNs',[1] referring to the different elements of the UN system.[2] Indeed, this point can be taken

1 P. Kennedy, *The Parliament of Man: The Past, Present and Future of the United Nations* (Toronto: HarperCollins 2006), xvi.

2 For discussion of the different elements, see N. D. White, *The United Nations System: Toward International Justice* (Boulder, CO: Lynne Rienner, 2002), 3–22.

further when considering the most influential and powerful organ in the UN system – the Security Council. The Security Council has many facets, many roles and many functions in the international political and legal orders and this makes it difficult to prescribe the legal framework within which it should operate.

On the one hand, it is a 'corporate' organ of action taking coercive measures under Chapter VII to maintain or secure peace and security. On the other, it is an organ of 'diplomacy' recommending peaceful solutions to disputes under Chapter VI, or acting simply as a vehicle for powerful states to meet and discuss.[3] In taking measures to combat ruptures to international peace and security, the Security Council is seen as an 'executive' organ, but more recently, and controversially, it has also acted as a 'legislative' organ in requiring states to take measures to combat terrorism and prevent the spread of weapons of mass destruction (WMD).[4] Paul Szasz observes that when voting for Resolution 1373 in 2001 which legislated against terrorism, the members of the Council 'were most likely unaware...of the pioneering nature of what they were doing';[5] but as Roberto Lavalle states, when they adopted Resolution 1540 in 2004 legislating against the spread of WMD, they were 'fully ... aware of what they were doing'.[6] As well as acting as an 'executive' organ against states supporting terrorism,[7] and a 'legislative' organ against terrorism generally, the Security Council also appears to have acted in a 'judicial' or at least a 'quasi-judicial' way when putting in place a scheme of targeted measures whereby an individual whose name is placed on the Security Council's list of individual members or supporters of the Taliban or Al-Qaeda has his assets and funds frozen by relevant member states, as well as being subject to a travel embargo.[8] Though there is some debate as to whether these sanctions are 'administrative' rather than 'criminal', 'preventive' rather than 'punitive';[9] thereby causing uncertainty as to what human rights of the listed individuals are engaged, there seems to be

3 I. Claude, 'The Security Council', in E. Luard (ed.), *The Evolution of International Organizations* (London: Hudson, 1966), 68, 83–8.

4 UNSC Res. 1373 (28 September 2001) UN Doc. S/RES/1373 (on terrorism). For discussion, see M. Happold, 'Security Council Resolution 1373 and the Constitution of the United Nations' (2003) 16 LJIL 593; S. Talmon, 'The Security Council as World Legislature' (2005) 99 AJIL 175. UNSC Res. 1540 (28 April 2004) UN Doc. S/RES./1540 (on WMD).

5 P. C. Szasz, 'The Security Council Starts Legislating' (2002) 96 AJIL 910 at 904.

6 R. Lavalle, 'A Novel, if Awkward Exercise in International Law-Making: Security Council Resolution 1540' (2004) NILR 411, 435.

7 See, for example UNSC Res. 748 (31 March 1992) UN Doc. S/RES/748, which imposed sanctions against Libya for supporting terrorism.

8 Starting with UNSC Res. 1267 (15 October 1999) UN Doc. S/RES/1267 (against the Taliban) and UNSC Res. 1333 (19 December 2000) UN Doc. S/RES/1333 (against Al-Qaeda).

9 A. Bianchi, 'Assessing the Effectiveness of the UN Security Council's Anti-terrorism Measures: The Quest for Legitimacy and Cohesion' (2006) 5 EJIL 881, 905–7.

increasing judicial recognition that such measures, without any safeguards, violate the human rights of the individuals concerned.[10]

As well as exhibiting 'executive', 'legislative' and 'judicial' characteristics in an institutional sense, the Security Council is similarly multifaceted, or at least Janus-faced, when considering its place within the international legal order. When the Security Council acts under Chapter VI, to facilitate the peaceful settlement of disputes, it is required to respect the principles of sovereignty and consent,[11] but when it acts under Chapter VII, to take coercive measures against states (and individuals) it can bypass the principles of non-intervention (by the very terms of Article 2(7) itself)[12] and the non-use of force (by means of Article 42).[13] Furthermore, while it can be strongly argued (and this will be the line taken in this chapter) that, subject to the necessary competence to intervene in states and authorize the use of force, the Security Council is bound by international law. However, whenever it takes measures under the Charter it is accepted that its mandatory decisions are obligations of the UN Charter by virtue of Article 25,[14] which according to the terms of Article 103 prevail over any other inconsistent treaty provision.[15] The drafters of the UN Charter seemed to envisage the effects of Article 103 applying to the 'secondary' obligations imposed by the Security Council under Article 25,[16] and this was certainly the position of the International Court of Justice (ICJ) in its 1992 judgment on provisional measures in the Lockerbie cases brought by Libya against the United States and the United Kingdom.[17] Thus, while it will be argued that the Security Council is bound by international

10 See decision of the ECJ in Joined Cases C-402P and C-415/05P, *Yassin Abdullah Kadi and Al Barakaat International Foundation* v. *Council of the European Union and the Commission of the European Communities* [2008] ECR I-6351 and the decision of the Human Rights Committee in *Sayadi and Vinck* v. *Belgium* (2009) 16 IHRR 16. For discussion, see H. Keller and A. Fischer, 'The UN Anti-Terror Sanctions Regime under Pressure' (2009) 9 *Human Rights Law Review* 257.

11 The heart of Chapter VI, Art. 36(1) states that the 'Security Council may, at any stage of a dispute of the nature referred to in article 33 or of a situation of a like nature, recommend appropriate procedures or methods of adjustment'.

12 Art. 2(7) states that:

> [n]othing in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any State or shall require the Members to submit such matters to settlement under the present Charter; but this principle shall not prejudice the application of enforcement measures under Chapter VII.

13 In the Charter scheme there are two exceptions to the prohibition on the threat or use of force in Art. 2(4) of the Charter; individual or collective self-defence in response to an armed attack under Art. 51; and the empowerment of the Security Council to 'take such action by air, sea or land forces as may be necessary to maintain or restore international peace and security' in Art. 42.

14 Art. 25 states that 'Members of the United Nations agree to accept and carry out the decisions of the Security Council in accordance with the present Charter'.

15 Art. 103 states that '[i]n the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail'.

16 UNCIO, vol. XIII 707.

17 *Questions of Interpretation and Application of the 1971 Montreal Convention Arising from the Aerial Incident at Lockerbie* [1992] ICJ Rep. 114, 126.

law, Article 103 suggests that it can free itself from that law by means of creating overriding obligations.

This makes the Security Council very difficult to quantify and reform, and very difficult to control.[18] It appears that the main controls are political ones so that any controversial decision needs to avoid the veto, to gain a majority in the Council, and arguably in the Assembly if the measure is to be sustainable. Though international law in theory might apply to decisions of the Security Council, the application of that law to control those decisions seems to be non-existent, or rather is dependent upon self-regulation, by the Security Council recognizing, for instance, that its listing procedure for suspected members of the Taliban and Al-Qaeda must become more human rights compliant, which it has done to an extent.[19] There is certainly no system of independent judicial review of such decisions as the saga of the Lockerbie trials shows.[20]

It can be strongly contended that a legal order that has at its heart such a multifarious, many-tentacled actor, able to act in the most coercive, devastating manner in one situation, but unable to act at all in another very similar situation, is not really a 'legal order' at all, but simply a set of uncertain standards, rules of thumb, which can be potentially overridden by a politically motivated organ. Arguably, because of this, the rule of politics and not the rule of law thus prevails in international relations.

1.3 The Security Council unbound?

It is wrong, however, to see the Council (or for the Council to see itself) either as untrammelled by international law, or to see it as judge, jury and executioner – effectively a law unto itself. Difficulties in application, in enforcement and in compliance should not disguise the fact that international law is applicable to the Security Council. In other words the Security Council is not somehow outside of, or exceptional to, the international legal order: rather, it is an exceptional body within the international legal order. In any political and legal order there must be room for executive discretion that enables the executive or government to take emergency action to protect society from genuine imminent threats to its very existence. However, such a power is not placed outside the system, but is exceptional within it. Although the idea of an effective government being the essential component of the state is still part of the international legal criteria for statehood,[21] 'effectiveness' is no longer the sole criterion. A state is bound by international laws protecting the rights

18 On reform debate, see N. Schrijver, 'Reforming the UN Security Council in Pursuance of Collective Security' (2007) 12 *Journal of Conflict and Security Law* 127.

19 See I. Johnstone, 'The UN Security Council, Counterterrorism and Human Rights', in A. Bianchi and A. Keller (eds.), *Counterterrorism: Democracy's Challenge* (Oxford: Hart, 2008), ch. 10.

20 N. D. White, 'To Review or Not To Review? The *Lockerbie* Cases Before the World Court' (1999) 12 LJIL 401; A. Aust, 'Lockerbie: The Other Case' (2000) 49 ICLQ 278.

21 M. Shaw, *International Law* (6th edn, Cambridge: Cambridge University Press, 2008), 197–204.