

Contents

<i>List of Contributors</i>	vii
<i>Tables of Cases</i>	ix
<i>Tables of Legislation</i>	xi
<i>List of Abbreviations</i>	xv
1 Introduction	1
<i>Bardo Fassbender</i>	
2 The Security Council and Human Rights—from Discretion to Promote to Obligation to Protect	8
<i>Daphna Shraga</i>	
3 The Security Council as Enforcer of Human Rights	36
<i>Vera Gowlland-Debbas</i>	
4 The Role for Human Rights in the Decision-making Process of the Security Council	74
<i>Bardo Fassbender</i>	
5 Security Council Targeted Sanctions and Human Rights	98
<i>Annalisa Ciampi</i>	
6 Human Rights Considerations and the Enforcement of Targeted Sanctions in Europe: The Emergence of Core Standards of Judicial Protection	141
<i>Erika de Wet</i>	
7 Reviewing Security Council Measures in the Light of International Human Rights Principles	172
<i>Salvatore Zappalà</i>	
<i>Annex: Guidelines of the Committee for the Conduct of its Work (Security Council Committee established Pursuant to Resolution 1267 (1999) concerning Al-Qaida and the Taliban and Associated Individuals and Entities)</i>	195
<i>Index</i>	217

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.

⁷ Ibid 147.

⁸ Ibid 185 *et seq.*

⁹ Bailey (n 1 above) x.

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.*

became the 'centre-piece of the human rights protection system' of the international community. The author describes the place of the Security Council in the framework of the UN human rights institutions, and how the Council came to regard human rights violations as a threat to international peace, making it possible for the Council to take action against such violations with measures provided for in Chapter VII of the UN Charter. Daphna Shrager identifies three human rights, or clusters of human rights, which have attracted most of the Council's attention: the right of peoples to self-determination, the right to democratic governance, and the fundamental rights (arising under international human rights law and international humanitarian law) of civilian populations and minorities during war and internal conflict. One section of the chapter is devoted to the Council's obligation to prevent and punish the crime of genocide. In a concluding section, the author addresses the Council's reaction to criticism levelled against a number of 'legitimacy deficits' in its procedure and in peacekeeping operations endorsed by the Council.

The issue of a qualification of violations of human rights and humanitarian law as threats to the peace within the meaning of Chapter VII of the UN Charter also figures prominently in the chapter by Vera Gowlland-Debbas on 'The Security Council as Enforcer of Human Rights'. Taking a different approach to Daphna Shrager, Professor Gowlland-Debbas focuses her attention on the legal issues of the Council's actions in favour of human rights. In particular, the author addresses the legal problems of a qualification of human rights violations as a threat to international peace, problems which in the past aroused an intensive debate among international lawyers: Was the Council competent to broaden the notion of a threat to the peace to include human rights violations? Is the Council authorized to act in internal matters of a state? Can the Council hold responsible for human rights violations not only states but also de facto governments and non-state entities? Who can legally review such qualifications made by the Security Council? In a subsequent section of her chapter, the author distinguishes five major categories of measures applied by the Council in order to enforce fundamental norms of international human rights and humanitarian law: (i) the sanction of nullity and non-recognition, (ii) non-military measures, in particular economic sanctions, (iii) military force, (iv) measures in the context of criminal law, and (v) monitoring and fact-finding. Further sections of the chapter address the effects of the enforcement of human rights by the Security Council on the development of international law (for instance, its sources) and on human rights treaties and domestic law. The author concludes that today human rights form 'a component part of the security fabric' the preservation of which has been entrusted to the Security Council.

Procedural questions take centre stage in the contribution by Bardo Fassbender on 'The Role for Human Rights in the Decision-making Process of the Security Council'. The chapter addresses questions of safeguarding human rights in the course of Council action directed towards 'other' goals rather than the direct protection of human rights, ie mainly 'classical' goals of maintaining and restoring international (inter-state) peace. In particular, the chapter evaluates how human rights considerations and concerns can be better integrated in the decision-making processes of the Security Council. The chapter takes as its starting point the idea of

an 'international rule of law' as a concept expressing, inter alia, certain expectations regarding the place of human rights in the work of the Council. It then addresses the foundation and the extent of the human rights obligations of the Council in the present international legal order. In a following section, the decision-making process of the Council is analysed with a view to the problems of a lack of transparency and legitimacy. Subsequently, an effort is made to identify types of Security Council action in which the problem of safeguarding human rights is acute. In the final section, the author explores different options for enhancing the role for human rights in the decision-making of the Council.

The chapter by Annalisa Ciampi on 'Security Council Targeted Sanctions and Human Rights' then turns to a practice of the Council which has been sharply criticized because of its negative effects on human rights—'targeted sanctions' imposed on individuals in the form of travel bans, arms embargoes, and the freezing of financial assets. In no other area of its work has the Security Council been so vulnerable to attack by human rights activists and lawyers. Paradoxically, the Council only intensified the use of this particular form of non-military sanction because of the harsh criticism levelled against its 'conventional' sanction regimes, ie sanctions imposed on the entire population of a country, as provided for in Article 41 of the UN Charter. Such criticism was especially strong in the case of the sanctions against Iraq upheld after the liberation of Kuwait. Many humanitarian organizations and governments disapproved of those sanctions as mainly hurting the general population (and in particular its most vulnerable parts) without influencing the policies of the Iraqi government and military leadership. After setting out the general legal framework of targeted sanctions, Annalisa Ciampi focuses on the most significant case of such sanctions, the measures imposed on al-Qaida and the Taliban in Security Council Resolution 1267 (1999) and subsequent resolutions. She critically analyses the absence of any *ex ante* protection of individuals and entities placed on the list of the 1267 Committee of the Security Council, as well as the deficiencies of the available *ex post* remedies. Following sections of the chapter deal with the legal challenges brought against the 1267 sanctions regime before national and regional (EU) courts as well as international human rights bodies (the Human Rights Committee and the European Court of Human Rights). A final section is devoted to possible improvements of the system of targeted sanctions with a view to an effective review of listing and de-listing decisions made by the 1267 Committee. In conclusion, the author warns against 'the potentially devastating consequences of a continuous failure to take into account the law's limits' in the Security Council's fight against international terrorism.

In her contribution entitled 'Human Rights Considerations and the Enforcement of Targeted Sanctions in Europe: The Emergence of Core Standards of Judicial Protection', Erika de Wet analyses decisions of European courts pertaining to the targeted sanctions provided for in Security Council Resolutions 1267 (1999) and 1373 (2001). The focus of her attention are the *Kadi* and the *OMPI* cases decided by the courts of the European Union. In addition, she also takes into account decisions rendered by courts of the United Kingdom and views of the Human Rights Committee. Erika de Wet's analysis focuses on the right to a fair hearing and the right to judicial review of the individuals and entities who were

made the addressees of sanctions by their being placed on the respective lists. She seeks to identify the legal standards for listing and de-listing that would satisfy the requirements of effective judicial protection before courts in the European Union. The author reaches the conclusion that 'after a cautious start', characterized by a deferential attitude towards the Security Council, courts have become more assertive with respect to their own jurisdiction over targeted sanctions cases, the applicability of national (constitutional), European, and international human rights law, and the requirements to be met by national administrative organs and the European Commission when they exercise their discretion in determining whether a particular person is listed or de-listed. However, many open questions remain, not least with respect to the effectiveness of the judicial decisions and the interplay of domestic courts, EU courts, and international institutions (in particular the Sanctions Committees of the Security Council and the Ombudsperson established by Security Council Resolution 1904 (2009)).

The final chapter of the book, 'Reviewing Security Council Measures in the Light of International Human Rights Principles', contributed by Salvatore Zappalà, is a very critical account of the Security Council's involvement in human rights matters since the early 1990s from a legal perspective. The author maintains that the Council has often operated outside the original framework of the UN Charter, taking measures not provided for in the text of the Charter and probably not even anticipated by its drafters. He argues that the action of the Council has produced positive effects for human rights when the Council limited itself to measures of a general character and the establishment of autonomous bodies (such as the ad hoc criminal tribunals for the former Yugoslavia and Rwanda) able to balance contradictory interests in specific cases. On the other hand, action of the Council directly interfering with individual rights, as in the case of targeted sanctions, is assessed as likely to have resulted in violations of human rights. Accordingly, the author advises the Council against imposing such individualized sanctions.

As this brief review of the chapters indicates, this book does not claim to cover all aspects of the responsibilities and the practice of the Security Council in the area of human rights. Nor is it a systematic review of the Council's work. Rather, the book offers a collection of individual views and appraisals, presented by experts in international law, of how the Council has dealt with human rights issues in the post-Cold War phase of its life and of possible avenues for improvement. Thus, no effort shall be made here by the editor to harmonize those views or to come up with general findings shared by all authors. Evaluating the human rights work of the Council in light of the different perspectives and views presented by each of the authors contributing to this volume, readers will draw up their own balance sheet. However, I personally believe that the efforts of the Council, though still inconsistent and in most cases inadequate, can be described as significant steps towards an international order of the kind Sir Hersch Lauterpacht referred to as an 'organised *civitas maxima*, with the individual human being in the very centre of the constitution of the world'.¹⁷

¹⁷ Lauterpacht (n 3 above) 463.