The United Nations Security Council and War: The Evolution of Thought and Practice since 1945

Edited by Vaughan Lowe, Adam Roberts, Jennifer Welsh, Dominik Zaum

[Oxford: Oxford University Press, 2008. 816pp. ISBN 978-0-19-953343-5. £110]

This work (816 pages), with contributions from a constellation of 32 leading academics and practitioners of international law and diplomacy, will no doubt rank as a major contribution on the UN Security Council. Yet it is a distinctly Western manuscript. Presumably the editors never aspired to present a uniformly global input into the subject. With the exception of three from Africa and India, all are from Europe or North America (plus one Australian).

The stated aim is to describe and evaluate the Council's part in addressing, and sometimes failing to address, the problem of war since 1945. It is composed of four parts.

Part I lays down the framework for analysis. It recalls the creation of the Council, the limitations granted to it for the use of force, and the various proposals over the years for a UN standing force. Part II examines the roles the Council plays – the relationship it maintains with the "great powers" [sic], the General Assembly and regional arrangements, and its history with peacekeeping and sanctions. Part III explores eleven case studies (Korea, Suez, Middle East, Kashmir, East Timor, Iran-Iraq, Iraq (1991, 2003), Yugoslavia, Bosnia, Afghanistan, West Africa) and one on the Council's "non-involvement" in crises. Part IV takes a thematic approach, analysing the Council's actions with respect to humanitarian law, humanitarian intervention, contested territories, military occupations, terrorism, and the use of private force.

The central theme is described by the editors as "obvious, simple and sobering". While the Council is a pivotal body which has played a "key part" in many wars and crises, it is not, in practice, a "complete solution" to the problem of war. Nor, they contend, has it been at the centre of a "comprehensive system" of collective security. But, they add, it could never have been. The UN's founders, despite their idealistic language, did not see things in such terms. And in practice, not only during the Cold War but since, the Council's roles have been "limited and selective".

This theme, they observe, is similar to that entered in the other comprehensive book on the UN – the broader work that is *The Oxford Handbook on the United Nations* (Weiss and Daws (eds); OUP, 2007). The fundamental contention was also advanced there that state sovereignty remains the core of international relations.

The theme, the editors acknowledge, is "not so much a conclusion as a starting-point". It puts into focus a series of key questions which the book progressively addresses. What have been the actual roles of the Security Council and have they changed over time? Has the Council, despite the

many blemishes on its record, contributed overall to the maintenance of international order through its response to international threats and crises? Why has the Council fallen short of some of the expectations held out for it? Are particular countries to blame for its failures? Has it reacted constructively to the changes in the character of war – including the prevalence of non-international armed conflict and the rise of terrorism – and to broader transformations in international society, such as the rise of post-colonial states and the increase in the number of powers with nuclear weapons? Is the Council simply a meeting-place of sovereign states, or does it put in place certain limits on the unfettered sovereignty of at least some states?

In particular the editors question whether the Charter, even in theory, "provides a basis for a general system of collective security". The term "collective security", in its classical sense, refers to a system in which each state accepts that the security of one is the concern of all, and agrees to join in a collective response to threats to, and breaches of, the peace. The assumption is that the threats arise from one or more states within the system. Collective security is thus defined as distinct from, and more ambitious than, systems of alliance security or collective defence, in which groups of states ally with each other, principally against possible external threats.

There is, they observe, a long history of efforts to establish a system of collective security, commencing, they believe, with Westphalia – at least in embryonic fashion. But "sadly", the history of proposals is a "long record of failure". There have been "some elements" of collective security arrangements in the two principal international organisations of the 20th century – the League and the UN. "Yet neither was set up as, still less operated as, a full collective security system". The UN Charter does not refer to the term "collective security", and it includes "main departures" from such a system: the veto; the discretionary breadth of the Council's power to determine a threat; the inherent right of self-defence; the "co-existence" of global with regional security arrangements; and the "enemy state" clause which the editors concede has been a "dead letter" for many years.

The Charter is therefore not a blue-print for a "general system of collective security" – at least "if defined in the classical way". Nonetheless, there been a tendency to invest in the Security Council "hopes for collective security that exceed what can be prudently based on the Charter and on the Council's record". Thus is the general reader gratuitously, if gently, admonished.

Three main conclusions stand out in the book:

- The Security Council was not created to be, and has not been, a "pure collective security system";
- The constant interplay between the Charter's provisions and the actual practice of states has produced, not only some disasters, but some creative variations on role and responsibility of the Council;
- When compared with other international institutions, the Council has a unique status, both in its authoritativeness and accountability vis-à-vis member states.

That the book will stand as an authoritative piece is not in doubt. Among the *status quo* countries from which the authors are largely drawn, the natural world-view is from the top down – of the UN system largely as an arena for oligopolistic control of international affairs by the self-identified major powers of the 1940s.

The tone struck in the book is in fact less "sobering" than it is sobered. What seems prudent in one's singular world-view is usually disputed elsewhere. What might realistically be expected from, and perceived in, the Charter depends on one's national origin and vision of the human future. Granted that failure in global collective security can, and does, result in regression into regional collective defence (alliances, coalitions) or unilateralist hegemonic power, the vision remains alive, not just in theory but at a practical level. The self-fulfilling criteria laid down for "classical collective security" is largely of the editors' imagining. The founders of the UN at San Francisco by and large did believe they were creating a second attempt at collective security just as those of the League, particularly Wilson and Smuts, believed they were blazing the trail. Not one of the editors' "main departures" were seen by the true architects of the two organisations as nullifying the concept, notwithstanding concerns that the veto in particular might weaken it. There is an historical irony in having experts, who hail from the major powers which insisted on the veto at the time of the UN's founding, cite it six decades later as the principal criterion for disqualifying it as a true system of collective security.

The book reflects essentially an Anglo-American world-view of the UN Security Council. In this it contrasts with the more dynamic, teleological perception of the Charter and the Organisation embraced by scholars across continental Europe and Latin America. It is no denial of the centrality of state sovereignty to juxtapose it with a view of an evolutionary future of the nation-state. Suffice to cite the work of Simma, Koskenniemi, Grewe, Fassbender and Tomuschat. A parallel exists here in the distinction between the common law and civil law systems, and between the positivist and natural law branches of jurisprudence. More visionary again are the reflections contained in the comprehensive work edited by two Canadians, MacDonald & Johnston (*Towards World Constitutionalism: Issues in the Legal Ordering of the World Community*, Maritius Nijhoff Publishers, 2005). And long after the *The UN Security Council and War* has been laid aside, the words of Hammarskjöld will continue to resonate:

> The experiment carried on through and within the United Nations has found in the Charter a framework of sufficient flexibility to permit growth beyond what seems to have been anticipated in San Francisco. Even without formal revisions, the institutional system embodied in the Organization has undergone innovations explained by organic adaptation to needs and experiences. [UN Secretary-General, Dag Hammarskjöld, *The Development of a Constitutional Framework for International Co-operation*, Address to Chicago University, May 1960].

As Manual Frölich has observed, "To this very day there is clear deficit regarding … a political philosophy of international relations and world organization. Political theory is still very much concerned with the state as the centre-piece of social order. The example of Hammarskjöld can provide some orientation since both his actions and thoughts as Secretary-General can be seen as a quest for a political philosophy of world organization."

Hammarskjöld has contributed to this ultimate of human goals. So have scholars elsewhere. This book has not.

Dr Kennedy Graham MP
Adjunct Senior Fellow, School of Law, University of Canterbury

Shipping Interdiction and the Law of the Sea

By Douglas Guilfoyle

[Cambridge: Cambridge University Press, 2009. 374pp. ISBN 978-0-521-76019-5. £75.]

In *Shipping Interdiction and the Law of the Sea* Douglas Guilfoyle provides a comprehensive and scholarly assessment of the rules relating to interdiction on the high seas conducted by non-flag states and interdiction in coastal waters conducted by states other than the littoral state (p 5). As Guilfoyle points out, such interdictions "involve jurisdictions of two states [raising] questions of general international law, the simultaneous validity of two national laws of police procedure and substantive criminal law on board a vessel, state immunity and state responsibility" (p 5). Guilfoyle logically divides his material into three parts. Part I is devoted to a discussion of the general principles relating to maritime jurisdiction (chapter 2) and this is followed, in Part II, by an examination of specific rules relating to jurisdiction and, more particularly, interdiction in respect of selected activities: piracy and the slave trade (chapter 4); drug trafficking (chapter 5); fisheries management (chapter 6); unauthorised broadcasting on the high seas (chapter 7); migrant smuggling and human trafficking (chapter 8) and maritime counter-proliferation of weapons of mass destruction (chapter 9). In Part III Guilfoyle identifies and explores general rules and principles that apply to interdiction and examines the extent to which human rights, the rules relating to the use of force (chapter 10), immunity (chapter 11) and international responsibility (chapter 12) apply to interdiction activities on the high seas and elsewhere. Chapter 13 concludes this book with an assessment of whether a general law of interdiction can be identified.

Overall this is an excellent text that provides a comprehensive and easily accessible introduction to the important topic of interdiction at sea and the many issues that are associated with interdiction operations. The discussion is well balanced between an examination of general rules under international law and an exploration of what individual states actually do within their own regions or on the high seas.

Part I is perhaps a little short, and fails to deal with some of the more specific questions relating to jurisdiction over a state's maritime zones. For example, the two pages devoted to enforcement and prescriptive jurisdiction in the territorial sea do not include a discussion of the distinction between vessels in unlawful innocent passage (meaning vessels which fail to comply with coastal state regulations governing innocent passage but which cannot be categorised as non-innocent in accordance with Article 19 of the 1982 United Nations Convention on the Law of the Sea (UNCLOS)) and those vessels which have lost the right to innocent passage. This is an interesting and contested area of jurisdiction, and one which has direct implications for coastal state interdiction. Rather more surprising is that the entire regime for international straits is omitted from Part I of this book although the topic would have benefited from some discussion, particularly in light of the fact that the first case study in Chapter 3 focuses on piracy in the Malacca and Singapore Straits (pp 53-61).

The chapters in Part II of this book examine the various interdiction regimes that apply to a wide variety of unlawful activities. The first of these chapters (chapter 3) deals with interdiction in connection with piracy and the slave trade. Although these two very different categories of unlawful activities are linked by the fact that rights of interdiction are long-standing, as Guilfoyle himself points out, the regimes are quite different. Whereas rights of interdiction in respect of a suspected pirate ship are universal and based on customary international law, rights of inspection in connection with suspected slave ships are derived from treaty and rather more limited when it comes to arrest. It is therefore surprising that Guilfoyle chose to deal with piracy and the slave trade together instead of more logically including a discussion of slavery in chapter 9, which deals with its modern equivalent: migrant smuggling and people trafficking.

The discussion of piracy itself is predicated on a very broad understanding of what constitutes piracy. Piracy is defined as any "illegal acts of violence or detention, or any act of depredation, *committed for private ends* by the crew or the passengers of a private ship or a private aircraft" on the high seas against another ship or aircraft (Article 101 of UNCLOS, emphasis added). This reference to private ends has led many scholars to exclude political violence from the definition of piracy (for example, see Rothwell and Stephens, *The International Law of the Sea* (Hart: 2010) at p 162). By contrast, Guilfoyle argues that "the words 'for private ends' must be understood broadly. All acts of violence that lack state sanction are acts undertaken 'for private ends'" (p 37). He justifies this broad interpretation by asserting that "[t]he rule against piracy exists to protect the freedom of navigation and the safety of persons upon the high seas. This function is not served by reading the definition as inherently excluding acts with a subjective 'political' motive" (p 38). Although superficially attractive, Guilfoyle is not entirely persuasive in his argument and provides little in the way of practice or academic support for such a broad interpretation of piracy. He alleges that the reason why

terrorist attacks to date have not been categorised as piracy is that they do not in general comprise an attack from another vessel, but are initiated by passengers or crew from within the "victim" vessel (p 40). Although this may be factually correct – and in this context it is perhaps surprising that there is no real discussion of the second part of the definition of piracy under Article 101(a)(ii) of UNCLOS, which does not appear to require a second vessel when dealing with attacks "in a place outside the jurisdiction of any State" (as opposed to on the high seas) – it does not entirely explain why states felt it necessary to create specific (and lesser) rights of interdiction to deal with political violence under the Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation and its protocols (SUA Convention). Moreover, one (perhaps unintended) consequence of defining piracy to include political violence is that the regime for interdiction under the SUA Convention and its protocols in relation to political violence is insufficiently analysed, and thus the coverage of this book is not as complete as it might be. Nevertheless, Guilfoyle's exploration of piracy undoubtedly makes a rich contribution to the debate on not only its definition but how coastal and other nations should respond to it.

The remaining chapters in Part II are less controversial and provide excellent introductions to rights of interdiction in relation to offences such as drug trafficking, people smuggling, unauthorised broadcasting and the transport of weapons of mass destruction. It is particularly pleasing to see that this book includes a substantial chapter on fisheries organisations in this context, and a wide-ranging discussion of several interdiction regimes that have been developed with the aim of combating the extremely serious problem of IUU (Illegal, Unregulated and Unreported) fishing.

In the final part of this book Guilfoyle examines what he describes as "the general law of interdiction" and explores the extent to which human rights law and other rules relating to the use of force, the application of local law and the carriage of firearms apply to interdiction activities (chapter 10). This is an important chapter and highly topical in light of the increased debate over the extra-territorial application of – particularly – human rights law to these activities, which has been recently highlighted by the transfer of Somali pirates to nations such as Kenya for trial by a number of western nations. Similarly important is Guilfoyle's discussion of immunity in chapter 11 and responsibility in chapter 12 although his analysis in relation to immunity is somewhat protracted in light of the fairly obvious fact that officials carrying out interdiction activities are almost always going to be categorised as acting in a public capacity. In his short final chapter Guilfoyle concludes that there is no "single unified theory which will indicate when interdictions are *permitted*, in the sense of vesting unilateral rights in a boarding state ... [but] that there may be a law that is generally applicable to how interdictions are *conducted* and to the consequences of wrongfully conducted interdictions before national tribunals" (p 344, emphasis in original).

This book makes a valuable contribution to the existing literature on the law of the sea and maritime security. It should appeal to academics, advanced students and practitioners interested in the rights and obligations associated with interdiction at sea and is highly recommended for library, institutional and individual purchase.

Karen N Scott
University of Canterbury

Under the Protection of the Palm: Wars of Dignity in the Pacific

By International Committee of the Red Cross (Regional Delegation in the Pacific)

[Suva, Fiji: International Committee of the Red Cross (Regional Delegation in the Pacific) 2009. 56pp. Available free to download at: <http://www.icrc.org/eng/assets/files/other/wars-of-dignity-pacific-2009.pdf>]

In this publication, the Regional Pacific Delegation of the International Committee of the Red Cross (ICRC) looks at the connections between traditional forms of regulation of conflict in the Pacific and those found in international humanitarian law (IHL). The aim of the book is, explicitly, to affirm the universal nature of the Geneva Conventions and the laws of war. It does not seek to undermine or critique IHL but instead, as noted by Dr Langi Kavaliku in the foreword, aims to place IHL in the "minds and souls" of the peoples of the Pacific (p 4).

The subject matter of the book is important precisely because of the universality of IHL. Recent events in the Solomon Islands and Papua New Guinea also suggest a need for a deeper understanding and application of IHL in the Pacific region. As in other areas of international law, the Pacific region sometimes appears to be uncomfortably situated between the local and the global, with the result that the core principles of IHL are not yet firmly embedded in the region.

The book is divided into three substantive chapters. Chapter one looks at the causes and types of conflict. It notes that traditional warfare in the Pacific was often concerned with power and control over land. Retribution and redress was another prominent cause of war. Different types of conflict in the Pacific included inter-tribal invasion and conquest, conflict within a tribe, head-hunts, and raids and skirmishes for restitution purposes. Chapter two considers traditional practices protecting persons and property in times of war such as those relating to women, religious figures, non-combatants, the wounded, prisoners of war, and civilian and cultural property. Although some exceptions are identified, this chapter concludes that there were a number of traditional rules for persons and property not directly involved in conflict (p 14). For example, a common theme was that women, children, the elderly and the ill should be spared.

Chapter three looks at the practice of warfare. It concludes that many of the general limitations on warfare found in the IHL, such as the obligation to warn civilians of a pending attack, the need for protective signs and the

concept of disciplined fighters, are also found in the Pacific (p 30). There were also a number of examples from around the Pacific of conflicts which suggest that engagement was proportionate to the objective sought.

The publication highlights the linkages between traditional limitations on armed conflict in the Pacific and the principles of IHL in two ways. In chapters two and three, the general principles of IHL are depicted in sidebars alongside the traditional and customary accounts, highlighting the links between the two. There is also an appendix which presents the linkages in table format, and usefully includes reference to the specific provisions of the 1949 Geneva Conventions and the 1977 Additional Protocols. While a number of specific connections between traditional practices and contemporary IHL are drawn, caution is also urged not to overstate the commonalities (p 40). The rape of female captives, starvation and cannibalism are noted as examples of traditional practices in the Pacific contrary to contemporary IHL.

In terms of methodology, the ICRC assigned nine law students from seven countries, all based at the University of the South Pacific's Port Vila campus, with the task of looking into traditional warfare practices in the Pacific and possible similarities with IHL. The location and expertise of the researcher cohort narrowed the geographical focus of the study to the South Pacific, with particular emphasis on Melanesia. The methodology included interviews with community leaders, literature reviews and the collection of poems, songs and pictures. The researchers relied significantly on oral history. The research does not aim to present a comprehensive picture of traditional practices surrounding conflict in the Pacific. Rather, it is a collection of historical accounts, often from specific tribes or clans, at particular moments in history. The traditional practices varied both within and between what are now the modern Pacific states, and so it was not possible, nor indeed desirable, to present a homogenous account.

This publication will be of interest to many working in the South Pacific region. It will be of particular value to those working in the areas of conflict, peace-building and human rights. It may also have a broader appeal to those working in the area of IHL in other parts of the world, as it prompts reflection on the ongoing importance of situating IHL in particular local contexts in order to affirm its universality, and so contribute to its observance.

Overall, the publication contains an interesting account of traditional Pacific practices during times of conflict and demonstrates the linkages between IHL and these practices. While it is unashamedly intent on promoting IHL, the publication is likely to make a useful contribution to a broader understanding and application of IHL in the Pacific. It also confirms that, in the Pacific, as elsewhere, "Even Wars Have Limits". It is a timely publication for 2009, the 60th Anniversary year of the Geneva Conventions.

Natalie Baird
University of Canterbury