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Völkerrechtsblog
INTERNATIONAL LAW & INTERNATIONAL LEGAL THOUGHT

IFHV

BOFAXE

What Needs to Be Said

HOW STATES SHOULD PRESERVE INTERNATIONAL LAW, WHEN THE SECURITY COUNCIL IS UNABLE TO REACT

It seems these days that international law and its institutions are unable to keep power at bay. In recent times, the UN Security Council (SC) – one member in particular – has failed to maintain international peace and security greatly and frequently. Prominent examples are the aggression against Ukraine and the humanitarian crisis in Syria – most recently debated in July 2022. When states disregard certain international obligations, the international community has the responsibility to respond – at least by expressing condemnation as *opinio juris* – if it wants to uphold the law's validity claim against creeping erosion. As far as the prohibition on the use of force is concerned, the international community tends to fulfill its responsibility fairly well. But in relation to the ineffectiveness of the Security Council, such reactions are rarer and less explicit – although SC practice often perpetuates situations contrary to international law. The SC has the responsibility and competence to end it – but it does not. To prevent its ineffectiveness from effectively perpetuating material illegality, the international community must react.
In this blog post, we recall the impact of illegal acts on international law to reflect on the importance of state reactions to SC ineffectiveness. We show how its ineffectiveness is not a political nuisance but can impact the development of material norms and of UN Charter (UNCh) provisions, and find that although the SC's responsibility is understood by some as a mere competence (p. 103), it should be more than that, if we take the UNCh serious.

The Dogmatic Impact of Silence

Lacking effective enforcement mechanisms to stop unlawful conduct, the normative power of facts is greater in international law than elsewhere. In this dynamic, when power challenges law, upholding the law's normative validity by responding to a breach is crucial. Otherwise, breaches may eventually modify law in the sense of Art. 31 (3) (b) VCLT (IO) (p. 596) or condense into a new custom over time (at 186).
Sometimes, even silence can play a substantial part in the formation of customary law (at 28) and modification of treaty provisions (p. 85). Especially in cases of prohibitions, where breaches are supposed to be rare and where non-breaches are not easily identifiable as law-abiding practice, *opinio juris* plays a decisive role in the formation and modification of international law. When states violate prohibitions, the general consensus (at 139) is that general condemnation is enough but also necessary to prevent the normative impact of illegal practice. Especially in the context of the prohibition on the use of force, states tend to react clearly and frequently to violations, both individually and collectively through the General Assembly (UNGA). Art. 2 (4) UNCh may get breached, but its normative validity stands firm.

Violations and Ineffectiveness – Apples and Oranges?

Is this logic transferable to the ineffectiveness of the SC? If the SC does not pass a resolution despite illegal challenges to international peace and security – for example through Russia's aggression or Assad's treatment of Syria's population – illegal behavior remains unaddressed by the very organ mandated and responsible to address and end it. A veto used for questionable purposes is treated as valid as any other. "We must give peace another chance" was the Secretary-General's reaction to Russia's veto of the Ukraine resolution – as if peace was one of many options under the Charter. The SC is treated as a purely political organ and not too much is read into the SC's responsibility (Art. 24 (1), (2)) or the use of vetoes (27 (3) UNCh) – God forbid any legal obligations or constraints.
The SC is not only an actor on the political stage but "operates and contributes to the 'international legal system' in different ways" (p. 432). As we will show, its conduct has doctrinal relevance for the development of material international law, especially for the interpretation of SC-related UNCh provisions.

Security Council Ineffectiveness and Breaches of Material Law

Because international peace is understood broadly (p. 66-67) under Art. 39 UNCh, when the Security Council gets involved, cases often concern material illegality created by states, such as breaches of the Charter or large-scale human rights violations. If unaddressed, such breaches can erode material standards. On the level of customary international law, the conduct of international organizations is relevant practice (ILC Conclusion 4 (2)), if the conduct falls within the scope of their mandate (p. 131). The more states are represented by an international organization, the greater the impact of its organs in shaping international custom (p. 131). Because the practice of international organizations counts as State practice (p. 130; p. 192), their inaction can become relevant, too (p. 319). Thus, the SC's conduct can contribute to the development of international law, regarding the "maintenance of international peace and security". If an illegal act threatens or breaches international peace, such as the Russian invasion of Ukraine or the dire situation of the notoriously undersupplied Syrian population (Res. 2165 (2014)), the SC's failure to intervene per its mandate perpetuates illegality and may contribute to the erosion of a norm or even the development of new custom. Although the SC is not breaching material law itself, its ineffectiveness is causal for the illegal situation to persist.

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The international community should stand up against an active perpetrator by condemning the breach, to strengthen the validity claim of the violated norm. For breaches of material law, speaking up against SC ineffectiveness is, however, not as important as speaking up against the violation itself. Although the SC's impact on the validity and seriousness of international norms should in theory be rather influential, as it acts as representative of the UN Member States (p. 157), in practice this influence depends on multiple other factors, such as the voting ratio and the debates in the Council (p. 148).

While the SC represents the UN Member States, it is composed of individual members, which all voice their opinions before and after a vote. In most internal discussions on matters, which resulted in ineffectiveness due to a veto in recent history (for Syria see here and here, for Ukraine here) the opinions expressed in the SC are – apart from the vetoing power – clear in that a resolution needs to be passed and that illegality must cease. Against this backdrop, the eventual failure to pass a resolution will not weigh heavily towards any creeping normalization of illegality (para. 71). Additionally, the SC's ineffectiveness is only one factor weighing on the validity claim of the violated norm, besides other states reacting to the material breach (p. 130; p. 192). Individual reactions of states are slightly preferable over institutionalized reactions through the UNGA, as states are generally bound "more directly" by the norms on which violations they comment. But overall, when the SC's ineffectiveness is contrasted with overwhelming international protest, its already modest impact on material rules is diminished greatly. The latter consideration applies also to breaches of the UNCh by states. Although SC ineffectiveness could work towards modifying material provisions of the UNCh under Art. 31 (3) (b) VCLTIO (p. 85), sufficient state protest regarding the breach itself would ultimately prevent this.

Security Council Ineffectiveness and the UN Charter

The situation is different for the UNCh. Not as much for the material provisions like Art. 2 (4) UNCh, but for those specifically relating to the SC. Here, under the notion of "established practice" of the organization (Art. 2 (1) (j) VCLTIO), which is akin to the concept of customary law, the SC's conduct can shape the interpretation of provisions (p. 631-32) relating to itself (p. 191, p. 633) significantly. A prominent example is the case of abstentions (para. 22). Established practice requires repetitive conduct and the acceptance by the members of the organization, here the UN (p. 464). In the Namibia Advisory Opinion, the ICJ confirmed that "repetitive conduct" can also consist of inaction (para. 22).

As only a few UN Member States have a seat in the SC at a time, a universally established practice can only accumulate very slowly. Therefore, as with prohibitions, where relevant practice is also difficult to assess, evolving or creating international law in relation to the SC depends largely on *opinio juris* in the form of reactions of the other states (p. 294, p. 633). Their failure to protest the practice of the SC can be interpreted as a tacit consent, fostering the development of an established practice (p. 294).

According to Article 24 UNCh the SC has the "responsibility for the maintenance of international peace and security". This responsibility is not an entitlement, but a legal requirement to act timely and decisive (para. 13, p. 342). If the SC fails to maintain international peace and security for political reasons, its ineffectiveness challenges the interpretation of Art. 24 UNCh as a responsibility under law. If UN Member States do not address this issue and stress the SC's responsibility in legal terms, they risk that the politicization of the SC becomes an "established practice" and cementing the SC's role as nothing more than a "political theater". International law can only play a role in getting the SC back on track, if its responsibility is a legal one. Therefore, states should speak up against the politicization of the Security Council's mandate and the members involved in this process. Their critique would be an effective counterweight to any normative power of the SC's ineffectiveness. A welcome opportunity to express it is the recently introduced automatic UNGA meetings after a veto in the Security Council. Here, responses through the UNGA as reactions of one organ to another in organizational matters also holds slightly more relevance.

Conclusion

International law alone cannot maintain peace and shape reality. Even the most fundamental norms of international law could not prevent the invasion of Ukraine or the advancing politicization of the SC. Because values like peace, human rights and cooperation are not achieved, but constantly fought for, states must stay aware of the importance of staying in the fight on the normative level. This fight revolves around the very validity of international norms. It is won and lost by the amount of reinforcement and reaffirmation which norms receive. This applies to material norms as well as to those governing the structural architecture of international peace.

The good news is: With very little effort, states can weigh in with doctrinal relevance on multiple levels. We argue that especially regarding the ineffectiveness of the Security Council they should seize this opportunity more, as e.g. as Germany and Estonia did when sharing their understanding of Art. 24 UNCh, reacting to the SC's ineffectiveness in agreeing on humanitarian aid for Syria.

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