

PREFACE

This book provides ample testimony, if any were needed, of His Excellency Judge Mohammed Bedjaoui's fine legal mind. Indeed, the question of the judicial review of the acts of the Security Council is one of the most urgent and revealing contemporary issues facing the United Nations.

For many years, the member States of the United Nations and students of international law grappled with the Security Council's weaknesses. During the whole cold war period, the question centred around the need to shore up the weak authority of the Council so that, by one means or another, peace could be maintained.

Today, the question has been turned on its head. The end of the West-East confrontation has released the full creativity of the Security Council. Since the Gulf war, the Security Council has taken innumerable initiatives. It has moved into areas it had previously shunned. Many of the decisions adopted were unheard of in the past. It has taken numerous initiatives in peace-keeping activities. New institutions have been set up.

All this new activity by the Security Council does, however, raise a number of key issues. Does the Security Council, acting with the unanimous support of its permanent members, have unlimited powers? Where do its prerogatives end? Is the Security Council alone entitled to decide where its powers begin and end? Are the actions of the Security Council exempt from any control?

Clearly, these are fundamental issues, which involve the balance between the various organs of the United Nations, and the balance of power between the Organization and member States. Furthermore, these issues touch upon the political purpose of the United Nations — indeed upon the very structure of the Charter.

The author's handling of these questions is masterly. His intimate knowledge of the International Court of Justice allows him to approach the issue of the legality of Security Council actions from the perspective of a jurist. But the author goes beyond this perspective. His closely argued examination of possible areas of control and of the nature of the control mechanism touches upon the very foundations of the United Nations.

Are the actions of the Security Council subject to judicial review by an external authority? This fundamental question, first raised by member States at the San Francisco Conference, touches upon two issues: control over the constitutionality of the Security Council's actions, and the Council's power of self-interpretation.

Whichever way one looks at it, the issue of the constitutionality of the Security Council's acts is basically a political matter. Without pushing too far the analogy with the State, it seems clear that most States have taken very cautious positions regarding the review of the actions of the executive. One need only think, in this respect, of the various theories of "Acts of Government".

The problem is raised in even more acute form when, in the case of the United Nations, it involves the constitutionality of the actions of the Security Council. The process of integration is not sufficiently developed to prevent any legal challenge to the acts of the Security Council from being seen immediately as politically motivated. It would be futile to deny that any judicial challenge to the constitutionality of an act of the Security Council would be interpreted as an expression by the States making it of an underlying political disagreement.

Similarly, should some check be placed on the power of the Security Council to review those provisions of the Charter which concern it? At San Francisco, member States refused to include a provision for judicial review machinery in the Charter. In so doing, they admitted implicitly that each organ is competent to interpret the sections of the Charter which concern it. The question of how far such powers of interpretation should go, and how differing interpretations by the Council and member States should be reconciled, nevertheless remains. Some recent examples spring readily to mind.

One of the contributions made by Judge Bedjaoui in his study is that he proposes some initial answers to these questions.

Who, then, is to carry out this judicial review function? The author, in an essential chapter, proposes that the International Court of Justice might help to monitor the legality of the actions of international political organs. The suggestions made in this chapter regarding the role, both in contentious cases and in advisory jurisdiction, of the International Court of Justice, merit serious attention. The author also suggests that "the Secretary-General of the United Nations should be empowered to seek advisory opinions from the International Court of Justice".

Some years ago, the issue of control was debated at the United Nations. It was suggested, in particular, that the Secretary-General should be authorized to request advisory opinions, in the context of Article 96, paragraph 2, to facilitate the "carrying out of his functions by enabling him to receive authoritative legal advice as to questions of international law arising within the scope of his activities, particularly in respect of disputes in which the Secretary-General has been asked to play a role such as the exercise of his good offices or mediation". That suggestion was prompted by the "complementary relationship between the Security Council and the Secretary-General".

Opinion on this matter is divided. The Special Committee on the Charter

reflects, in this respect, the different positions of member States. Yet, here again, Judge Bedjaoui draws attention to a highly topical issue.

That should suffice to convey the richness of his work. By the subtlety and fecundity of his analyses, Mohammed Bedjaoui brings us a book which provides both a work on positive law and an essay on normative law. The work reflects the personality of its author: Judge Bedjaoui, a practising jurist and a visionary theoretician of international law.

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