Book Reviews

Erika de Wet. ***The Chapter VII Powers of the United Nations Security Council***. Oxford: Hart Publishing, 2004. Pp. xviii + 412, including Table of Cases and Index. ISBN 1–84113–422–8.

M.ª Eugenia López-Jacoiste Díaz. ***Actualidad del Consejo de Seguridad de las Naciones Unidas: La legalidad de sus decisiones y el problema de su control***. Madrid: Editorial Civitas, 2003. Pp. 396. ISBN 84–470–2081–9.

Linos-Alexander Sicilianos. ***Η Εξουσιοδότηση του Συμβουλίου Ασφαλείας του ΟΗΕ για Χρήση Βίας***. Athens – Komotini: Ant. N. Sakkoulas Publishers, 2003. Pp 567, including Appendix of Documents. ISBN 960–15–1015-X

The United Nations Security Council has played an influential role in world political and legal developments throughout the post-Cold War era. By gradually expanding the scope of its activities, it has virtually reshaped its role and function, as well as the public discourse and perception of the UN itself. Suffice it to recall the Council's involvement in humanitarian crises, in restoring democracy, in state reconstruction; its decisive role in enforcing existing rules of international law, or in consolidating emerging ones. In the name of a comprehensive, almost all-encompassing, perception of peace and security, the Council has not shied away from addressing purely internal situations, non-state actors or thematic issues. At the same time, such unprecedented activism is widely criticized as too selective and too much in line with the priorities of the big powers. The Council has sometimes seemed to behave in a way that would merely make it more vulnerable to such criticism, a conspicuous example being Resolution 1422 exempting certain personnel of UN and UN-authorized operations from jurisdiction of the International Criminal Court.

Hardly any of the above developments has remained legally unchallenged. Yet the Council has only rarely made an effort to justify the creative and novel interpretations of its powers. This task was left to international lawyers. Not surprisingly then, a considerable literature has developed on the Council's powers and their limits, often – and more properly – discussed in conjunction with the question of judicial review. Hundreds of articles have been written on these issues in law journals and collective works. It is noteworthy, however, that barely a dozen monographs have been published in the last decade, mostly in German.[1] To the best of this reviewer's knowledge, there have only been a handful of recent monographs published in English or French that focus on questions of legality pertaining to Chapter VII action.[2]

A possible explanation may be that any study revolving around the Council's past practice runs the risk of quickly becoming dated, overtaken by events and irrelevant for future developments, unless it also envisages

[1] See, e.g., the books revidwed in Fassbender, '*Quis judicabit?* The Security Council, Its Powers and Its Legal Control', 11 *DJIL* (2000) 219.

[2] Apart from Bedjaoui's, *The New World Order and the Security Council. Testing the Legality of its Acts* (1994) published in both English and French, see also D. Schweigman, *The Authority of the Security Council under Chapter VII of the UN Charter: Legal Limits and the Role of the International Court of Justice* (2001); A. Constantinides, *Legal Limits and Judicial Review of the UN Security Council* (2004) (in Greek).

a comprehensive and viable legal framework of the Council and its powers. Of course, seminal works, such as Kelsen's *The Law of the United Nations* or Combacau's *Le pouvoir de sanction de l'ONU* are not an everyday achievement, especially in an era when the practice of the Council and other pertinent actors becomes increasingly unmanageable. Still, depending on the focus of the study, a comprehensive framework would need to tackle some general issues, such as the legal context and background of Security Council action, the legal nature and implications of its powers, its role within the Charter and the international community, its relationship with Member States, and so on. The entire range of legal issues, conceptual and generic, practical and specific alike, would nowadays be almost impossible to cover exhaustively in a single book, let alone in the present brief review of three monographs. This review cannot, therefore, do justice to the plurality and complexities of the issues discussed therein and will inevitably be limited to a handful of generic and controversial questions.

One of the books under review, Linos-Alexander Sicilianos' *Authorization by the UN Security Council to Use Force* (in Greek)[3] focuses on the specific issue indicated in its title. Nonetheless, Sicilianos, Associate Professor of International Law at the University of Athens, addresses an array of related issues and locates the authorized operations within a comprehensive legal framework of SC action. The other two books, *Actualidad del Consejo de Seguridad de las Naciones Unidas: La legalidad de sus decisiones y el problema de su control*[4] by M.ª Eugenia López-Jacoiste Díaz, Professor of International Law at the University of Navarra, and *The Chapter VII Powers of the United Nations Security Council*, the *Habilitationsschrift*[5] of Erika de Wet, Professor of International Constitutional Law at the University of Amsterdam, focus on the legal limits and judicial review of SC action.

The title of de Wet's book seems to suggest a comprehensive study, but in fact examines comprehensively only the limitations to the Council's Chapter VII powers and some important aspects of judicial review. The book does cover a lot of ground, adequately addressing a number of questions pertaining to the Council's Chapter VII powers. Yet, one cannot fail to notice the lengthy discussion of issues that are unwarranted by its actual title, such as the ICJ legitimation of peacekeeping or the meaning of general principles of law, at the expense of more pertinent questions, including the normative characteristics of Article 39 determinations or the Council's powers under Article 40. Although her bibliography of post-Cold War English, German and Dutch writings is indeed impressive, the absence of writings by francophone authors (there are but half a dozen titles, not including seminal works) is conspicuous.

López-Jacoiste's monograph is largely devoted to a comprehensive analysis of the notion, the necessity, the conditions and consequences of control of SC action. Her comprehensive bibliography includes titles in five languages,

[3] For a summary in French, see Sicilianos, 'L'autorisation par le Conseil de sécurité de recourir à la force', 106 *RGDIP* (2002) 5–50. His lectures on this topic at the Hague Academy of International Law (summer 2005) are also expected to be published in French in the Academy's *Recueil des Cours*.

[4] *Current Issues Surrounding the United Nations Security Council – The Legality of its Decisions and the Problem of its Control* (in Spanish).

[5] Supervised by Professor Thürer (University of Zurich). Substantial parts of the book (nearly four out of its ten chapters) have been previously published elsewhere. See de Wet, 'Judicial Review of the United Nations Security Council and General Assembly through Advisory Opinions of the International Court of Justice', 10 *SRIEL* (2000) 237–278; 'Judicial Review as an Emerging General Principle of Law and its Implications for the International Court of Justice', 47 *NILR* (2000) 181–210; 'Human Rights Limitations to Economic Enforcement Measures under Article 41 of the United Nations Charter and the Iraqi Sanctions Regime', 14 *LJIL* (2001) 277–300; 'The Relationship between the Security Council and Regional Organizations during Enforcement Action under Chapter VII of the United Nations Charter', 71 *NJIL* (2002) 1–37.

although her use of the authorities is not always reliable, not to mention the frequent mistakes in English and French throughout the book.

Both López-Jacoiste and de Wet view the Charter as a constitution. They seek to accommodate control of SC action within the constitutional nature of the Charter, and make use of domestic analogies to that effect. De Wet examines the constitutional character of the Charter in the context of investigating whether judicial review has emerged as a general principle of law within municipal orders, transferable to the UN legal order. Most of her analysis is substantiated, but it is only by circumventing, 'for the sake of argument', the fundamental structural differences between the international and municipal legal orders that she concludes, hastily in my opinion, that 'analogies between the Charter and domestic constitutions in relation to judicial review are regarded as permissible'.

Still, her excellent analysis of judicial review as an emerging general principle of law and her substantiated conclusion that such an emergence would – at least for the present – be tenuous, are a praiseworthy contribution to the academic debate (as is her investigation elsewhere of judicial review by domestic or other international courts).[6] De Wet provides both the *problematique* of this perspective and the solution, which will take long to challenge. Meanwhile, there exists safer ground, though not devoid of controversy, for the ICJ, if it ever wishes to embark on (incidental) judicial review in contentious cases. As de Wet explains, it can derive such authority by applying *mutatis mutandis* the rationale it used in the *Namibia* Advisory Opinion, where the Court examined the disputed validity of UN resolutions 'in the exercise of its judicial function' (even though it denied that it had powers of judicial review).

In any case, although judicial review is undoubtedly the most authoritative means to enforce compliance with the principle of legality, its uncertain character, scant application and limited effects have prompted scholars to investigate alternative means of enhancing SC legitimacy. Such means are explored by López-Jacoiste, in what stands out as the most innovative part of her monograph. Thus, in addition to her articulate analysis of judicial review, López-Jacoiste also makes an interesting case for political control of the Council by the General Assembly and the Secretary General. To that effect, she adopts a multifaceted, nearly all-encompassing, notion of control that comprises diverse processes of verifying and safeguarding the conformity of institutional decisions with their superior norm. She regards such control as an indispensable element of any constitution. Hence, she finds with de Wet that the actual division of functions within the UN amounts to a separation of powers, albeit rudimentary, which is a prerequisite of a system of checks and balances and a constitutional characteristic of the Charter.

Both de Wet and López-Jacoiste are also in favour of the right of states to reject illegal SC resolutions as a 'right of last resort'. This reviewer sides with them, but must point out that such a right is hardly compatible with the nature of the UN Charter as the purported constitution of mankind (and not merely of the international community of states). This 'primitive' right, traditionally put forward by the proponents of the contractual nature of the Charter, underscores the sovereignty of Member States and presupposes that they are the ultimate interpreters of their rights and obligations under the Charter and international law.

Besides, López-Jacoiste's unduly restrictive interpretation of the Council's powers is further inconsistent with her perception of the Charter as a vivid instrument that requires a constant dynamic and teleological interpretation. Her arguments are not always legally sound and lack clarity, as when she speaks, for instance, of the *illegality* of the Council contravening its 'quasi-legal, objective and, above all, moral' obligation to intervene in situations requiring so. For López-Jacoiste, the Council can only adopt measures not differing

[6] See de Wet and Nollkaemper, 'Review of the Security Council by National Courts', 45 *GYIL* (2002) 166–202.

in nature from the ones expressly provided in the Charter. Not surprisingly, then, she considers all creative Council innovations, including the creation of the *ad hoc* criminal tribunals, as *ultra vires*. Her overall excessively formalist approach is reminiscent of and proper to administrative organs functioning within strictly defined domestic legal orders rather than of a political organ endowed with broad discretion to fulfil a political function within a constitutional framework.

In contrast, de Wet's informative and thorough analysis of all controversial Council innovations is more balanced and substantiated. She identifies *ius cogens* norms and the purposes and principles of the UN as limits to SC Chapter VII powers, paying particular attention to the role of core human rights norms. However, her otherwise interesting 'abstract analysis' of Article 39 'according to the ordinary meaning, in context and with due consideration to the object and purpose of the Charter' is rather questionable; it fails to take into account the relevant practice of the Council t*ogether* with the context and in effect understates the Council's *exclusive* competence to interpret and apply Article 39 and, thereby, activate Chapter VII. Thus, by opting for an abstract (and narrow) definition of peace as negative peace, de Wet tends to downgrade the pivotal role of SC practice, which is only being imported into her analysis *ex post* to affirm or not the validity of this 'abstract' definition. Even then, any resolutions favouring a broader concept of positive peace, such as Resolution 794 on Somalia, are played down as isolated instances, incapable of modifying the 'abstract' definition; the latter is considered as embedded in the Charter and requiring a 'consistent and generally accepted' practice of the Council to amend it by delinking the term 'peace' in Article 39 from the outbreak of an armed conflict (which, of course, is not the case with the Council's overall practice).

However, one cannot validly exclude *a priori* the emergence of major – yet purely internal – crises (and not necessarily only within Somalia-type 'collapsed' states) involving 'non-military sources of instability in the economic, social, humanitarian and ecological fields' that would qualify as threats to international peace and security. This is *a fortiori* the case if such crises involve violations of *erga omnes* obligations, which, as Sicilianos rightly observes, is increasingly the case. The Council should not be precluded beforehand from addressing such crises under Chapter VII if these warrant an urgent – coercive or not – response. Such action may well be without prejudice to the mid/long-term socio-economic strategies of other competent UN organs and is unlikely to turn the Council into a world government, as de Wet reasonably fears.

Sicilianos further makes an interesting point on the normative characteristics of Article 39 determinations. Building upon his earlier writings,[7] he notes the similarities and underlines the progressive convergence of the Chapter VII sanctions regime with the regime of international responsibility. He is rightly cautious, though, not to attribute any *judicial* characteristics to SC functions under Article 39. In fact, this reviewer would be hesitant to attribute even *normative* characteristics to the (factual) determinations of 'threat to peace', as long as the Council itself refrains from doing so and does not regard the situations threatening peace as necessarily resulting from or amounting to internationally wrongful acts. Besides, as de Wet rightly points out, the concept of 'threat to peace' can include behavior which is not illegal *per se*. Sicilianos makes another warranted distinction in not categorizing UN-authorized operations *in globo* and *a priori* as sanctions *or* police measures, but opts for an *ad hoc* evaluation of their normative function.

His book is the first monograph devoted to UN-authorized operations.[8] It revolves

[7] See, e.g., L.-A. Sicilianos, *Les réactions décentralisées à l'illicite: des contre-mesures à la légitime défense* (1990); Sicilianos, 'The Classification of Obligations and the Multilateral Dimension of International Responsibility', 13 *EJIL* (2002) 1127–1145.

[8] See also D. Sarooshi, *The United Nations and the Development of Collective Security. The Delegation by the Security Council of its Chapter VII Powers* (1999), covering a broader range of issues.

around the hybrid legal nature of authorized operations, which are neither purely institutional measures nor decentralized reactions, but encompass both institutional and decentralized elements. This conclusion necessarily reflects and affects their *sui generis* legal regime when it comes to their conduct on the ground. The institutional elements comprise the legal characterization of the situation, the initiative to take action and the organization/direction of the operation. He emphasizes with de Wet that all these functions are incumbent upon the Council and may not be delegated to states if the operations are to remain within the bounds of legality. Sicilianos' arguments are remarkably consistent throughout the book and throughout his writings. He is less concerned, if at all, with the politics behind the authorizations (in fact, none of the books under review engages in an interdisciplinary analysis), but remains preoccupied with developing from scratch the legal premises and framework of the authorizations and their functioning on the ground, based upon SC, UN and state practice. His exhaustive use of pertinent UN material to that effect makes his conclusions and suggestions on novel legal questions (such as the applicable law in so-called low-intensity operations) instructive and reliable.

On the other hand, López-Jacoiste's analysis of UN-authorized operations is flawed. She apparently confuses the generally accepted authorizations to use all necessary means (implying the use of force) with the highly controversial implicit authorizations. Surprisingly (judging from her overall restrictive pattern of interpreting SC powers and resolutions), she seems sympathetic to the latter – in sharp contrast to Sicilianos, de Wet and this reviewer – but considers the UN-authorized humanitarian operations in Somalia and elsewhere not in conformity with Charter provisions from a strictly legal perspective, even though reasonable and morally necessary.

Highlighting some of the merits of the books under review, one can sum up as follows: Sicilianos demonstrates that SC innovations can be welcome and viable contributions to the cause of peace and security, while remaining within the bounds of legality. A plurality of (f)actors within and outside the UN have largely contributed to the Council becoming increasingly mindful of legality considerations and adjusting its practice of authorizations accordingly. This encouraging development took place without any judicial review, emphasizing the merits of López-Jacoiste's multifaceted concept of control. Absent a predictable system of judicial review, such alternative mechanisms of control should be further developed in order to foster the rule of law in international relations by effectively enforcing the (few but fundamental) limits to the Council's powers, which de Wet has aptly articulated.

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David Raič. ***Statehood & the Law of Self-Determination***. Leiden, Boston: Martinus Nijhoff Publishers, 2002. Pp. 515. ISBN 904111890x.

At first glance another book on self-determination may not seem an exciting prospect to scholars of international law. However, despite the intensive scrutiny this subject has come under by recent generations of international lawyers,[9] it continues to evade clarity, remaining a concept of 'uncertain legal

[9] Notably in volumes written, amongst several others, by A. Cassese, *Self-Determination of Peoples, A Legal Reappraisal* (1995); J. Crawford, *The Creation of States in International Law* (1979); J. Crawford (ed.), *The Rights of Peoples* (1988); H. Hannum, *Autonomy, Sovereignty, and Self-Determination, the Accommodation of Conflicting Rights* (1996); M. Pomerance, *Self-Determination in Law & Practice, the New Doctrine in the United Nations* (1982); A. Rigo Sureda, *The Evolution of the Right of Self-Determination, A Study of United Nations Practice* (1973); C. Tomuschat (ed.), *Modern Law of Self-Determination* (1993).