

multifaceted problems of societies and their development. Human rights are, perhaps, no more than another language for addressing these problems. One language or one approach will never alone provide a solution.

*University of Helsinki* Anja Lindroos

*The Erik Castrén Institute of International Law and Human Rights*

Email: [Anja.Lindroos@helsinki.fi](mailto:Anja.Lindroos@helsinki.fi)

doi: 10.1093/ejil/chl040

Max Hilaire. **United Nations Law and the Security Council**. Aldershot; Burlington, VT: Ashgate, 2005. Pp. 333. \$99.95. ISBN 0754644898.

Catherine Denis. **Le Pouvoir normatif du Conseil de sécurité des Nations**

**Unies: portée et limites**. Bruxelles:

Editions Bruylant; Editions de

l'Université de Bruxelles, 2004. Pp. 424.

€75. ISBN 2-8027-1943-2.

The point of departure for the two books under review is the increased activity of the Security Council since the beginning of the 1990s. There is a sense of concern on the part of both of the authors that the Security Council is moving too far away from its mandate under the United Nations Charter. They each examine the tendency of some permanent members to hijack the Security Council and (ab)use it for their own purposes rather than for the purposes of the international community as a whole, with legally dubious resolutions as a result. These similarities aside, the books under review are very different in form and content.

Hilaire's work is broad, descriptive and rich in information on the actions of the Security Council since its creation, mostly under chapter VII of the UN Charter. Hilaire's book is policy-oriented, with an open door towards political considerations, which inevitably intertwine with legal considerations in a discussion of the Security Council. The form of the book, its large number of case studies grouped under different headings (based on the kind of conflict involved) and followed by legal

analysis, makes the book seem suitable as an introductory textbook for those who may want or need to know more about the Security Council. Thanks to the wealth of information it contains on the practice of the Council, the book may also serve as a useful reference book, even for those who are already familiar with the subject. The lack of a detailed table of contents, however, reduces its value as a reference book, although the detailed index may partly compensate for this.

The book by Denis is a deep and analytical work of meticulous research aimed at a highly qualified audience. Previously presented as a doctoral dissertation, it is narrower in scope than Hilaire's book, or more focused. At the same time, however, it is also more informative when it comes to the debates held within the Security Council and the General Assembly on the issues under study. It is a clear, coherent and consistent work, with a limited number of questions concerning the normative power of the Security Council in international law effectively running through the book as a whole. The book is legal in style and content, and shows less interest in politics than does Hilaire's volume. Far from being bloodless and boring, however, Denis's book belongs to the rare category of international legal research that manages to combine intellectual rigour with passionate argumentation, all in a highly readable form. The result is an impressive work indeed – solid and innovative at the same time. Denis's book constitutes an important contribution to the current research on the capacity of the Security Council to affect international law. Indeed, while this review will examine both of these books, greater attention will be devoted to the volume by Denis, given its importance as a contribution to the literature.

The large number of case studies comprising Hilaire's book are grouped under rather randomly chosen rubrics in the table of contents. Sometimes the rubrics refer to the legal or constitutional arrangements involved (such as delegation of authority or the

relationship between the Security Council and regional organizations) and sometimes the rubrics refer to the kind of conflict involved (small-scale regional conflicts or inter-state conflicts, for instance). On other occasions, the rubric refers to the type of activity in which the Security Council is involved (such as peacekeeping). There is no consistency between the different headings, most likely because the book is a rather chronological account of the practice of the Security Council and as such is not easy to order in neatly separated categories without further intellectual processing on the part of the author. Indeed the title of the book, *United Nations Law and the Security Council*, is slightly misleading.

On a general level, the book is certainly about UN law and the Security Council, in that it treats the mandate of the Security Council under the UN Charter and the practice of the Security Council with respect to different situations relating to international peace and security. The focus of the book, however, is on the performance of the Security Council in handling those situations rather than on the legality of its actions. The legal issues may be dealt with, but typically very briefly at the end of each case study. Moreover, the author is often content to raise a large number of questions. Although these may in themselves be highly relevant, no profound answers are provided. The book's conclusion concentrates on ways of enhancing the capacity of the Security Council to maintain international peace and security in the future. The stated purpose of the book – to examine and critically appraise the application of UN law in post-Cold War Security Council decision-making – is not quite accomplished, since the book closes with conclusions relating to the more or less successful policy performance of the Security Council.

Nevertheless, the broad-ranging nature of Hilaire's account and the wealth of information it contains on Security Council actions from the very beginning of its existence to the present day makes for interesting reading, offers much food for thought, and provides a bird's eye view of the subject in addition to the

more frequent near-sighted descriptions of individual cases. Comparisons are always worthwhile and it is useful to be reminded through historical exploration that what are perceived as new issues today often have significant historical precedents. However, no systematic comparison is performed by the author himself in this case, leaving it therefore to the reader to make the comparisons. It is the breadth of Hilaire's account and the fact that it spans the entire life of the Security Council to date which constitutes the original contribution of this work to the field of Security Council studies as well as studies of international relations and peace and security generally.

The issue of Security Council legislating, which is the subject of the other book under review here, is not touched upon by Hilaire as such. Indirectly, however, Hilaire expresses a critical view of what Catherine Denis would label Security Council legislating, in relation to Resolution 748 (1992) on Libya. He finds that the Security Council's action was in complete disrespect for the judicial branch, given that the International Court of Justice was deliberating Libya's request for interim measures. Hilaire also mentions the creation of the international criminal tribunals for the former Yugoslavia and Rwanda, by Resolutions 827 (1993) and 955 (1994), which, as we shall see, are also taken up by Denis as examples of law-making. Hilaire limits his evaluation to commenting that the establishment of such tribunals was an extraordinary measure by the Security Council, neither provided for nor prevented by Article 41 of the Charter. Finally, he notes, without further comments on the legality or potential law-making that the Security Council, with Resolution 687 (1991), established an international boundary and created a mechanism for the compensation of victims of Iraq's invasion of Kuwait.

Since the contents of Hilaire's book are so comprehensive and so descriptive, it is difficult to summarize. For the same reasons, it is difficult to infer any main idea(s) or proposition(s) from the text as a whole. Two quotes may serve to illustrate what this reviewer

nevertheless finds to be Hilaire's general, conventional, simplistic and rather uncritical tendency in most instances to merely wish for the strengthening of the role and the capacity to act of the Security Council in international conflict management. On the subject of Iraq in 1990–1991, Hilaire writes that '[t]he manner in which the Security Council handled the Iraqi situation was the closest the Security Council came to functioning as the Framers of the Charter of the United Nations intended'. Then he finds that '[t]here is no likelihood the Security Council will act in a similar manner in the future'. That is to say, unless the Security Council's ability to act is strengthened in the different ways eventually suggested by the author, one may presume. But then again, how beneficial was the Security Council's handling of Iraq after all?

A word of warning about the book's reference system is in order. Apart from Security Council resolutions and other official documents, the references contained in the endnotes present serious problems. Sometimes the information that should be contained in the endnote is simply missing (only the actual endnote numeral appears). This does not occur frequently, but would seem to bear witness to a certain measure of carelessness in the completion of this work. Other recurring weaknesses throughout the reference system are more serious. For example, footnotes are lacking in many instances where they are needed; the literature referred to is often old and although not entirely outdated would at least need to be supplemented by more recent works in the field; the literature referred to is insufficient and does not do justice to the considerable amount of research that has been carried out on Security Council issues over the years and in particular since the end of the Cold War; and, finally, the quality of the literature is at times rather dubious, ranging from truly academic research works to lightweight newspaper articles. The choice of sources as well as the choice of referenced points seem haphazard. The reference system as it stands is unworthy of an academic work, and seems to point to either a marked degree of negligence on the part of the author or a

considerable lack of understanding of the purpose of a reference system.

Denis's book, on the other hand, on the normative power of the Security Council in international law is a highly ambitious, careful, convincing and intellectually stimulating study of a very topical subject. It raises fundamental issues relating to the place of the Security Council in the international normative system, but also relating to the formation and nature of international law as a whole. The author manages to stay on course from the beginning to the end, despite this being a broad and changing area, an admirable feat, especially for a young researcher.

Taking as her starting point a number of resolutions adopted by the UN Security Council, Denis seeks to draw some conclusions as to the capacity of the UN Security Council to create new international law. One may agree or not agree with some or all of those conclusions, with some or all of the aspects of the framework of analysis she applies to her cases, or with her choice of cases and the way in which she distinguishes between different categories of cases, but the book is undoubtedly worth reading. In fact, it would be a most useful addition to the literature if the book were to be translated into English in order to expand its potential readership.

Denis recognizes that the Security Council participates in an indirect way in the process of international law-making by interpreting and applying rules of international law to particular situations and by giving evidence of the *opinio juris* of states. This she labels the normative power of the Security Council in a broad sense, which is not widely contested and which she leaves aside in her study. The core of Denis's interest is what she refers to as the normative power of the Council in a strict sense, namely the power to produce binding international norms, directly and unilaterally.

The cases chosen by Denis to illustrate this normative power are numerous and diverse. They include, for example, Resolution 687 (1991), by which the Security Council decided the boundary between Iraq and Kuwait and established the international responsibility of Iraq while setting up a

procedure for indemnification; Resolutions 731 (1992) and 748 (1992), by which the Security Council, in the words of Denis, put aside the application of an international treaty within the framework of an international legal dispute; and Resolution 1497 (2003), by which the Security Council laid down exclusive criminal jurisdiction of non-parties to the Rome Statute of the International Criminal Court over acts committed by their nationals participating in the UN operation in Liberia.

The further cases chosen by Denis are a number of thematic resolutions adopted by the Security Council in which it, arguably, to use Denis' words, 'generalizes' its action (on subjects such as the situation in Africa, the protection of civilians and children in conflicts, peace-keeping operations, the aids virus, equality between men and women, conflict prevention, and non-proliferation of nuclear weapons). Also significant are Resolutions 808 (1993), 827 (1993) and 955 (1994), by which the Security Council created the international tribunals for the former Yugoslavia and Rwanda, and Resolutions 1422 (2002) and 1487 (2003), by which the Security Council modified, generally speaking, the terms of the Rome Statute of the International Criminal Court. Finally, the author highlights the (in)famous Resolution 1373 (2001), by which the Security Council may be seen to have legislated on measures to be taken by states, among other things, to prevent and suppress the financing of international terrorism.

Denis begins by describing the contents of these resolutions and how far, in her view, the Security Council has stretched its power to enounce new binding international law. Denis distinguishes between two kinds of law-making by the Security Council – the special case in which the Security Council acts as judge and the general case in which it acts as legislator. As far as the resolutions listed above are concerned, the line between these two norm-making roles of the Security Council is drawn between Resolution 1497 on the exclusive international criminal competence and the thematic resolutions adopted by the

Security Council. The Security Council does not legislate properly speaking with its thematic resolutions, but shows its tendency to generalize its action beyond measures taken in response to particular problems in particular situations.

As far as the character of the norms are concerned, Denis, as mentioned, distinguishes between particular norms which the Security Council produces when it acts as a judge, and general norms which the Security Council produces when it acts as legislator. There may be some lack of clarity and some inconsistencies here and there as to the terminology, but on the whole Denis uses her terminology consistently throughout her analysis. Denis repeats her main arguments at regular intervals in her study, which in another book could have been irritating, but which in Denis' case is very useful as a means for the reader to remember the 'red thread' running through the book.

The main source material used by Denis are the resolutions of the Security Council, the records of the debates held in the Security Council and the General Assembly on the issues, and the international legal doctrine which in this case was very thoroughly researched. Denis has also spent some time at the UN and had informal conversations with representatives of states connected to the work of the Security Council.

After having accounted for the practice of the Security Council, Denis takes the next step of evaluating whether the claimed law-making, particular and general, by the Security Council is really legal. Denis uses the rules of treaty interpretation in the Vienna Convention on the Law of Treaties as her starting-point and especially the rule on the potential of the subsequent practice of the state parties to establish their agreement as to the interpretation of the treaty, i.e. Chapters VI and VII of the UN Charter in our case. Denis' answer to her main question of whether the Security Council's legislation is legal is basically negative, which one would somehow have expected. Her only slight reservation relates to situations where the member states have been more tolerant towards the

'generalization' of activities of the Security Council – even if not towards legislation proper – than might have been expected. This relates to the thematic resolutions referred to above on subjects such as the situation in Africa, the protection of civilians and children in conflicts, and so on.

Even though there is such an openness in the attitude of the states towards the Security Council, Denis maintains that the subsequent practice on the part of the states to date is neither sufficiently consistent nor common, so that the law in force has not yet changed and the Security Council is not (yet) entitled to legislate. In any case, as Denis writes towards the very end of her excellent book, the Security Council could not act as a genuine legislator at this stage under any circumstances because it currently lacks the necessary representativity and legitimacy in order to be able to do so. It may be that future developments will render the Security Council both legitimate and a lawful global legislator, but that possibility still seems remote.

Several questions must be raised in relation to Denis' work. Concerning the choice of resolutions, might it be that there are other Security Council resolutions which would weaken the thesis concerning the tendency of the Council to act as norm-creator? On what basis were resolutions chosen, apart from the fact that they support the thesis that the Security Council acts as judge and legislator? Is there a tendency in Denis' book to start from theses rather than to try hypotheses? Moreover, is it possible that the normative power of the Security Council has been reinforced, as Denis writes, while this practice by the Council is illegal or at least *ultra vires vis-à-vis* the law contained in the UN Charter? Also, can it be that the readiness of states to accept the Security Council as legislator depends very much on the subject matter at hand, as Denis's

study would seem to suggest, and if so would it be possible to draw any conclusions as to the capacity of the Security Council to act as a legislator in general? And further, is it really impossible in principle for the Security Council to function as a legislator if, incontestably, as Denis writes, essentially political motives underlie its decision-making?

Finally, on the vexed issue of what states say versus what states do, what is more important? Denis finds that although states may initially protest, or even continue to oppose certain resolutions of the Security Council, they still apply them. This is because, Denis writes, for reasons of political, diplomatic and economic power these states have no choice but to obey, even if they both think and say that this is contrary to their *opinio juris*. And so, where does this lead in the long run, do the words weigh as heavily as the actions? What is the legal relevance of states feeling forced to act as they do for the reasons just cited? And how many states must take part in a practice before the balance tips in favour of a new rule – each and every one? Also, why not apply the words versus deeds approach to the action of the Security Council *mutatis mutandis*? Even if the Security Council itself would not admit that it is creating new international law, but would only admit that it is applying existing rules, Denis writes that whatever the position taken by the Security Council on the question of its law-making, law-making is what the Security Council does. Why not let the attitude of the Security Council itself affect whether new rules are created or not, just as Denis lets the attitude of the states temper the legal effects of their actions?

Law Department

Uppsala University

Email: [Inger.Osterdahl@jur.uu.se](mailto:Inger.Osterdahl@jur.uu.se)

Inger Österdahl

doi: 10.1093/ejil/chl041