

Book Reviews

Antonios Tzanakopoulos: Disobeying the Security Council – Countermeasures against Wrongful Sanctions

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Extent and limits of the powers of the UN Security Council have been a topic of scholarly debate since the newly founded United Nations took up work after World War II. There was much discussion about the Security Council's power to impose general (S/RES/1373) and smart sanctions (S/RES/1267) and to establish judicial bodies like the ICTY and the ICTR under Chapter VII of the UN Charter. To this continuing debate, Tzanakopoulos adds a new and interesting twist by going beyond the usual stumbling blocks of the interpretation of delicate passages of the UN Charter and the classical shield of Chapter VII which in the eyes of many exempts the Security Council from too rigorous scrutiny.

A short introductory Chapter speaks about responsibility as a form of accountability. The carefully edited book is divided into three Parts of similar length: Part 1 deals with the engagement of responsibility; Part 2 discusses the determination of responsibility and Part 3 has the consequences of responsibility as its topic. This outline follows a logical order as the questions of engagement and determination of responsibility should be answered as preliminary questions before the consequences and especially the question of countermeasures can be addressed. The most important part of the book is contained in Chapter 7 on "implementation through self-enforcement" with a critical and thorough examination of whether states can resort to countermeasures against the United Nations in response to a wrongful act by the Security Council.

Tzanakopoulos argues in Chapter 1 that the control of the exercise of the power by international organizations and especially by the Secu-

rity Council as the major organ of the United Nations, becomes more and more important. Such control could be best exercised through legal accountability using the concept of responsibility. The two following Chapters on the engagement of responsibility, consisting of attribution and the element of breach can be seen as representing a preliminary question and precondition for the treatment of the topic of countermeasures later in the book.

Attribution of actions is a specifically complex issue if international organizations are involved. Chapter 2 provides an illustrative list of recent and of conceivable Council action as a good complement to the more technical aspects of attribution. Since this Part often speaks of violations of the UN Charter, it could, as the author recognizes (pages 24/25), have been located in Chapter 3 of the book on the element of breach. It offers nonetheless a useful range of cases, such as the one to be found under the Section on attribution of Member State conduct to the United Nations. There are interesting thoughts in this Part on omissions, especially on the differences to state responsibility. Mention could have been made in this context of the Responsibility to Protect and the current state of debate on it.

Chapter 3 deals with the breach of an international obligation as the second element of the engagement of responsibility. The reader would expect this to be just an inevitable transit point of preliminary nature on the author's way to the treatment of the topic of countermeasures, reproducing the well-known discussion of the legal limits of the Security Council. Tzanakopoulos, however, not only addresses various obligations of the Security Council under the UN Charter, such as the compliance with the principle of proportionality and with procedural rules, and under general international law, along the differentiation between *ius cogens* and *ius dispositivum*. He also draws a functional analogy between countermeasures and sanctions, arguing that both these measures aim at inducing the recalcitrant state to comply with its international obligations. This analogy should allow for the application of general international law regulating countermeasures to sanctions imposed by the Security Council. Thus, the contents of article 50 (1)(b) and (d) of the Articles on the Responsibility of States for Internationally Wrongful Acts were applicable to the imposition of sanctions by the Security Council. This approach could add a new explanation to the old discussion of the Security Council's human rights obligations. Yet, the brief treatment of this interesting aspect does not elaborate on the different perspectives of countermeasures (bilateral between states, as far as article 50 of the Articles on the Responsibility of States for Internationally

Wrongful Acts is concerned) and sanctions (multilateral context of the UN as an organization) nor on the arguable reference in article 50 (1)(b) of the Articles on the Responsibility of States for Internationally Wrongful Acts to already existing human rights obligations (rather than itself constituting such) and the resulting implications for the question of the Security Council being bound by human rights. Still, the idea of this functional analogy remains an approach worth thinking about.

Chapter 4, as one of the two Chapters discussing the tricky topic of determination of responsibility covers first the question of judicial determination. The author defines “judicial review” as comprising the elements of internal, hierarchical, binding review of an inherent and systematic nature. He argues that there is no such judicial review since what could be performed by existing courts would be neither systematic, i.e. ensuring some regularity of control, nor binding in the sense of the definition. He concludes that in international law the determination of UN responsibility is done extra-judicially in a decentralized manner and therefore turns to such determination by states in Chapter 5 of the book.

The author concedes states the right of auto-interpretation of acts of international organizations and auto-determination of their violations of international law which he deems justified since the states were the addressees and “agents of execution” of such acts. Such right of determination was the necessary corollary of the lack of compulsory, centralized law-determination on the international level and would in principle subsist as long as there was no binding third party dispute settlement process. This picks up the “*Solange*” idea of the German Constitutional Court’s decisions of the same name and the ECtHR’s *Bosphorus* decision and is a convincing argument as it takes into consideration the legitimacy aspect of UN action and provides for a flexible and appropriate tool to support the proper mutual functioning of the domestic and international levels. The self-determination by states and the fact that a state is *index in causa sua* in such cases is justified by Tzanakopoulos with the argument that the impact of such auto-determination was eased by the presumption of legality existing with regard to Security Council action and by the fact that a state in a multilateral context had to seek support and a collective decision for such a determination. It must, however, be kept in mind that the ideal state of international law would show states following the acts of their own organization. This gets rather out of sight here. Again, the exemplifying case law (pages 119, 126-130, 131-136) gives a good illustration of state practice on the various conceivable case constellations.

In the third Part of his book, Tzanakopoulos unfolds his central thesis that states may, under certain circumstances, react to responsibility of the United Nations by applying the countermeasure of disobedience. Chapter 6 deals with the content of responsibility. The secondary obligations incumbent upon the United Nations as a consequence of its responsibility are cessation and reparation. The relatively short Chapter (the shortest of the book) gives a brief sketch of the named secondary obligations, their different limitations and their consequences if applied in cases of acts of the Security Council, with reparation typically consisting of “juridical” restitution, i.e. the reversal of respective resolutions of the Security Council. What Chapter VII of the UN Charter is for the work of the United Nations Chapter 7 of this book is for the thesis of the author, the most important part of the piece: the examination of whether states can resort to countermeasures against the United Nations in response to a wrongful act by the Security Council. While other countermeasures, such as withholding contributions or action in domestic courts are shortly discussed at the end of the Chapter, the emphasis is put on disobedience as a countermeasure.

The specific attraction of this approach lies in its potential to point to a clever way out of an old and increasingly pressing dilemma: measures taken by the UN Security Council are among the most powerful tools in international law but at the same time escape an effective control. There is no central, compulsory determination of engagement of responsibility of the United Nations. No international nor national court has the jurisdiction to examine them. And even if national courts or authorities did step in to review Security Council measures to find eventual violations of international law and subsequently to order non-compliance with such measures, the respective state would risk violating its obligation under Article 25 UN Charter to accept and carry out the decisions of the Security Council. Tzanakopoulos argues that as long as there is no central authority which could determine the engagement of responsibility, states retain their power to resort to countermeasures which were not explicitly excluded by the UN Charter. The author thoroughly examines how states’ disobedience, i.e. their non-compliance with Security Council measures, can be legally qualified.

After discussing the concept of civil disobedience which is, however, not a legal argument, the author examines whether Article 25 UN Charter allows for non-compliance with Security Council measures in certain cases. He first arrives at the honest and open answer that interpretation cannot solve the question of the legal effects of UN resolu-

tions that are not in conformity with the UN Charter. He then turns to the question of the legal consequences of such non-conforming resolutions, and more precisely to the discussion of the notion of “invalidity” and its relationship to that of “illegality”.

Starting from the ICJ’s approach to presume validity/legality of Security Council resolutions, Tzanakopoulos argues for two distinct presumptions: on the one hand, there was the presumption of validity according to which it is presumed that all acts of a UN organ are valid, if declared by its President or Chairperson to have been validly adopted. On the other hand, there was the presumption of legality according to which any action within the organization’s purposes is considered to be *intra vires* and thus legal. While such legality could be rebutted by the proof that the action was *ultra vires*, the respective Security Council resolution would then be illegal but not invalid as it would still produce legal effects.

This is a decisive point of the book. The author needs this construction for his countermeasure argument: if an illegal resolution was invalid, states might be allowed to just disregard it since they were not bound by it. If, on the other hand, the presumption of legality was not rebuttable, states would never be allowed to take countermeasures which they are only allowed to take against an internationally wrongful act of an international organization (article 51 (1) Draft Articles on the Responsibility of International Organizations). The author’s argument is valid: he tries to sort out the sometimes confusing discussion around the legal effects and consequences of Security Council resolutions which are not in conformity with the UN Charter by establishing two distinct categories of presumptions. Earlier in the book, the idea to use such presumptions was convincingly justified as a means to ensure that the self-determination of the UN’s responsibility and subsequent disobedience is not rendered too easy an option for states (cf. page 121). And that illegal Security Council resolutions remain valid in view of the lack of judicial review (page 176) is acceptable as an argument considering the aspect of desirable legal certainty concerning the applicability of such resolutions.

The conclusion that the legal consequence of an *ultra vires* act of the Security Council is not its invalidity, but rather its illegality allows the author then to proceed to a detailed examination of disobedience (i.e. non-compliance) of states as a countermeasure according to articles 51 et seq. of the Draft Articles on the Responsibility of International Organizations against such illegal acts. He arrives at the conclusion that all

UN Member States have the right to take countermeasures against the United Nations and especially the countermeasure of disobedience.

Tzanakopoulos' approach entails several interesting aspects. It is not only new and innovative, but it also provides the legal framework that allows discussion of the political reactions of states to Security Council measures as legal matters, so that rules and standards of international law are applicable and enable a legal assessment of such disobedience. The countermeasure approach fits nicely in the given framework of international law, using the well-established concept of responsibility and countermeasures to argue that a state's own violation of Article 25 UN Charter is justified as the countermeasure response to a wrongful act by the United Nations. This appears to be an elegant way to avoid the difficult and contentious problems of interpretation of the UN Charter, especially with regard to what the limits of the Security Council under Chapter VII are and the question whether Article 25 UN Charter allows for disobedience in case of wrongful Security Council action. At the same time, Tzanakopoulos' proposal does not solve all the problems: there is still no answer to the question where Chapter VII powers end, there is still no central international control of Security Council action and many detailed questions of responsibility (e.g. concerning attribution) remain. The author's approach lends UN Member States a strong legal argument for taking countermeasures when they exercise their kind of indirect control of the Security Council. It should not be forgotten, though, that the ideal solution for the states would be to solve such problems in the governing bodies of the United Nations rather than to take the secondary avenue of countermeasures.

In sum, Tzanakopoulos presents a very detailed book where the treatment of one important legal question flows easily into the next without any distracting redundancy. He makes a convincing argument for the idea of employing disobedience as a countermeasure against Security Council resolutions and thus adds one beautiful stone on the way to complete the mosaic of the debate on the exercise of its powers by the Security Council and states' options of reaction to it. It might not be the last one in the whole picture but Tzanakopoulos with this diligent and thorough work makes it a particularly shiny one – provided that one reads the book as a skillful dogmatic classification of realities rather than as an instruction to states to be destructive *vis-à-vis* the UN Security Council.

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