

Erika de Wet
André
Nollkaemper
(eds.)

Petra Dijkstra
(ass. ed.)

Review of the Security Council by Member States

INTERSENTIA



THE SECURITY COUNCIL'S WAR ON TERRORISM: PROBLEMS AND
POLICY OPTIONS

(JOSE E. ALVAREZ)

1. Introduction

Americans need to approach this topic with considerable humility. It is clear that the rest of the world, including Europeans, have had to deal with the threat of terrorism close to home for a far longer period of time. For those of us on the other side of the Atlantic, 11 September 2001 (9/11), was a shock to the system. Perhaps this helps to explain why some United States policymakers appear only too ready to remake international law (along with the Security Council) to deal with what they see, perhaps wrongly, as a "unique" or "unprecedented" threat.

Three points help to put the discussion in a broader context. First, while it is a fact that the leading force behind the Security Council's counterterrorism measures is probably the United States, we should not forget that the Council's post 9/11 actions have deeper, more complex roots. Whether or not we praise or condemn the Council, we need to acknowledge that international law scholars have helped to promote the demise of the public/private distinctions that are so clearly evinced by its counterterrorism efforts. Its financial sanctions, which target directly individuals as well as non-state entities, are only the latest manifestation of international organizations' growing tendencies to intrude upon domains formerly reserved to "domestic jurisdiction." Council Resolution 1373 (2001) is only the most obvious attempt by a creature of public international law to affect non-state actors, including their private contracts. In addition, those scholars who now have second thoughts about the wisdom of these counterterrorism sanctions should not forget that some of them are partly responsible for them. Our insistence on the superiority of "smart sanctions," which target directly violators of international law instead of innocent populations, helped convince the Council to pursue the course of action that resulted in its controversial direct listing of suspected terrorists or terrorist

organizations.¹ We have a responsibility, therefore, to do more than point the finger of blame. We owe the international community not only an accounting of the possible legal difficulties with "smart sanctions" but a list of viable policy options to remedy these.

A second contextual point relates to the remarkable transformation of the Security Council's role that has occurred in the wake of its recent counter terrorism actions. The Council is gradually changing its global responsibilities by transforming itself from mere (occasional) enforcer of collective security to (equally selective) global law maker. The Council's post-9/11 counter terrorism efforts show us more clearly than ever before that it is inaccurate to dismiss the Security Council as merely the enforcement arm for norms that are "legislated" elsewhere.² Although the Council, like most law makers within intergovernmental organizations, is reluctant to acknowledge that its actions constitute legal "precedents," it makes law in the course of acting upon it.

Commentators like Yemin have suggested that "legislative" acts worthy of the name have three essential characteristics.³ They are first, unilateral in form - that is, they are promulgated by a designated person or body and not by agreement among all those to be governed by it. Such unilateral acts do not require the explicit consent of all those who will be subsequently bound. Second, "legislative" acts create or modify some element of a legal norm; that is, such acts purport to be binding and are accompanied by meaningful sanctions suggesting that they are credibly enforced. Finally, legislative acts worthy of the name are general in nature; that is, they are directed at indeterminate addressees and are capable of repeated application over time.

The Security Council's counter terrorism resolutions share these characteristics and are therefore "legislative" both in intent and effect. Although the Council's authority for promulgating them stem from a treaty to which states gave their consent, that consent was given long ago. While the UN Charter is arguably as much a product of "consent" as domestic constitutions are, the Council's legislative acts, like a domestic legislature's, stem only indirectly from the "consent" of the governed. It is also clear that the Council's decisions are that rare phenomenon in international law - a real attempt to promulgate binding rule backed by at least the possibility of real sanction, capable of binding all states of the world, and as of

demonstrated in the practice of the Council, capable of producing legal precedents whose normative ripples are felt far beyond the case at hand. The Council's counter terrorism actions - both its resolutions and its establishment of subsidiary bodies such as the Counter Terrorism Committee and Sanctions Committee to give them effect - resemble national legislative acts in yet another sense. The Council is acting in this instance in ways that are hard to distinguish from the law-making actions taken by domestic executive branches pursuant to delegated legislative authority. Its resolutions authorize sanctions that the President of the United States, for example, is authorized to undertake under domestic statutes like the International Emergency Economic Powers Act and the Trading with the Enemy Act. Finally, Council resolutions, particularly 1373 (2001), resemble but go beyond the closest equivalent to a "legislative" act by the international community, namely a law-making multilateral treaty. This is particularly clear - as emerged during one of our question and answer periods during this conference - if we compare Resolution 1373 (2001) with the requisites of the recent International Convention for the Suppression of the Financing of Terrorism which was the Council's presumptive model.⁴ What the Council did in its Resolution 1373 (2001) was to select from that UN-sponsored Convention certain provisions, add to others, and omit other portions (such as the Conventions' explicit deference to other requirements of international law, including the rights of persons charged with terrorism-related offenses, the rights of extradited persons, and the requisites of international humanitarian law).⁵ While the Council was clearly inspired by that UN-sponsored Convention dealing with the same subject, it did not limit itself to the measures specified in that consensus document and choose to impose its measures by fiat, ignoring the fact that this recently concluded Convention has not yet achieved a large number of ratifications.

Of course, like other "legislative" acts undertaken by international global authority, the Council's counter terrorism resolutions elicit increasingly familiar legitimacy concerns. These resolutions are the product of a body that purports to represent the international community but which acts on the basis of weighted voting dramatically at odds with the notion of one-state-one-vote suggested by the principle of "sovereign equality." Indeed, some attribute the Council's actions to the desires of one "hyper-power" in particular and not to the members of the UN as a whole. Moreover, the Council is at least as vulnerable to complaints that it is not open to non-state members of "international civil society" as the more prominent targets of such critiques, such as the international financial institutions or the WTO.

1 See, e.g., E. de Wet, "Human Rights Limitations to Economic Enforcement Measures Under Article 41 of the UN Charter and the Iraqi Sanctions Regime", *Leiden Journal of International Law*, Vol. 14, 2001, p. 277 (questioning the legality of the Iraqi sanctions regime due to its impact on human rights).

2 Compare M.C. Wood, "The Interpretation of Security Council Resolutions", *Max Planck Yearbook of United Nations Law*, Vol. 2, 1998, p. 73. Wood describes the Council as a "political organ" which neither produces "legislation" nor engages in judicial dispute settlement. See *ibid.* pp. 77-78. At the same time, Wood acknowledges that the Council "has some of the attributes of a legislature" and does exercise "quasi-judicial functions." *Ibid.*

3 See E. Yemin, *Legislative Powers in the United Nations and Specialized Agencies*, Leyden, Sijthoff, 1969, p. 6.

4 See International Convention for the Suppression of the Financing of Terrorism, GA Res. 54/109, UN Doc. A/RES/54/109, Annex (2000); SC Res. 1373, UN Doc. S/RES/1373 (2001).

5 Compare articles 9, 15, 17, and 21 of the International Convention, *supra* note 4, to Resolution 1373, *supra*, note 4. The Convention evinces greater concern for the rights of accused as well as for potentially conflicting rules of international law. By comparison the one explicit mention of human rights in Resolution 1373 urges states to exercise caution in respecting the rights of refugees to asylum. See Resolution 1373, *supra*, note 4, paras. 3 (f) and (g).

The Council's counter terrorism sanctions combine legislative and executive power as yet unrestrained by any clearly developed judicial check - at least not by the UN's judicial organ, the ICJ. These are the underlying problems to which this conference responds.

But a final contextual point suggests the need for caution in reacting to what the Council is now doing. We need to recall that the Security Council has been a prime supporter of international human rights. As many commentators have noted, the Council has managed to carve out for itself a considerable and diverse mandate with respect to human rights and its normative impact in this field has been substantial.⁶ Particularly since the end of the Cold War but in some respects starting with the Council's earliest days (as when it condemned Franco's dictatorship as a potential danger to the international peace), the Council has raised the legal visibility of international human rights law and international humanitarian law by its repeated (if selective) condemnation of states that violate these norms.⁷ It has helped to affirm or renew interest in the specific rights of vulnerable groups which now have treaty regimes that seek to protect them, such as women, children, refugees, and civilians in armed conflict. It has redefined its collective security role and helped reformulate human rights law by branding racist regimes (such as Southern Rhodesia) and non-democratic regimes (such as Haiti in the wake of a coup against Aristide and Sierra Leone in the wake of coup against Kabbah) as "threats against the international peace." Its actions branding the violations of the rights of human beings, including a state's own nationals and refugees, as such "threats" and attempting to ensure humanitarian protection in response - as in 1991 with respect to the Kurds in Iraq, Somalia in 1992, and in the former Yugoslavia through UNPROFOR, has helped to redefine the nature of "modern peace operations" while also casting normative ripples far afield - as with respect to the alleged right of states to engage in collective or unilateral humanitarian intervention. The modern revival of international criminal law owes much to the Council's efforts in the former Yugoslavia and Rwanda and its establishment of the ICTY and the ICIR. While it is now routine to credit the judgments of those *ad hoc* tribunals with numerous innovations in international criminal law, we should not forget that it was originally the Council, in 1994, which described the events in Rwanda as "genocide" for example.⁸ Thomas Franck's controversial suggestion that there is now an "emerging norm of democratic governance," owes much to the Council's actions, not only because of the Council's authorization to use force to restore the democratically elected government in Haiti, but also because of the Council's many prior authorizations for plebiscites, election monitoring and

6 See O. Schachter & O. Ulich, "The Security Council and Human Rights", *The UN and Human Rights* (forthcoming second edition, ed. Ph. Alston), 2003 (summarizing many of the human rights contributions made by the Security Council briefly mentioned here).

7 See *ibid.*, p. 5; SC Res. 4, UN Doc. S/RES/4 (1946).

8 See SC Res. 912, UN Doc. S/RES/912 (1994); SC Res. 918, UN Doc. S/RES/918 (1994); SC Res. 935, UN Doc. S/RES/935 (1994).

verification.⁹ The Council, acting together with the Secretary-General, has influenced the content of international humanitarian law by indicating more clearly the responsibilities of UN peacekeepers, by incorporating human rights standards into modern peace operations established to administer particular territories, and even by refining or interpreting the "humanitarian" exceptions in its many sanctions programs (as through its sanctions committees). Most recently, the Council's suggestion that medical emergencies such as the AIDS crisis in parts of Africa may constitute a "threat to the international peace" worthy of the Council's attention, may yet elevate the significance of certain long ignored rights contained in the International Covenant of Economic, Social and Cultural Rights.

Although the Council's actions with respect to international human rights and international humanitarian law are problematic and selective, its mixed legacy needs to be remembered as we deal with the dilemmas resulting from its new war on terrorism. We need to be precise about exactly what are the "human rights" difficulties presented by the Council's current actions. We should not propose policy fixes to non-existent problems or advocate solutions that may undermine the legitimacy or effectiveness of one of the few effective tools that we have for responding rapidly to human rights crises as well as for the progressive transformation of the law of human rights.

2. On the Scope of the Council's Powers

All agree that it is up to the Security Council to decide what is a "threat to the international peace and security." We all agree as well that the Council's institutional practice, especially when drawing general acquiescence from member states generally, has greatly expanded the scope of this term, regardless of the presumptively narrow "original intent" of the UN Charter's drafters. It seems clear that a "threat to the international peace" does not now require a specific armed attack directed against a member state with the Security Council stepping into the shoes of the victim state and authorizing individual or collective self defense. It is clear today - if it was not before - that the scope of an article 39 determination is not entirely coterminous with a determination under article 51. While the Council's authorization of the use of force prior to the Gulf War might possibly be seen as an application of article 51, many other findings by the Council of "threats to the peace" both before (Rhodesia) and after (e.g. Haiti, Somalia, Libya) have involved threats beyond those foreseen by article 51.

The Security Council resolutions under discussion - 1368 (2001) and 1373 (2001) in particular - are examples of that body's creative use of its power to find new "threats" to the peace.¹⁰ The Council's branding the attacks of 9/11 as such threats, combined with its invocation of self defense in the preambles of these two

9 See Th.M. Franck, "The Emerging Right to Democratic Governance", *American Journal of International Law*, Vol. 86, 1992, p. 46.

10 See SC Res. 1373, *supra*, note 4; SC Res. 1368, UN Doc. S/RES/1368 (2001).

resolutions, hint at innovative interpretations of long-standing law. Arguably those Council resolutions suggest, first, that non-state actors can engage in "armed attacks" under article 2(4). Second, self-defense can be used as a justification to attack a state that harbors terrorists even if the actual attack was undertaken by non-state actors and, third, a terrorist armed attack can constitute a continuing threat to the international peace and perhaps to the victimized state sufficient to make a continued response by the victimized state not illegal retaliation or anticipatory self-defense. We do not yet know to what extent the Council will endorse these interpretations beyond the immediate context of the events of 9/11 - as the United States' own war on terrorism expands both temporally and geographically to other countries beyond Afghanistan.

As is suggested by the Council's potential normative impact on the rules governing the use of force, the Council's authority to interpret "threats to the international peace" has few obvious limits. If the Council were to decide tomorrow, for example, that the possession by Iraq of (ambiguously defined) "weapons of mass destruction" constitutes a threat to the international peace permitting the use of force, I do not think that this resolution would be necessarily illegal or *ultra vires* merely because under established law, the mere possession of such weapons, without indication of a specific intent to use them against a particular state, does not constitute a threat of armed attack against any state sufficient to trigger article 51. This is because, as noted, the meaning of a "threat to the international peace" is not necessarily coterminous with the scope of UN members' self defense. For this reason, it would not be entirely proper to say that the Security Council is not able to do anything that the members are not free to do themselves. The Council has a unique power possessed by no state acting alone: it can declare something to constitute a threat or breach of the international peace. The Council is capable of doing more than the states that compose it. At the same time, the Council does not enjoy all the powers that states have. Its treaty-making power is restricted and it has no territory over which to exercise sole dominion, for example. The Council is both more and less than the states that compose it - a topic to which I will return.

As is suggested during discussions on the topic, the limits on the Security Council when it determines what constitutes a "threat to the international peace" and with respect to what actions to take in response present more difficult issues. Presumably the Council, like all UN Charter organs, has to abide by the UN Charter and especially by its principles and purposes. The UN Charter itself tells us that "the organization" has to act in accordance with the Principles of article 2 and article 24(2) tells us more specifically that the Council "shall act in accordance with the Purposes and Principles of the UN." I am less confident, however, that article 25 adds much to this point.¹¹ The negotiating history of the phrase in that provision "in accordance with the present Charter" was intended not to modify or limit the duty of members to accept and carry out Council decisions but to be merely a cross

11 Article 25 states: "The Members of the UN agree to accept and carry out the decisions of the Security Council in accordance with the present Charter."

reference to the fact that under other UN Charter provisions (articles 41, 42, and 48), member states accept that such decisions are legally binding and not merely recommendatory.¹² We should hesitate before interpreting article 25 as an open license for member states to judge for themselves when particular Council resolutions are or are not in conformity with the UN Charter; this would appear to be precisely the flaw in the League of Nations scheme for collective security that the UN Charter drafters were trying to avoid by making Chapter VII decisions legally binding.

2.1 The Limits Imposed by Human Rights Norms

But what exactly are the limits imposed by the Principles and Purposes of the UN Charter? When does the Council violate the "sovereign equality" of members, for example? When does the Council violate equally vague "purposes" as the organization's duty to accord respect to "equal rights" and the "self determination of peoples" under article 1(2)? A number of commentators have addressed the meaning to be given to the organization's purpose to "promote and encourage respect for human rights" in article 1(3). The least controversial interpretation of this phrase imposes on the Council a presumptive duty to respect all customary norms of human rights and a non-derogable obligation to abide by those norms that are *ius cogens*. But I disagree with the suggestion that article 1, 55 or 56 of the UN Charter, import into the UN Charter all the rights contained in a wide number of widely ratified human rights treaties, including the ICCPR, ICESCR, CERD, CEDAW, the CRC, UDHR. It is not strictly true that these human rights instruments can be said to "elaborate" the rights referred to in articles 1(3), 55 and 56 of the UN Charter and are therefore binding in full on the Council. While I agree that these documents may be relevant in helping us to interpret UN Charter provisions in light of institutional practice, we need to be specific about which rights - which provisions of the rights spelled out in these instruments - truly generate the universal acquiescence needed for customary norms.

Nor do I agree with the proposition that merely because most member states, and most Permanent Members, have ratified most of these human rights treaties, the Council can be said to be equally bound to these treaties. Neither the UN as a whole nor the Security Council in particular is the alter ego of its members. Whether or not one agrees with the views of United Kingdom courts that confronted the issue of whether to "pierce" the organizational veil of the International Tin Council and impose liability on that organization's individual members, it seems clear that international institutional law has for a long time regarded intergovernmental organizations as unique international legal persons that are both distinguishable from and not ultimately reducible to the states that form them.¹³ This is so because,

12 See F.L. Kirgis, Jr., *International Organizations in Their Legal Settings*, St. Paul, West, 1993, p. 629.

13 See generally, Ph. Sands & P. Klein, *Bonetti's Law of International Institutions*, London, Sweet & Maxwell, 2001, pp. 521-526.

as the ICJ found in the *Reparations* case, the UN is not itself a state or a super state and its powers - and limits upon them - cannot be reduced to those of states. The UN's (and the Council's) powers and limits must be ascertained by a more focused inquiry, a functional analysis of what powers the particular intergovernmental organization/organ has been given and requires for it to accomplish the purposes for which it was established.¹⁴ The notion that states' obligation to comply in good faith with their human rights treaty obligations also obliges them to fulfill these obligations while acting in the context of an organ of the UN, while less troubling doctrinally, is backed by few international precedents. The ICJ has yet to determine (in the course of the *Lockerbie* cases¹⁵ or elsewhere) that member states of the Council are individually liable for what the Council has done, even when they vote in favor of the resolution in question. We should not be surprised if that Court or other bodies should avoid a result which is, after all, doctrinally at odds with at least one state's rulings with respect to the International Tin Council. Consider the proposition that the Council has engaged in illegal Iraqi sanctions for several years.¹⁶ Even if this is correct, can we imagine a decision by the ICJ - whether in a contentious case or in an advisory opinion - that finds that all the states that served on the Council during this period should be liable for the resulting catastrophic damages? Can it really be said that any of these states "expected" this result or that such a result would be consistent with the evolving expectations of the membership? While such a liability rule might be a good idea and I would favor a UN Charter amendment to this effect, it strikes me as farfetched to suggest that this is *already* established law under the UN Charter.¹⁷

For these reasons, I doubt that member states may be held responsible under existing international law for an infringement of human rights by international organizations to which they have transferred powers. Even with respect to human rights, intergovernmental organizations do not operate on the premise that they are merely the alter ego of their members. The UN, for example, did not determine that every aspect of international humanitarian law applies dot for dot to it as an organization and it has never stated that every right contained in the pantheon of human rights treaties applies dot for dot to it. For its part, the EU has opted for a European Charter of Human Rights whose text is not identical to either the ICCPR or the ECHR. Quite apart from the rights of the European Community to accede or not to this UN Charter or other human rights treaties, European lawyers did not

14 See generally, *Reparation for Injuries Suffered in the Service of the United Nations (Advisory Opinion)*, ICJ, 1949 ICJ Rep. 174 (11 Apr. 1949).

15 See *Questions of interpretation and application of the 1971 Montreal Convention arising from the aerial incident at Lockerbie (Libyan Arab Jamahiriya v. United States) (Provisional Measures)*, ICJ, 1992 ICJ Rep. 3 (14 Apr. 1992); *Questions of Interpretation and Application of the 1971 Montreal Convention Arising from The Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v. United States) (Preliminary Objections)*, ICJ, 1998 ICJ Rep. 115 (27 Feb. 1998).

16 See E. de Wet, *supra*, note 1.

17 Compare Ft. Sands and P. Klein, *supra*, note 13.

accept the premise that merely because the states of the Union have adhered to human rights treaties, these obligations can be automatically applicable to the Union itself or its organs. We need also to remember that human rights treaties were not drafted with inter-governmental organizations in mind and indeed do not generally provide for the possibility that these organizations can accede to them as parties. I therefore have trouble accepting the suggestion that the UN or the Security Council has a treaty obligation to abide in good faith with these human rights treaties as such or that because of this they are "estopped" from behavior that violates the rights protected in these treaties. I also have trouble with the argument that the Council has generated an "expectation of respect" with respect to a number of multilateral human rights treaties merely because most (but not all) of its Permanent Members are parties to such instruments. If such expectations have arisen (as I believe that they have) I would prefer to ground this in the institutional practice of the Council and other UN organs which appear to recognize the need to respect human rights. Such institutional practice is relevant to UN Charter interpretation under the standard rules for treaty interpretation contained in the Vienna Convention rules for determining treaty "context."¹⁸

The suggestion that the Security Council is bound by the human rights conventions its members are parties to, raises more problems than answers. It appears to assume that the Permanent Members have all accepted the same obligations with respect to such instruments and that all these states expected that the ICCPR, for instance, would apply to the actions of the Council. There is no evidence that either of these is true. This argument ignores the many reservations that states such as the United States have filed with respect to instruments such as the ICCPR. To the extent that argument is intended to suggest that because a Permanent Member of the Security Council has ratified the ICCPR, this therefore means that the courts of that member can be permitted to apply the ICCPR against the Council ignores the reservations, understandings and declarations filed by states such as the United States, including its understanding that the ICCPR would not be self-executing in United States courts. The contention that this understanding or other reservations made by the United States or other parties to the ICCPR is invalid or illegal is, as many know, controversial. Although the Human Rights Committee has suggested that some of the reservations may be invalid, many states - including the United States, France and the United Kingdom - have disagreed and the issue has drawn the attention of the International Law Commission whose interim conclusions are somewhat at odds with the views of the Human Rights Committee.¹⁹ It is also far from clear that those members of the UN which have not

18 See article 31 (2) of the Vienna Convention on the Law of Treaties.

19 For background on the controversies generated by the Human Rights Committee's General Comment 24 on the scope of reservations (Human Rights Committee, UN Doc. CCRP/C/21/Rev. 1/Add. 6 (2 Nov. 1994); see J.P. Gardner, *Human Rights as General Norms and A State's Right to Opt Out*, London, British Institute of International and Comparative Law, 1997. Appendices to that volume contain the full text of some states' detailed objections to that Comment.

ratified the ICCPR "would nonetheless be bound to the core of the human rights contained therein when they are acting on behalf of the organization itself."²⁰ There is no understanding that Permanent or non-Permanent Members of the Council have somehow acceded to particular treaties merely as a result of accepting a seat on the Council. The notion that the Security Council, the quintessential political body, widely regarded as the UN's enforcement arm, is subject to legal constraints would surprise some of UN members to begin with; they would be even more stunned by the notion that a highly prized seat on that political body comes with hidden unannounced *de facto* accession to particular human rights treaties that their governments have not given their consent to - even for the limited purpose of actions taken while being on the Council.

The proposition that a "widely ratified" human rights treaty is automatically incorporated into the UN Charter raises other questions as well. At what point in the number of ratifications does the tipping point arise? Does it matter if the "widely ratified instrument" is, like CEDAW, subject to so many broad reservations that its implementation is, in the real world, nearly eviscerated? Nor is clear how this argument is consistent with the most common cases involving international organizations in domestic courts, namely challenges to the privileges and immunities enjoyed by these organizations. There is no evidence that in negotiating human rights conventions or in ratifying them, parties intended to expand the domain of these treaties to embrace such matters as, for example, the hiring and firing of or actions taken by UN employees. Certainly this would be quite a surprise to the many national courts, in the United States and elsewhere, that have routinely dismissed complaints of sexual harassment or race discrimination against international organizations on the basis of the privileges and immunities of such organizations - without an inquiry as to whether the organization has violated human rights treaties such as CEDAW or has established its own internal procedures to handle such complaints that would satisfy the procedural and substantive expectations of article 14 of the ICCPR. Although the ECHR in *Waite and Kennedy v. Germany* appeared to consider whether the intergovernmental organization in that case had given the complainants "reasonable alternative means" to vindicate their rights,²¹ we need to remember that many other national courts, faced with comparable questions, have not engaged in similar inquiries but have merely recognized the immunity of international organizations in such cases.²² Moreover, even the ECHR in *Waite* did not find, unequivocally, that the European Convention *as such* needed to be applied against these intergovernmental organizations. That court merely suggested that these organizations could not violate the "object and purpose" of a particular fundamental right reflected in the European Convention - namely the right of access to courts - and applied a

20 Cf. contribution of E. de Wet in Chapter I, (text leading up to) note 28.

21 See *Waite and Kennedy v. Germany (Judgment)*, ECHR, Application no. 26082/94 (18 Feb. 1999).

22 See generally, A. Renisch, *International Organizations Before National Courts*, Cambridge, Cambridge University Press, 2000 (surveying immunity cases from a wide number of jurisdictions).

proportionality inquiry that was acutely sensitive to the unique rights of these organizations and especially their need for immunity from national jurisdiction.

2.2 The Relationship between the Security Council and Customary International Law

But if the human rights obligations of the Security Council cannot be derived from the human rights treaty obligations of its members, these obligations need to be found in customary international law and in those practices that suggest support for a rule as one of *jus cogens*. I would therefore make different use of such examples as the Security Council's practice of respecting human rights through humanitarian exceptions in its sanctions regimes. The Council's and states' respect for such norms are evidence that these are binding as rules of custom on both intergovernmental and state actors. There is no substitute for looking to such concrete manifestations of the actual practice of states for determining the applicability of particular human rights, including some in the ICCPR, and asking whether these rules are binding rules of custom, or *jus cogens*. We might indeed find, for example, that there is enough evidence in the practice and *opinio juris* of states and international organizations to suggest that those parts of article 14 of the ICCPR (guaranteeing certain minimal rights to both civil claimants and criminal defendants) are indeed accepted as fundamental, non-derogable norms.²³

Which customary human rights are arguably violated by resolutions such as 1267 (1999), 1333 (2000), and 1373 (2001)? These resolutions, as applied by the Sanctions Committee, freeze the financial assets of particular individuals or organizations, including those "associated" with Al-Qaida, prohibit future financial transactions with such individuals or associations, obligate states to deny safe haven to alleged terrorists, and attempt to ensure that states "bring to justice" perpetrators of terrorist acts. The views of the Human Rights Committee as well as decisions issued by the Inter-American and European human rights courts might be cited for the proposition that customary international law requires a fair hearing by a competent, independent, and impartial tribunal established by law both with respect to "suits at law" and criminal proceedings. But, as is suggested by the text of article 14 of the ICCPR, customary international law would appear to require much more specific procedural guarantees only in the course of criminal trials.

To the extent the Council's freeze orders are seen as merely deprivations, ostensibly temporary, of either established property rights or the right to engage in

23 Article 14 of the ICCPR provides in relevant part that "In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law." This is notably, the one provision in that article that applies both to criminal defendants as well as to civil suits. The rest of article 14, including the detailed rights to presumption of innocence, to examine witnesses, to trial without undue delay, apply only with respect to criminal trials.

future transfers of property, it is harder to portray these actions as in violation of the customary international law of human rights. The right to property, mentioned in the Universal Declaration, disappears in the ICCPR and was incorporated into the Strasbourg system only after Protocol No. 1 (in force as of 1954). The relevant text of Protocol No. 1 suggests why this right is not a particularly sturdy reed on which to rely:

"Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to conditions provided for by the law and by the general principles of international law. The preceding provisions shall not, however, in any way impair the right of a state to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties."²⁴

Much like the customary rights of aliens (such as foreign investors) to property under the rules of state responsibility, this is not a ringing affirmation that property rights as such need to be subject to particular procedures in independent, impartial courts fully respectful of defendants' rights to due process. Protocol One's conception of the right to property suggests a right whose expected remedy is compensation after the fact, not preventive due process prior to deprivation. As is suggested by the Strasbourg caselaw on point, this is a right that protects existing possessions, not future expectations, that protects only against permanent not temporary deprivations of property, and that is particularly solicitous of states' rights under ample "margins of appreciation" or notions of "subsidiarity."²⁵

For these reasons, the Security Council actions that are the focus of this conference are far more likely to be successfully challenged to the extent they can be seen as imposing criminal sanctions without due process. To the extent that what the Council is demanding in these resolutions are criminal prosecutions in domestic courts, there is no ambiguity that a criminal proceeding is afoot but there is nothing in Resolution 1373 (2001) requiring states to file criminal charges against terrorists in violation of the customary rights enjoyed by criminal defendants. On the contrary, the Council's direction that states ensure that they "bring to justice" such

individuals could be read to imply that such proceedings should be brought in conformity with all applicable standards of justice.²⁶

More problematic for proponents of human rights is the Council's (or its Sanctions Committee's) listing of particular individuals for financial sanction. Is the Council's requirement to impose comprehensive financial sanctions, imposed on states and intended to be applied to individuals within their jurisdiction without any objective judicial finding, tantamount to the imposition of a "criminal" penalty or the filing of a "criminal charge" sufficient to trigger the extensive procedural rights due all criminal defendants? The issue poses particular difficulties because the Council has given us no general definition of what constitutes either the crime of "terrorism" (or the offense of "facilitating" terrorist acts) and it requires serious financial sanctions to be imposed on individuals and groups without requiring states to bring criminal charges against either.²⁷ In the absence of a specific, accepted definition of what the crime is, it becomes even more difficult to tell whether an individual has been accused of a crime. And without the bringing of what is indisputably seen as a "criminal" charge, it is not clear that the severity of the punishment – the freeze orders on financing – standing alone would serve to qualify any and all such orders as *de facto* criminal charges.²⁸ While some have suggested that the Council's "punitive" intent should suffice to prove that its financial sanctions are in effect "criminal" in nature, this claim needs further explanation. Putting aside the inherent difficulties of finding the "intent" of a collective body such as the Council, it is not altogether clear what the Council means to accomplish through its actions. If it is undertaking financial sanctions on designated individuals not with the intent to "punish" these persons but to incapacitate them from committing terrorist acts in the future, this intent is not necessarily unique to the criminal law. Perhaps more promising and more consistent with the limited caselaw that we have concerning the bringing of *de facto* "criminal charges" would be an examination of the impact of the Council's actions on the individual. It could be argued that the severity of the Council's financial sanctions (particular those which deprive individuals of all access subject to no humanitarian exception as for the necessities of life) results in treating individuals

26 See Resolution 1373, *supra*, note 4, para. 2 (e).

27 See, e.g., Resolution 1373, *supra*, note 4, para. 1 (c) (requiring the freezing of assets of those who "facilitate" the commission of terrorist acts); para. 1 (e) (requiring states to bring to justice under their criminal laws those who "support" terrorist acts).

28 While Strasbourg case law suggests that the nature and degree of severity of the penalty is a relevant factor in determining whether a "criminal" charge has been brought, this is only one (vaguely defined) element of a three step test in that courts' jurisprudence. See *Campbell and Fell v. United Kingdom (Judgment)*, ECHR, Application no. 7819/77 (28 June 1984); *Ergel and others v. the Netherlands (Judgment)*, ECHR, Application no. 5100/71 (8 June 1976); *Ozthürk v. Germany (Judgment)*, ECHR, Application no. 8544/79 (21 Feb. 1984).

24 Article 1 of the Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms (as amended by Protocol No. 11)

25 See, e.g., *Loizidou v. Turkey (Judgment)*, ECHR, Application no. 15318/89 (18 Dec. 1996); *Lithgow and others v. United Kingdom (Judgment)*, ECHR, Application no. 9006/80 (7 July 1986); *Raimondo v. Italy (Judgment)*, ECHR, Application no. 12954/87 (22 Feb. 1994); *Gesius Dozier-and Fordertechnik GmbH. v. the Netherlands (Judgment)*, ECHR, Application no. 15375/89 (23 Feb. 1995). See also *Bosphorus Hava Yolları Turizm ve Ticaret AS v. Minister for Transport, Energy and Communications and others*, ECJ, Case C-84/95, ECR 1996, p. I-03953 (30 July 1996).

as *de facto* criminals regardless of whether they are formally so charged.²⁹ A decision rendered by the D.C. Circuit court in a recent United States case involving two Iranian dissident organizations provides the kind of nuanced inquiry that some national courts are likely to find more compelling than simplistic analyses of Council "intent." That case involved a challenge to the United States Secretary of State's designation of these two organizations as a "foreign terrorist organization." The Secretary of State had, pursuant to the United States Anti-Terrorism and Effective Death Penalty Act, issued an administrative order making this designation and blocking the funds these organizations had on deposit in United States banks. The Court agreed with the petitioners that "by designating them without notice or hearing as a foreign terrorist organization, with the resultant interference with their rights to obtain and possess property and the rights of their members to enter the United States, the Secretary deprived them of 'liberty, or property, without due process of law' in violation of the Fifth Amendment of the United States Constitution.³⁰ The Court found that the stigmatizing effect of branding these organizations as terrorists required in and of itself due process because it deprived petitioners of their good name, reputation, honor or integrity.³¹ Something like this kind of analysis might be needed in order to determine that a freeze order without more is in effect a "criminal" sanction requiring the full panoply of rights due any criminal defendant.

But even assuming that the Council's freeze orders violate customary human rights, is the Council free to derogate from existing law? Because customary international law is not as such mentioned in article 103 of the UN Charter, some might contend that the Security Council has no right to derogate from such rules as compared to treaty rights. If one reads article 103 as a grant of explicit power on the Council that it otherwise would not have, this implied limitation on the Council would make some sense but in the absence of a hierarchy not recognized in article 38 of the Statute of the ICJ between recognized sources of international law, this seems a particularly artificial reading of the purpose and intent of article 103. The Council would have a strong argument that it has the authority to supersede both customary law and treaty law, not only because these two sources of obligation have comparable status but also because, as was found by the ICJ in the *Nicaragua*

case,³² the UN Charter intertwines treaty and custom throughout and it is difficult not impossible to clearly distinguish between the two, especially given the UN Charter's own references to human rights. On its face and as applied article 103 has been used to permit states to violate existing treaty obligations when ordered to do so by the Security Council, as with respect to International Civil Aviation Organization obligations under Council sanctions directed at Libya.³³ In such cases the Security Council has asked states to violate not only those specific treaty obligations but also the customary principle of *pacta sunt servanda*. Such precedent indicate that the Council has exercised, and the membership has acquiesced in, the power to violate customary norms as well as treaties. Alternatively article 103 might be read simply as an affirmation *sub silentio* of a long standing rule, namely that states are free to deviate from customary norms through later treaty. Arguably article 103 omits mention of customary law because it was not necessary to provide the Council with an explicit license to override existing rules of custom and to authorize member states to do the same pursuant to its legally binding decisions.

The next inquiry is whether the rights that the Security Council is purporting to abrogate from might be, notwithstanding article 103 or the general principle that customary rules may be overridden by treaty, non-derogable. Not all customary human rights obligations are non-derogable because they are *jus cogens*. If this were the case, states would not be free to make any substantive reservations to human rights conventions (and not merely those which violate those treaties' object and purpose). There is considerable disagreement with respect to which human rights, whether or not enshrined in these treaties, must be recognized as *jus cogens*.³⁴ The Human Rights Committee has suggested that one guide are those rights which are identified as non-derogable for purposes of article 4 of the ICCPR.³⁵ Unfortunately, article 4 of the ICCPR does not include the procedural rights reflected in article 14 as non-derogable and other lists of probable *jus cogens* also omit many of the rights that are most likely to be directly implicated by the Security Council's counter terrorism measures adopted to date.³⁶ While it is possible that recent developments

32 See *Military And Paramilitary Activities in and against Nicaragua (Nicaragua v. United States)*, 1986 ICJ Rep. 14 (27 June 1986).

33 See SC Res. 748, UN Doc. S/RES/748 (1992).

34 This is putting to one side, of course, continuing doubts about whether *jus cogens* exists, despite its recognition in the Vienna Convention of the Law of Treaties. Cf. A. D'Amato, "It's a Bird, It's a Plane, It's *Jus Cogens*", *Connecticut Journal of International Law*, Vol. 6, 1990, p. 1.

35 See General Comment 24, *supra*, note 19, para. 10.

36 Consider, for example, the list of *jus cogens* contained in section 702 of the United States Restatement of Foreign Relations. That list includes the prohibitions on genocide, slavery, murder/ disappearances, torture or cruel and unusual punishment, prolonged arbitrary detention, and systematic racial discrimination. It also recognizes as a *jus cogens* violation a consistent pattern of gross violations of internationally recognized human rights. See Restatement of the Law (Third), The Foreign Relations Law of the United States, § 702 (1986). Of course, as this list suggests, it would be a violation of *jus cogens*, as well as arguably

29 Compare *Foti and others v. Italy (Judgment)*, ECHR, Application no. 7604/76 (10 Dec. 1982); *Corigliano v. Italy (Judgment)*, ECHR, Application no. 8304/78 (10 Dec. 1982) (noting that apart from an official notification that a person has committed a criminal offense, a criminal "charge" for purposes of article 6 of the ECHR may take the form of "other measures which carry the implication" that the individual has committed a criminal offense and which "substantially affect the situation of the suspect").

30 *National Council of Resistance of Iran v. Department of State*, US Ct of Appeals Dist. of Columbia Circuit, 251 F.3d 192 (6 June 2001).

31 See *ibid.*, pp. 203-205.

have made the core elements of a fair trial for a criminal defendant *jus cogens*, this would require examining the actual practices of states as they relate specifically to the treatment of individuals charged with grave offenses against the security of the state such as terrorists. It would require detailed examination as well of the reservations states have filed to the ICCPR (including those relating to measures taken to protect national security or in the course of national emergencies threatening the "life of the nation.") We cannot merely rely on the general comments of the Human Rights Committee. Even a cursory look at the actual practice of states when it comes to dealing with alleged terrorists or saboteurs is not likely to provide comfort that there is uniform agreement among states on the scope of fundamental non-derogable rights in such instances. Nor can we seek to derive much support to the extent the relevant national precedents are those dealing with the deprivation of property rights comparable to those put at risk by the Council's financial sanctions. As noted, the relevant case law of the ECtHR and the practice of states involving regulatory and other forms of takings does not suggest that all states regard themselves as bound by due process when it comes to such deprivations. Nor is it clear that even prior to 9/11, the Security Council has been particularly respectful of such rights in analogous circumstances. The institutional practice of the Security Council, as with respect to its failure to respect the due process rights of Iraq when it came to determining its boundary dispute with Kuwait or with respect to the millions of cases now being heard under the expedited procedures of the UN Compensation Commission (which would not satisfy anyone's definition of an impartial, independent court respective of equality of arms), does not provide support for the proposition that the deprivation of property rights, standing alone, triggers universally recognized rights such as the right to an independent tribunal or the right to confront one's accusers in open court.³⁷ While, of course, we could try to suggest that these instances involve the rights of states and not of individuals, the UN Compensation Commission's decisions undoubtedly affect the rights of individual claimants as well as the rights of Kuwait and Iraq and the decisions of that body have not drawn any real protest from states other than Iraq.

If we regard the rights to fair trial as derogable, the Security Council would be free to dispense with a criminal defendant's right to an impartial hearing under article 14 of the ICCPR or certainly of the civil litigant who is "merely" deprived of his property (through a freeze order). There is the possibility, however, that even instances which at the outset did not involve a violation of *jus cogens* could over

contrary to the presumed intent of the Council, should some states attempt to use the Council's terrorism actions as a license to engage in, for example, prolonged arbitrary detention or systematic racial discrimination.

37 On the Council's treatment of the Iraq-Kuwait boundary, see, e.g., SC Res. 773, UN Doc. S/RES/773 (1992). For an introduction to the UN Compensation Commission, see, e.g., D.J. Bederman, "The United Nations Compensation Commission and the Tradition of International Claims Settlement", *New York University Journal of International Law and Politics*, Vol. 27, 1994, p. 1.

time, become a violation - as where, for example, the temporary deprivation of property amounts to a permanent deprivation or where the financial sanctions are accompanied by the detention of an individual without trial and such detention becomes prolonged arbitrary detention.³⁸

Other uncertainties result from article 103's silence with respect to whether the Council is authorized to render competing treaty or customary rights permanently void, merely voidable, suspended, or otherwise unenforceable and from the fact that general international law does not clearly spell out what the consequences of such action are.³⁹ In the absence of clear default rules it would appear that the Council should clearly indicate which treaty or customary rights it is purporting to supersede and indicate what effects on these preexisting rights it has in mind.⁴⁰ The UN's institutional practice would suggest that if the Security Council intends to override customary human rights norms that fall short of *jus cogens*, it must be explicit that this is its intent, and equally specific about the effects of its action (mere suspension or permanent deprivation?) as well as about which customary rules are intended to be swept aside. In the absence of such an explicit statement, it would appear that member states seeking to comply with the Council resolutions as well as with their preexisting human rights obligations would be justified in interpreting the Council's silence as requiring, whenever possible, giving full respect to both the Council's requirements as well as to customary human rights law. It is also arguable that the Security Council's ability to override treaty or customary obligations is, like peace,⁴¹ a power that it cannot delegate to another body.⁴¹ On this view, it must be the Security Council itself, and not its Sanctions Committee or members of the Council, that is required to direct states to override any competing rights ordinarily due to those individuals that it identifies as presumptive terrorists.

38 Thus, even the United States Restatement's possibly truncated list of *jus cogens* violations includes prolonged arbitrary detention. See Restatement of the Law, *supra*, note 36, § 702 (e).

39 See, e.g., E. Lauterpacht, "The Legal Effect of Illegal Acts of International Organizations", *Cambridge Essays in International Law: Essays in Honour of Lord McNair*, London, Stevens/New York, Oceana Publications, 1965, p. 88.

40 Although the Council has not been entirely consistent on this score, in at least some cases it has been careful to be quite explicit when purporting to authorize states to violate pre-existing treaty obligations. See, e.g., SC Res. 670, UN Doc. S/Res/670 (1990), para. 3 (authorizing all states "notwithstanding the existence of any rights or obligations conferred or imposed by any international agreement" to deny permission to any aircraft to take off from their territory if that craft would carry cargo to Iraq or Kuwait).

41 See, generally, D. Sarooshi, *The UN and the Development of Collective Security*, Oxford, Oxford University Press, 1999.

3. What will National Courts Do?

Assume a Security Council decision that, without according individuals due process, demands that a criminal sanction be imposed on individual X.⁴² What should a national court asked to impose or execute such a sanction do? The most likely outcome is not a direct confrontation with the Security Council through a finding that the Council has violated international human rights law and that the resolution is therefore null and void. In a state like the United States where treaty obligations are on par with federal law and neither can prevail over the United States Constitution, the most likely outcome in a United States court faced with an obvious infringement of an individual's right to due process would be a finding of violation under United States federal or constitutional law (as is suggested by the result in *National Council of Resistance of Iran v. Department of State*).⁴³ This would be especially likely where, either because the Council has not defined the crime with which the individual ought to be charged or provided the underlying evidence that justifies the charge, a domestic court is not free to accord the defendant a fair trial. Where a domestic court finds both a credible crime and has the evidence to convict, the most likely outcome is a reading of the demands of the Council in light of the demands of due process (including perhaps the demands of international customary human rights law). Such a court could find that the Security Council's silence with respect to the need to override fundamental rights must be read as an intention not to impair defendant's due process rights. Reliance on this canon of interpretation has long been common to many United States cases presenting an arguable conflict between domestic and international law.⁴⁴ In such cases, the

42 As noted, it is not entirely clear whether under existing human rights law the Council's imposition of a financial sanction on individuals constitutes, without more, an infliction of a "criminal penalty" or whether, even if it is not, customary human rights law requires at least some of the specific procedural guarantees reflected in article 14 of the ICCPR. It may be that human rights law provides no general answer to such an inquiry but requires a more nuanced look at the particular nature of the financial sanctions imposed and their impact on the individual. The hypothetical avoids these issues by presenting the clearest possible case of a potential violation of human rights, namely the clear imposition of criminal sanction without due process.

43 See *National Council of Resistance of Iran v. Department of State*, *supra*, note 30.

44 For a description of the many purposes and benefits of this canon of statutory construction, stemming from an early United States Supreme Court case, *The Charming Betsy*, (6 U.S. 64 (Feb. Term 1804)). See R.G. Steinhardt, "The Role of International Law as a Canon of Statutory Interpretation", *Vanderbilt Law Review*, Vol. 43, 1990, p. 1103. The decision by the Fifth Circuit Court of Appeals in *Nazikhatunmah v. Reno*, US Ct of Appeals 5th Circuit (Texas), 184 F.3d 419 (5 Aug. 1999), should not be taken for the general proposition that in instances where individual rights are pitted against United States treaty obligations the latter

domestic court could decide to implement the criminal sanction only after a trial that fully comports with both national and international standards of due process.

Note that even in the first scenario above, in most cases national courts will be reviewing not the Council's resolutions as such but the more directly applicable domestic implementing legislation. In the United States, Security Council resolutions are generally not deemed to be "self-executing."⁴⁵ In the United States the Council's counter terrorism mandates, including the application of financial sanctions on individuals, are undertaken pursuant to domestic legislative authority.⁴⁶ Thus, to the extent challenges emerge in United States courts arising from the Council's counter terrorism regime, these are likely to be cast as challenges to United States laws against competing rights recognized under United States laws, including perhaps the United States Constitution. While it is possible that United States courts will ultimately affirm the ability of the United States executive to freeze the assets of alleged terrorists without due process, it is also possible that constraints will be judicially imposed on such actions, without recourse to either the Security Council decisions on point or human rights norms directly. Such cases are likely to present limited opportunities for the interpretation of international law, including the law of the UN Charter, since they are not likely to present either an affirmation of or a refutation of the Security Council's powers under international law.

invariably prevail. That case involved the narrow question of whether or not it was constitutional for the United States to surrender a Rwandan citizen to the ICTR pursuant to a Congressional-Executive Agreement and not an article II treaty subject to Senate consent. That case did not present a serious human rights or constitutional rights challenge. The decision permitting extradition carefully reviewed the constitutional authorities and precedents permitting extradition through congressional/executive agreement the Fifth Circuit opinion did not avoid review in deference to the executive and the case stands for no such proposition. It is doubtful that United States courts would show "slavish and mechanical" application of Security Council resolutions, even if this is urged by the executive branch (at least where there is a serious constitutional right violation. Even in United States courts, where international human rights norms are typically not cited at least as against actions taken by the United States executive branch), given the likely overlap between the law of customary human rights and United States constitutional rights, it is quite likely that serious consideration would be given to competing due process principles while attempting to honor the presumption of legality attached to Council resolutions.

45 Under the UN Participation Act, 22 United States Code, § 287 e-d (1982), the Congress of the United States has authorized the President to implement, via executive order, some Council resolutions (involving the United States of armed forces). Other United States statutes permit the implementation of other Council mandates.

46 See, e.g., the Anti-Terrorism and Effective Death Penalty Act, 8 United States Code, § 1189, 1996; and the International Emergency Economic Powers Act, 50 United States Code Annotated, § 1701-07, 2000. The latter is available at <<http://www.ustreas.gov/offices/enforcement/ofac/legal/statutes/ieepa.pdf>> (visited at 24 Apr. 2003).

Those expecting to find national courts engaged in "judicial review" over the Council comparable to what some scholars expected to see in the *Lockerbie* case as a result of these Council actions may be disappointed, at least in systems that do not elevate international norms above the status of domestic law or domestic constitutions. Challenges based on international human rights law to the Council's actions or at any rate to implementing legislation stemming from Council action are more likely within those European states that have implemented domestically the ECHR. Apart from such national courts, a number of international dispute settlers - including such specialized entities such as the Appellate Body of the WTO and regional human rights courts - may also present possible venues for testing the legality of the Council's counter terrorism measures, although such judgments may say little about applicable customary human rights.

4. Ten Options for the Future

While many commentators focus, perhaps understandably, on the possibilities of national court review over Security Council resolutions, it is important to recognize that cases where an explicit challenge of the Council's actions will be brought pursuant to competing international human rights rules are likely to remain rare and are only one of many possible options. It is also important to remember that if such cases were to arise, there are a multitude of standards of review that may be found applicable. One commentator suggests that there are two different models of review of Security Council actions by national courts, namely strict scrutiny versus more deferential review.⁴⁷ But domestic legal systems entertain a wide diversity of models of judicial review and it is impossible to say which is likely to be regarded as applicable in the unlikely event national courts undertake to directly review the legality of Council action.

4.1 Models of Review in the United States

First, strict scrutiny (as applied to classifications based on race) which would impose the burden of proof on the Council to demonstrate that its regulation is required to advance a substantial interest by the least restrictive means possible, that is, that no alternatives are possible that are more respectful of human rights.

Second, intermediate scrutiny (as applied to classifications involving sex) which would require the Council to demonstrate that it is pursuing an "important" interest and that the means employed are "substantially related" to advancing those interests.

Third, rational scrutiny (as applied to most governmental actions) which would require only a demonstration that the challenged Council measure bears a "rational relationship" to the interests it seeks to advance.

47 Compare the contribution of M. Herdegen in Chapter VI.

Fourth, *Chevron* review (reserved for judicial review over acts by administrative agencies) which would require courts to ask, when reviewing what an agency has done, whether the statute authorizing the agency to act is silent or ambiguous with respect to the issue. Under this standard, a court would reverse an agency's determination that is contrary to an unambiguous demand made by Congress. If Congress is silent or ambiguous in its demands, the court will ask whether an agency's interpretation is "reasonable" and uphold it if it is. While the precise meaning and application of *Chevron* deference to agency action has undergone considerable development in United States law even in the brief years the standard has been in effect, this standard could be instructive for our purposes in various ways. If we regard the Security Council as comparable to an agency whose expertise on matters of international peace and security are worth deferring to, one could argue that even on matters of human rights one ought to defer to its judgment if the customary human rights at issue are ambiguous - as is, for example, the right to property and due process rights attendant to its deprivation - *and* if the Security Council is acting reasonably. Alternatively, the *Chevron* doctrine might be seen as suggesting the wisdom of requiring that the Security Council, like any legislator, be very precise when it comes to overriding competing rights or with respect to delegating authority to a subsidiary organ, especially given the appropriateness of deference to the (national) decision-maker who is closest to the issue.⁴⁸ This would amount to imposing on the Council what United States courts call a "clear statement" rule.

Should national courts attempt to engage in "judicial review" over the Council, they will need to contend with three distinct issues. Such courts will need to indicate first, who bears the burden of proof or persuasion. This is key since whomsoever has this burden is more likely than not to lose. Second, they will need to indicate the standard of review once the burden is decided. As the United States constitutional cases suggest, a "strict" scrutiny standard is usually (but not always) fatal; rational scrutiny usually leads to the opposite result. Note as well that the United States approach of a distinct "standard" might well be replaced by a vaguer, balancing approach which leaves to judges considerably more discretion to strike the requisite balance between the rights of the state (or of the international community) versus those of the individual. Finally, such courts will need to indicate what the consequences are if they decide the applicable standard of review is not satisfied. As noted above, we have little international law when it comes to determining what is the result of an *ultra vires* act. Although it has been suggested that there are clear differences between "invalid" and "illegal" acts and that these differences will determine whether the ICJ (or perhaps other courts) can determine the invalidity of only "manifestly" *ultra vires* acts,⁴⁹ such conclusions may reflect

48 For a thoughtful look at the difficulties of trying to apply the *Chevron* standard in the context of WTO dispute settlement, see S.P. Croley & J.H. Jackson, "WTO Dispute Procedures, Standard of Review, and Deference to National Governments", *American Journal of International Law*, Vol. 90, 1996, pp. 193, 202.

49 Compare M. Herdegen, *supra*, note 47.

terminological distinctions that exist only in some national legal orders but not in others and are not yet established for international law.

At present it is difficult to predict what a national court would find the consequences to be should it be brave enough to find Council action "voidable" or even "void." A court courageous enough to find Council action to be "illegal," "invalid," or even "manifestly *ultra vires*" might still recoil from a decision that would obligate the relevant executive branch in the state in which the court is based to undertake a specific remedy. Indeed, it is possible that such a court would still refuse to impose on its executive branch a particular course of action on the basis, for example, that this would involve the judiciary in a "political question."⁵⁰ Of course, the range of other possible remedies for those courts brave enough to spell out consequences is extensive. These would include monetary compensation for those deprived of their property or injured in their reputation; retrials for individuals unfairly convicted or even freedom for individuals unjustly incarcerated pursuant to Council action; continued court supervision to see if, for example, deprivation of property or stigmatizing effect is permanent; or specific performance granting access to frozen funds or particular assets.

4.2 Additional Policy Options

First, there could be re-submittal to Security Council for reconsideration. At present, this appears to be the policy option favored by the United States and occasionally exercised. As mentioned in connection with the *Alden* case,⁵¹ Sweden turned to the United States and the Council to reconsider their listing of certain individuals for purposes of financial sanctions. Under the Council's existing procedures for "delisting" individuals improperly targeted for sanction, delisting is a political decision to be rendered by the same entity (and subject to the same non-transparent procedures) as the initial decision to list.⁵² While this approach refuses to

acknowledge the applicability or even relevancy of human rights norms, it may, as in the *Alden* case, nevertheless provide an (imperfect) and *post hoc* remedy to some of those injured by Council action. Note that delisting does not apparently envision any compensation to individuals wrongly identified or gravely injured by the Council's action and relies on the willingness of a state to take up the individual's challenge to the Council.

Second, one could resort to a regional organization for collective action, including political acts of defiance. While there are not, at present, any signs of such collective action by bodies such as the OAS, the Islamic Conference, or the African Union, such bodies have been critical of the Council on other occasions. As with the first, this is a highly political option which may have little to do with the invocation of human rights norms and which may benefit member governments of such organizations far more than the individuals harmed by Council action.

Third, individual member states could defy "illegal" Security Council resolutions. This political check on the Security Council is arguably the only real remedy anticipated by the (weak) enforcement systems endemic to international law. The problems with this remedy are obvious. Unless one were to interpret article 25 of the UN Charter to permit this, it is illegal. A second difficulty is that states willing to defy the Council (and arguably breach the UN Charter) risk being sanctioned themselves. Further, such self-judging defiance, without intervention by an "objective" judicial body, is arguably more destructive to the UN Charter order than would be judicial review by the ICJ or national courts.

A fourth possibility is to resort to a number of international tribunals or other international dispute settlers which permit some access by individuals, including courts in Strasbourg, Luxembourg, or Costa Rica or relevant UN human rights treaty bodies (such as the Human Rights Committee under the ICCPR's Optional Protocol). The proliferation of judicialized dispute settlers, along with precedents such as the ICTY's incidental "judicial review" of the Council in the course of determining its jurisdiction over its first case, make this a more likely possibility than ever before. While this option entails the risk of differing interpretations of both the underlying human rights as well as the Council's actions, this may not be as dangerous to the UN Charter order as options one to three above.

A fifth mechanism would include a centralized judicial review mechanism to be established either by the Security Council itself or by some other UN body (such as the General Assembly pursuant to its article 22 power to establish subsidiary organs). Ideally, such a mechanism would consist of impartial and independent judges but would permit some adjustments to the requirements contained in article 14 of the ICCPR in deference to the security issues at stake. Such a forum could permit the non-states actors, including individuals, implicated by the Council's actions to participate, a possibility foreclosed by the state-centric constraints of the ICJ's contentious jurisdiction. While this option would appear to be an ideal compromise for those fearful of a cacophony of results produced by competing international or national courts, it appears to be unlikely given the Council's rejection to date of serious human rights scrutiny of its counterterrorism measures or sanctions. This option would also appear unlikely given the United States'

50 For one example, see *United States v. Palestine Liberation Organization*, U.S. Dist. Ct. Southern Dist. of New York, 695 F.Supp. 1456 (29 June 1988) (refusing to compel the United States executive to arbitrate its dispute with the UN despite a treaty obligation to do so because such an act would involve the court in a "political question"). Even some international tribunals have found the "political question" analogy to be applicable. See *The Prosecutor v. Dusko Tadic et al/ "Duke"* (*Decision on the Defence Motion on Jurisdiction*), ICTY Trial Chamber, Case No. IT-94-1-T, paras. 22-24 (10 Aug. 1995).

51 See *Alden and others v. Council of the European Union and Commission of the European Communities*, CFI, Case T-306/01, involving Swedish nationals targeted by Resolution 1373 (2001), and examined in Chapter VII of this volume.

52 For a press report on the Council's delisting procedures, see E.M. Lederer, *UN Agrees on Returning Frozen Assets*, Associated Press, AP Online, 2002 WL 25670813, 16 Aug. 2002. For a summary of some of the concerns raised by the Council's procedures for listing and delisting, see the *Second Report of the Monitoring Group established pursuant to Security Council Resolution 1363*, UN Doc. S/2002/1050 (20 Sept. 2002).

demonstrated hostility to new international courts with the potential to adjudicate sensitive cases relating to national security.

A sixth alternative would be more human rights sensitive Security Council resolutions. As noted, the Council's turn to "smart" sanctions in and of itself suggests some sensitivity to the human rights critiques made with respect to its prior broad sanctions regimes such as its sanctions on Iraq. Changes to the Council's existing approach could be minimal. Faced with enough criticism of how its existing resolutions might be interpreted, the Council might be forced to include in future resolutions more express recognition of states' continuing duty to respect human rights law, along the lines of some of the provisions now contained in the International Convention for the Suppression of the Financing of Terrorism. Alternatively, a more human rights sensitive Council could opt for a more extreme remedy, such as leaving the actual listing of particular individuals or organizations to domestic authorities subject to general Council guidelines, accompanied by reporting obligations on member states.

A seventh option would be preventive, more human rights sensitive implementing legislation. Even if the Security Council refuses to take more explicit account of human rights concerns, member states or international organizations like the EU may make their enforcement of the Council's edicts explicitly conditional on fidelity to human rights. While such action might be seen as a more subtle variation on option three above, unless implementing legislation is directly contrary to an explicit counter demand made by the Council it need not be regarded as an act of open defiance (or UN Charter breach), but as merely an attempt by a member state to remain faithful to its duties under the UN Charter as well as its other international obligations. One advantage to this approach is that it permits states to respect the differing human rights obligations each of them has, given its own treaty obligations and relevant reservations. The use of implementing legislation for this purpose is hardly exceptional. The majority of international treaty obligations - which do not involve self-executing obligations but require implementing domestic legislation - implicitly recognize the need for some domestic flexibility (and variation) in their implementation. Indeed, some defend the resort to "corrective" implementing legislation as one of the principal ways international law achieves significant (if not perfect) compliance. As John Jackson has suggested is the case for the WTO, one advantage of non-self-executing international commitments is that these permit leeway for legislatures and others to tinker with international obligations, thereby permitting domestic authorities to avoid human rights (or domestic constitutional) problems.⁵³ Indeed, even EC Regulation 467/2001 of 6 March 2001, modified the requirements of Resolution 1333 (2000) in some (usually minor) respects.⁵⁴

53 J.H. Jackson, "Status of Treaties in Domestic Legal Systems: A Policy Analysis", *American Journal of International Law*, Vol. 86, 1992, p. 310.

54 See, e.g., of that Council Regulation, para. 9 (requiring "*prima facie evidence*" before instituting proceedings against any persons); art. 3 (1) (indicating that actions would be "without prejudice to" requirements in →

An eight alternative would involve bilateral agreements between member states and the Security Council. The Council has sometimes adapted its requirements on member states to the needs or legal constraints faced by particular states. Peacekeeping agreements between the UN and host states to forces authorized by the Council are one example, but a more pertinent precedent arises from the Council's resolutions requiring states to cooperate with its *ad hoc* war crimes tribunals, including with respect to the enforcement of sentences and the transfer of suspects. Some states have signed agreements with the ICTY which specify, on a bilateral basis, how these states will cooperate, including with respect to the enforcement of sentences. Despite the broad obligation to cooperate with the ICTY, this arrangement permits states to work out appropriate arrangements with the Tribunal, including through variations on the 1996 model agreement for the enforcement of sentences elaborated by the ICTY. To date, several states have signed specific agreements with the ICTY regarding enforcement of sentences and some of agreements contain unusual or distinctive provisions.⁵⁵ While the Security Council has the goal of creating under its Resolution 1373 (2001) a global "template" for anti-terrorist legislation, this template could be flexible enough to permit states to fulfill their own human rights requirements, under both national and international law. The Council's template for anti-terrorism action could include a model bilateral agreement between member states and the Council that would include, among other things, minimum applicable standards of due process but would in addition permit each state to tailor its agreement with the Council to its own needs. While the drawback to such an approach (as well as to some of the other options listed here) would be some loss to the uniform treatment of alleged terrorists (and to the consistency of global counter terrorist sanctions), the advantage would be counter terrorism legislation that is more responsive to local needs and sensitivities and is therefore more effective. A network of Council/state terrorism agreements would also be more respectful of the margin of appreciation and the principles of subsidiarity deployed in some human rights regimes.

Finally, there remains review by the ICJ. The extensive literature on the possibility or legality of Council review through the ICJ need not be replicated here. It is sufficient to note that procedurally, such review is possible both through the Court's advisory opinion jurisdiction as well as through its jurisdiction over

Community law concerning reporting, confidentiality and professional secrecy); art. 5 (excepting member states' public authorities); art. 13 (1) (requiring applicable sanctions to be proportionate as well as effective); and, art. 13 (2) (requiring members to bring applicable proceedings against persons "under its jurisdiction").

55 For a survey of such agreements, see S. Marcolliano, *The Enforcement of ICTY Sentences in National Courts* (draft research paper of Aug. 11, 2001) (on file with author). According to this survey, Spain, for example, requires that the sentence imposed by the ICTY not exceed the maximum sentences for any crime under Spanish law while Italy's agreement provides that it will recognize an ICTY sentence only if it is final, is not in violation of *ne bis in idem* or in violation of the ban on double criminality.

contentious cases. Certainly it is not inconceivable that two states at odds over their respective compliance with the Council's counter terrorism dictates might attempt to seek clarification from the Court, thereby raising incidentally the legality of the Council's decisions. Whether the ICJ, which is not open to individuals as parties, is sufficiently sensitive to human rights concerns or overly solicitous of the Council to exercise an effective supervisory role is a matter for further debate.

5. Concluding Remarks

The ten options surveyed above should not be seen as alternatives. Indeed, as the *Adem* case suggests, disputes over the legality or the interpretation of the Council's terrorism measures, to the extent that they arise, are likely to spill over a number of different venues - from national courts to the Security Council itself. No one solution, no single forum is likely to emerge and attempts to force disputes into a single judicial or political forum are likely to be futile.

These options presume that the Council will continue to deal with terrorist threats through the "smart" sanctions evinced by Resolution 1373 (2001), that is, through measures that target the money that enable terrorists to act and to network. As the international community gains experience with such sanctions, it should continually revisit the wisdom and practicality of such sanctions. The United States, a country that has had considerable experience with efforts to combat crime, especially drug trafficking, by following the "money trail" is now discovering that such efforts have prominent disadvantages. Some critics of money laundering prosecutions within the United States argue that such prosecutions have had limited success in reducing drug trafficking or deterring it. First, prosecutors and police tend to go for the crimes that are easy to detect - namely money laundering or attempts to evade the laws on this - rather than the drug offenses themselves. Second, there is limited capacity to detect the more serious offenses that are the target of efforts to police the money trail since sophisticated drug dealers and the leaders of criminal syndicates have found ways to evade the ways to detect money laundering. Finally, attempts to "follow the money" have defused the ability and capacity to go after the actual drug dealers at the top.⁵⁶ Others worry that the regulatory efforts needed to seriously pursue funds that finance international crimes (whether terrorism or other offenses), including intrusive new rules requiring banks and other private parties to question "suspicious" transactions and customers, will seriously undermine other internationalist goals, such as the free movement of capital and goods.⁵⁷

There is a risk that the Security Council's fixation on freeze orders on alleged terrorists could result, inadvertently, in a diffusion of domestic, international, and

regional efforts to enforce money laundering for terrorist activities at the expense of doing the more difficult job, namely striking at the social, cultural, economic causes of support for terrorism. The UN's focus on smart financial sanctions may also fail to reach the sophisticated and possibly more dangerous terrorist whose trade in diamonds or gold rather than currency is much harder to detect, while undermining the efforts of innocent traders of goods or foreign investors. While neither of these risks may be as troubling as the risks to human rights that have been our focus at this conference, they need to be considered as we struggle with the balance between "global security" and respect for human rights. We should not ignore the risk that the Security Council's war on terrorism, like perhaps the United States' war on drugs, will result in disproportionate penalties on low level operators or fellow travelers without doing much to strike at the heart of those truly responsible for acts as heinous as those committed on 9/11.

56 See M.F. Cuellar, *The Tenuous Relationship Between the Fight Against Money Laundering and the Disruption of Criminal Finance*, *Criminal Law & Criminology*, Vol. 93, 2003, p. 1 (forthcoming).

57 See generally, J.J. Norton & H. Shams, "Money Laundering Law and Terrorist Financing: Post-11 Responses - Let Us Step Back and Take a Deep Breath?", *International Lawyer*, Vol. 36, 2002, p. 103.

