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The 'Dark Side' of the UN's War on Terrorism

1. Introduction

As other chapters in this book demonstrate, the 'dark side' of rights emerges when the rights of certain groups or individuals conflict with one another and one group's (or one person's) rights are privileged over another's. As Sanford Levinson reminds us, this may occur in the course of a national emergency when government officials elevate 'freedom from fear' (now sometimes recast as the need to protect the rights to security of the person) over the due process (or other) rights of those whom are seen as possibly eliciting such fear. The prospect of abuse of rights in the name of security emerges on a daily basis for those rights-respecting societies faced with the need to choose between the security rights of the majority versus, for example, the rights to privacy of those who face intrusive scrutiny or searches, whether based on racial profiling or not. As Shlomo Avineri reminds us, we have recognized such tensions from the time of Tocqueville, as with respect to the tensions between liberty and equality.[1]

The 'Darth Vader' side of rights also emerges, as Martin Krygier and Gianluigi Palombella indicate, when government officials or judges abuse certain human rights *through* the use of the rule of law (as when governmental international assistance programs marginalize economic and social rights through Western rule of law development programs that privilege certain civil and political rights like the right to vote over the right to eat) or when courts

[1] Shlomo Avineri, Opening Remarks at the 13th *'The Individual vs. the State'* Conference, Budapest (10 June 2005).

A. Sajó (ed.), Abuse: The Dark Side of Fundamental Rights, 163–190.

adhere to the formal rule of law to the detriment of respecting substantive rights in the case at hand (as was regularly done by Nazi officials or the Stalinist judiciary).

Both types of abuse of rights occur at the international level. This occurs most readily due to the malleability of the concept of 'rights' at the international level, which may refer both to the rights of individuals and to the rights of sovereign states. International lawyers often contend that respecting the rights of states *qua* states—their rights to territorial integrity and political independence in particular—is the surest way to ensure that citizens' human rights are protected.[2] Indeed, the idea that protecting statehood is in itself supportive of the human rights agenda is implicit in the Preamble and Article 1 of the UN Charter, which affirms, simultaneously, its faith in fundamental human rights, in the dignity and worth of the human person, and in the rights of nations large and small. Even though the international human rights revolution was premised on the need to protect individuals from their own governments, privileging the rights of the 'international community' frequently means elevating the rights of sovereign peoples (that is, states) over the rights of individuals, ironically and paradoxically in the name of human rights. The clearest manifestation of how the international system abuses rights in the name of sovereignty is, of course, the first right in both the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR): the right of self determination.[3] International lawyers have for a long time chosen to elevate the rights of sovereigns and their mutual entitlement to territorial autonomy and peaceful relations among themselves over the right of 'external' self-determination (which ambiguously applies to undefined groups of 'peoples' within states), except for the rights of peoples subject to colonial rule, or perhaps in the most extreme cases where certain groups are totally denied rights of political representation or participation.[4] In this instance, there are evident tensions not only between 'human' and 'state' rights but also between 'group' and 'individual' rights.

[2] *See, e.g.*, Report of the Secretary-General, In Larger Freedom – Towards Development, Security and Human Rights for All, A/59/2005, at Para. 19:

> If States are fragile, the peoples of the world will not enjoy the security, development and justice that are their right. Therefore, one of the great challenges of the new millennium is to ensure that all States are strong enough to meet the many challenges they face.

For a more scholarly defense of the need to protect the rights of sovereigns in order to guard against globalizing forces that promote inequality, *see* B. Kingsbury, *Sovereignty and Inequality*, 9 EJIL 599 (1998).

[3] *See* P. Macklem, *The Wrong Vocabulary of Right: Minority Rights and the Boundaries of Political Community*, in this volume.

[4] *See, e.g.*, The Aaland Islands Question: Report Submitted to the Council of the League of Nations by the Commission of Rapporteurs, League of Nations Doc. B7/21/68/106 (1921); Reference re Secession of Quebec, [1998] 2 S.C.R. 217.

The international community can also violate both human and states' rights when it chooses to ignore or to puncture the territorial integrity or political independence of states by authorizing economic sanctions or the use of force. In the wake of the events of 11 September 2001 in the United States, the international community, as represented by the UN Security Council, appears willing to carve out certain new exceptions even to the fundamental right to life, as represented in the injunction not to use force, for the sake of international peace.[5] And it is not just new forms of inter-state violence that may prompt such collective action. International lawyers and diplomats, including UN officials, appear willing (at least in principle, but not as often in fact) to elevate certain collective goals (e.g., the prevention of ethnic cleansing) over the injunction not to use force. These ideas are today so much a part of established wisdom that they are no longer seen as involving choices among rights at all. Thus, UN Secretary-General Kofi Annan, in his recent comprehensive report on UN reform, In Larger Freedom, argues that 'freedom from fear' justifies the use of preventive force (as directed, for example, at those threatening terrorist attacks), even when it would not be justified under customary doctrines of anticipatory self-defense, so long as it is authorized by the Security Council pursuant to its all-purpose determination of 'threat to the peace.'[6] His report also endorses the Security Council's 'responsibility to protect'—that it can authorize humanitarian intervention in order to prevent on-going human rights violations.[7] We might classify these occasions—when we legally justify the killing of some people to save others—as routine examples of hard dilemmas involving conflicts between ostensibly absolute rights, but something else is going on as well.

The UN Secretary-General and the international lawyers who agree with the views expressed in the Secretary-General's report are not simply saying that the international community sometimes needs to privilege one group's rights over another's; what is being said is that multilateral processes themselves, in this case resort to the Security Council, are both the goal and the justification for choosing among rights. It appears that the international community is willing to sacrifice some human rights, even the right to life, so long as it is the Security Council that is authorizing (1) preventive force, (2) economic sanctions (which, as we learned with respect to Iraq, can prove devastating to certain civilian groups, like women and children), or (3) other collective forms of 'humanitarian' intervention (such as forms of 'peacekeeping with teeth'

[5] *See, e.g.*, S.C. Res. 1373 (28 September 2001) (acquiescing in the then-anticipated US military action in Afghanistan). For discussion of the potentially expansive effects of this resolution on traditional injunctions against using force under Art. 2(4) of the Charter, *see* J. E. Alvarez, *Hegemonic International Law Revisited*, 97 AJIL 873, at 879-882 (2003).

[6] Report of the Secretary-General, *supra* note 2, at Para. 125: Where threats are not imminent but latent, the Charter gives full authority to the Security Council to use military force, including preventively, to preserve international peace and security.'

[7] *Id.*, at Paras. 134-135.

that approximate, in their effects, the waging of war). It is argued that the UN Charter not only permits but compels such legal interpretations. Multilateral preventive force and muscular exercises of the responsibility to protect are the politically necessary responses offered by true believers in the UN system to those who would contend that the UN's collective security system cannot be counted on to work as intended to protect the peace. The Secretary-General's contentions, implicitly based on the interpretative principle that the Charter's fundamental purposes should always be given purposive effect, are intended to vindicate the legitimacy of the Security Council, the international system, and multilateralism itself. They seek to show that UN processes can work as the collective enforcers of the peace that they were intended to be. To the extent these developments produce human rights abuses (as well as intended benefits), it is important to see that these occur not only because some rights are given privileged status, but also *through* the formal use of the international rule of law.

2. The UN's Counter-Terrorism Efforts

The UN's 'war' on terrorism provides a rich example of the complex human rights dilemmas embedded in using the multilateral instruments of international law. The 'dark side' of the UN's counter-terrorism efforts emerges both from the UN's inability to confront the realities of terrorism and from multilateralists' attempts to use the organization as an alternative to unilateral counter-terrorist efforts. I address three aspects of the UN's war on terrorism in this chapter. First, I suggest that those parts of the UN that we traditionally turn to for normative development of the law—such as the General Assembly—have not succeeded in delineating clearly the threat to human rights posed by terrorist acts, in addressing the underlying human rights concerns that might help to explain some of the motivations for terrorist acts or those who sympathize with them, or explicating in detail the potential for rights abuses that may be committed in the name of the 'war on terrorism.' The 'dark side' of the General Assembly's efforts on terrorism stems from its passivity, its inability to address the undeniable threats to human rights posed by terrorism as well as by the reactions to terrorism. Second, I contend that one reaction to such passivity, the turn to the Security Council, also poses human rights problems. Those parts of the UN that we turn to for collective enforcement—principally the Security Council—are themselves threatening to undermine human rights through their efforts to protect individual and collective rights to 'security,' that is, through their exertions to provide 'freedom from fear.' Finally, I urge us to think more broadly and concretely about how human rights ought to

apply to the actions of inter-governmental organizations (IGOs), since these instruments of state power may abuse rights in the name of protecting them no less than governments themselves.

2.1. The General Assembly's Counter-Terrorism Efforts

The General Assembly, the promulgator of the Universal Declaration of Human Rights and the negotiating venue for dozens of subsequent human rights treaties and declarations, has a noble history of helping to define the normative contours of international human rights law. One would expect that it would be an exceptionally active participant in the most prominent human rights debate of our time: how best to deal with terrorist threats in the age of rights. Yet the General Assembly has remained on the sidelines when it comes to resolving the predictable normative conundrums posed by civil libertarians versus advocates of security. To be sure, the Assembly has passed innumerable resolutions on terrorism, including resolutions that purport to address terrorism within a broader human rights context. From about 1991 to the present it has addressed terrorism through at least two different sets of resolutions.[8]

The first stream of Assembly resolutions, adopted under the agenda item "measures to eliminate international terrorism," culminated in an 1994 resolution (49/60) that famously defined terrorism in a seemingly all-inclusive fashion as "criminal acts intended or calculated to provoke a state of terror in the general public."[9] That resolution also bravely stated that such acts were "unjustifiable regardless of the considerations of a political, ideological, racial, ethnic, religious or any other nature that may be invoked to justify them." This formula, now routinely repeated in later Assembly resolutions, and, as discussed below, by the Security Council, is often taken at face value as demonstrating refreshing acceptance by the organization and its universal membership that violent acts targeting civilians are egregious violations of human rights that are never acceptable, no matter the underlying political considerations or whose ox is being gored.

But the ringing words of this and other Assembly resolutions have not been followed up by concrete Assembly action, and subsequent events, including the Assembly's fitful (and so far inconclusive) efforts over more than 30 years to negotiate a comprehensive counter-terrorism convention, suggest that the members of the Assembly never really meant what they said in 1994.[10] When we look closely at what UN members (and their lawyers) say when pressed,

[8] For a thorough description of these efforts, *see* M. J. Peterson, *Using the General Assembly*, *in* J. Boulden & T. G. Weiss (Eds.), Terrorism and the UN 173 (2004).

[9] *Quoted in* Peterson, *id.*, at 178.

[10] For a summary of the 2004 negotiations on this convention, *see* Measures to Eliminate International Terrorism, Report of the Working Group, UN GAOR, 59th Sess., UN Doc. A/C.6/59/L.10 (8 October 2004).

it turns out that Resolution 49/60 is not taken seriously, even by the General Assembly itself. Governments remain especially divided about whether some terrorist acts might be justifiable if committed for the right reasons (including pursuit of the collective right of self-determination). The Arab Convention on Terrorism, for example, has an ambiguous exception for violent acts committed in cases involving armed struggle, foreign occupation, struggles for liberation, or self-determination.[11] The international community speaks with forked tongue on whether indeed all acts of violence against civilians should be seen as fundamental violations of the right to life.[12] Representatives to the Assembly remain divided about whether what a terrorist does ought indeed to be seen as a violation of human rights or of human rights treaties at all. Even ostensibly anti-terrorist states like the United States resist condemning violent acts against civilians when these are committed by actors associated with governments since 'state terrorism' has come to be associated (at least in the minds of US officials) with condemnation of Israel.[13] The United States has also resisted calls in the General Assembly to classify terrorist acts as 'violations of human rights' even when these are committed by non-state actors like Al Qaeda. US government representatives have argued that international human rights can only be violated by governments. Presumably, the United States is afraid that once it is established that non-state terrorists can commit human rights violations, it will prove irresistible to claim that other non-state actors (such as corporations) might be guilty of the same.

Moreover, the continued looming threat of terrorist acts is now undermining the Assembly's (and the United States' own) efforts to promote human rights. Indeed, the basic premise of the human rights revolution—the idea that all human beings, no matter where they are located or what their personal status, enjoy fundamental rights to be treated with full respect for their dignity—is now under fire, including within the Assembly. At least some governments

[11] Arab Convention for the Suppression of Terrorism, 22 April 1998, *reprinted in* International Instruments Related to the Prevention and Suppression of International Terrorism, UN Pub. Sales N. E.03.V.9 (2004), at 158, Art. 2(a) (excepting from the definition of terrorist offense "all cases" of liberation struggles "by whatever means including armed struggle" that are in "accordance with the principles of international law").

[12] Indeed, Assembly negotiations over a comprehensive counter-terrorism convention have been stalled for several years because of disagreements over (1) whether 'terrorism' should include the activities of a state's armed forces while engaged in official conduct, and (2) whether 'terrorism' ought to include the activities of national liberation movements and 'peoples struggling against foreign occupation.' *See* Office of Legal Affairs, Ad Hoc Committee established by General Assembly Resolution 51/210 of 17 December 1996, available at http://www/un.org/law/terrorism/index.html.

[13] Interestingly, the UN Secretary-General, perhaps unwilling to cross swords with the United States, has sided with the US on this question. In his report, In Larger Freedom, the Secretary-General argues that "[i]t is time to set aside debates on so-called 'State terrorism.' The use of force by States is already thoroughly regulated under international law." Report of the Secretary-General, *supra* note 2, at Para. 91.

engaged in the 'war' on terrorism, including the United States, now resist the idea that all humans, irrespective of place of detention (as in Guantánamo) or status (whether or not, for example, an 'illegal' combatant) are entitled to the full panoply of fundamental human rights protections. There is also resistance to recognizing a universal entitlement to all the rights traditionally accorded under international humanitarian law given the ostensibly novel dimensions of the new global war on terrorism.[14] The Assembly and other UN bodies have therefore, unsurprisingly, not been consistent on whether or how international human rights obligations apply extraterritorially during periods of armed conflict or military occupation.[15]

A second stream of Assembly resolutions, adopted under the rubric of "human rights and terrorism," initially acknowledged the due process rights of individuals accused of engaging in terrorist activity. These resolutions also mentioned, at least in passing, some of the violations of human rights that help to explain why some misguided, frustrated individuals turn to terrorist violence. This second stream of resolutions had the potential to put counter-terrorist efforts within a broader framework more amenable to a fuller understanding of human rights considerations. After 9/11, however, the positions of many states have hardened, and progress on this second set of resolutions, and on a more human rights-sensitive approach to dealing with terrorism, has stalled. Today, some see sympathetic references to understanding the 'root causes of terrorism' as code words for excusing some terrorist acts. Progress on this line of Assembly resolutions has also been stymied to the extent an emphasis on the due process or other rights of terrorist suspects is regarded as endorsing a criminal justice model for tackling terrorism, which some see as inconsistent with fighting a successful 'war' against it, including through unilateral and multilateral uses of force. In recent years, therefore, the Assembly's efforts to develop a coherent and consistent position on the human rights difficulties presented both by terrorist acts and by counter-terrorism government reactions have been unproductive. Given the Assembly's splintered efforts on this front, it is no longer seen as the center of UN counter-terrorism activity. Notwithstanding the Secretary-General's rhetorical efforts to present a

[14] *See, e.g.*, T. M. Franck, *Criminals, Combatants, or What? An Examination of the Role of Law in Responding to the Threat of Terror*, 98 AJIL 686 (2004).

[15] Although the ICJ opined in its advisory opinion, Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory (27 February 2004), that Israel's human rights treaty obligations applied in the occupied territories, other UN bodies, including Assembly resolutions, have not been consistent on this point, reflecting a diversity of state views on whether human rights obligations adhere to all military operations performed outside a state's territory, including on behalf of the UN, or only with respect to certain prolonged occupations as in the West Bank and Gaza. *See, e.g.*, M. J. Dennis, *Application of Human Rights Treaties Extraterritorially in Times of Armed Conflict and Military Occupation*, 99 AJIL 119 (2005).

united "vision of collective security,"[16] the organization as a whole—at least as reflected in the Assembly—has not articulated such a vision, much less implemented it, at least with respect to terrorism.

2.2. The Security Council's 'War' on Terrorism

Within the UN, the Security Council has come to be regarded as the center of counter-terrorism efforts, both operationally and normatively. This has come about precisely because, as noted, the Assembly has been regarded as insufficiently responsive to the terrorist threat and has made insufficient progress, at least through the normal treaty route, in promoting and implementing a comprehensive counter-terrorism legal regime.[17] Since 9/11, the Security Council has taken a number of novel legislative measures that obviate the need to rely on arduous negotiations involving all states in order to impose legal obligations on all states. It has compelled all states—pursuant to its Chapter VII authority to impose binding decisions on all states upon a determination that a "threat to the international peace" exists—to undertake a number of counter-terrorist measures. While the Council had previously responded to specific terrorist incidents with targeted responses directed at those incidents within particular countries,[18] its post-9/11 actions are a significant departure insofar as they purport to respond generally to the global terrorist threat (at least from Al Qaeda or members of the Taliban) and are directed at all states.[19]

[16] *See* Report of the Secretary-General, *supra* note 2, at Paras. 74-94.

[17] *See, e.g.*, E. Rosand, *The Security Council as "Global Legislator": Ultra Vires or Ultra Innovative?*, 28 Fordham Int'l L. J. 542, at 546-551 (2005) (defending the Council's counter-terrorism actions as a "triumph of pragmatism" since as of 11 September 2001, only two states had become parties to all twelve of then existing counter-terrorism conventions negotiated and concluded in the General Assembly and other UN bodies). As Levinson would put it, the turn to the Security Council enables the international community to take strong action without the "excess of deliberation and compromise" associated with the General Assembly. *Cf.* S. Levinson, *Constitutional Norms in a State of Permanent Emergency*, in this volume.

[18] *See, e.g.*, S.C. Res 1214 (8 December 1998) (condemning certain acts of the Taliban); S.C. 1189 (13 August 1998) (condemning bombings in Kenya and Tanzania); S.C. Res. 731 (21 January 1992) (condemning the Lockerbie and UT flight bombings).

[19] *See, e.g.*, P. C. Szasz, *Note and Comment: The Security Council Starts Legislating*, 96 AJIL 901 (2002). International lawyers and diplomats continue to debate whether such quasi-legislative action, by a body that was originally intended to act only as a global police force responsive to discrete emergencies, is either legitimate or lawful under the Charter. *Cf.* Rosand, *supra* note 17 (defending both the legality and legitimacy of such activity) to M. Happold, *Security Council Resolution 1373 and the Constitution of the United Nations*, 16 Leiden J. Int'l L. 593 (2003) (asserting that such activity is *ultra vires*). Various representatives to the UN have objected to the Council's new legislative initiatives, *see, e.g.*, Rosand, *supra* note 17, at 543, n.5 (listing objections by representatives from Egypt, India, Indonesia, Iran, Namibia, Nepal, Nigeria, Singapore, South Africa, and Switzerland).

Although these measures have involved sticks and carrots—both coercive measures and more cooperative technical assistance—each are problematic from a human rights perspective.

2.2.1. The Security Council as 'Bad Cop'

Under Council Resolution 1267 and its progeny, the Security Council now releases periodic lists of alleged terrorists or those who materially assist them.[20] Individuals and groups are identified by the Council's 1267 Sanctions Committee as associated with Al Qaeda or the Taliban, usually at the request of executive agencies in the United States or its allies. When this happens, all the assets of these individuals (at present numbering over 400) are frozen, under binding Chapter VII order.[21] Individuals so designated are also barred from receiving government benefits (such as welfare) and cannot travel.[22]

2.2.2. The Security Council as 'Good Cop'

At the same time, the Council is pursuing a broader legislative agenda: to entice states to adopt civil and criminal counter-terrorism national legislation. Under Council Resolution 1373 and its progeny, the Council has ordered all states, under binding Chapter VII order, to prevent and suppress the financing of terrorist acts, criminalize these acts, freeze the assets of those engaged in such acts, and bar their nationals from financial dealings with terrorists and organizations that assist them.[23] The Council's Counter-Terrorism Committee (CTC), now under the leadership of a Counter-Terrorism Committee Executive Directorate (CTED), is engaged in examining what states have been doing to comply with the many counter-terrorism demands imposed by the Council.

[20] S.C. Res. 1267 (15 October 1999) (imposing a flight ban and assets freeze on members of the Taliban); S.C. Res. 1333 (19 December 2000) (expanding the Taliban sanctions to include an arms embargo and broadening the assets freeze to include the assets of Osama bin Laden, Al Qaeda, and their supporters); S.C. Res. 1390 (16 January 2002) (expanding the sanctions beyond the territory of Afghanistan to embrace the world); S.C. Res. 1455 (20 January 2003) (adding to the compliance obligations imposed on states by requiring states to submit reports on implementation of the sanctions, permitting the Chairman of the Sanctions Committee to visit states and to report orally to the Council, and authorizing the Monitoring Committee to submit written reports on implementation efforts); and S.C. Res. 1526 (30 January 2004) (reinforcing the Sanctions Committee's abilities to oversee implementation efforts).

[21] While humanitarian carve-outs from the effect of these sanctions are possible, the Sanctions Committee reserves the right to object to these within 48 hours. *See* S.C. Res. 1452 (20 December 2002).

[22] For a detailed description of these efforts as well as those of the CTC discussed below, *see* E. Rosand, *Security Council Resolution 1373, the Counter-Terrorism Committee, and the Fight Against Terrorism*, 97 AJIL 333 (2003); E. Rosand, *The Security Council's Efforts to Monitor the Implementation of Al Qaeda/Taliban Sanctions*, 98 AJIL 745 (2004).

[23] S.C. Res. 1373 (28 September 2001). *See also* S.C. Res. 1377 (12 November 2001), S.C. Res. 1456 (20 January 2003), S.C. Res. 1566 (8 October 2004).

The goals of the CTC are to provide technical assistance to states to be sure that all are taking effective action. The Council seeks to use the CTC to endorse a template for national counter-terrorism laws throughout the world and to produce a welter of administrative and other 'best practices' to guide government employees and private companies on everything from airline security to the handling of cash transfers by banks. According to frank (if impolitic) Bush administration officials, the goal was to export to the world the USA Patriot Act.[24] Whether or not this remains the official goal, UN members have responded at an unprecedented rate and speed to the Security Council's demands for reports on what they have done to comply with the growing list of Council demands for tangible legal action. In response to the CTC's requests for reports, UN members are now approaching the fifth cycle of such reports, with some 800 having been filed.

3. The Emerging Human Rights Problems

The Council's counter-terrorist efforts, as good cop and bad, have won considerable praise. It is said that the Council has managed to establish a legal framework for universal cooperation that is both more far-reaching and potentially more effective than is possible through the network of previously established counter-terrorism conventions; that it has managed to define, at least politically, terrorism in such a way that no country now defends it; that it has engaged governments, private parties, regional and other organizations in a global fight; that it has created a network of self-sustaining capacity building and technical assistance efforts to induce cooperation without relying on coercive sticks; and, most significantly, that it has put counter-terrorist efforts under the international rule of law.[25]

At the same time, the human rights problems posed by the Council's own listing of alleged terrorists or their supporters are beginning to get attention. Consider what happens in practice. The Security Council announces to the world that 'Mohamed Z' is on its 1267 list. At a minimum, Mohamed cannot draw on his bank account, he loses any government benefits, and is barred from interstate travel. In the normal case, he and sometimes his spouse also lose their jobs. Mohamed's children, now the sons and daughters of someone who the 'international community' has identified as at least 'associated with terrorism,' may be hounded from school. The entire Mohamed family may be

[24] *See, e.g.*, S. Schmemann, *United Nations to Get a US Antiterror Guide*, New York Times, 19 December 2001, at 4 (reporting that the US 1373 Report to the Council, indicating a broad range of actions taken under the USA Patriot Act, was intended as a "template for other countries in adapting their own laws").

[25] *See, e.g.*, Remarks of Amb. Javier Rupérez, Executive Director of the UN Counter-Terrorism Committee Executive Directorate, Symposium: Recent Developments in Counter-Terrorism: The United Nations and Beyond, Columbia Law School (3 June 2005) (author's notes).

ostracized from the community. All of this occurs, in the usual case, without anyone in the Mohamed family being charged with a crime, at either the national or international level.

Moreover, although the Council's actions directly impact individuals, its non-transparent procedures for listing and de-listing remain dependent on the willingness of the state that initially identifies an individual for sanction to admit it has made a mistake. No formal burden of proof—not even evidence that a state has 'reason to believe,' much less proof beyond a reasonable doubt—is imposed on the Council member that requests that an individual be put on the Council's list or on the Council member that votes (usually by consensus) to agree to the listing. The political trust that has been built up within the Council, and especially within the Council's permanent members, has been the basis for the listing procedure. Although there now exist vague guidelines on which individuals can be put on the Council's sanctions list, the lack of transparency with respect to what is required to list an individual has been explained by the need to protect confidential sources of information. The need to maintain a high level of secrecy is also said to explain why individuals have no standing themselves to confront the Council or the Council member that accuses them of being 'associated' with terrorism or a material supporter. Individuals who want to contest their listing need to rely on their own government to challenge the actions of the Council. Judicial challenges by individuals listed by the Council have so far proven to be unavailing in national courts, but one brave court, a Brussels Court of First Instance, imposed a fine of 250 Euros for each day that the Belgian government failed to go back to the Security Council to request that one of its nationals be de-listed.[26] (That government complied with the Court order and returned to the Council to make this request, but apparently the Belgian request was denied and the individual in question remains listed.) We are still waiting to hear from the European Court of Justice at Luxembourg concerning an appeal by a Somali national living in Sweden who has been the subject of European Union sanctions imposed to give effect to the Council's actions.[27]

Although judging from the fact that some individuals have eventually been de-listed (but usually only after considerable efforts by their governments),[28] the Council has made some mistakes in whom it puts on its lists, but the Security Council, like President Bush, has been reluctant to admit mistakes. The Security Council requires those identified as implicated in terrorism or in

[26] In the case of Syadi and Vinck, Brussels Court of First Instance, 4th Chamber, RE: 2004, 34/04/05.

[27] Case T-306/01 R, Aden and Others *v.* Council and Commission, European Court of Justice, initiated on 10 December 2001 (pending).

[28] For a description of a case involving three Somali residents of Sweden, two of whom successfully sought Council de-listing, *see* P. Cramér, *Recent Swedish Experiences with Targeted UN Sanctions: The Erosion of Trust in the Security Council, in* E. de Wet & A. Nollkaemper (Eds.), Judicial Review of the Security Council by Member States 85 (2003).

terrorist financing to prove their innocence to the satisfaction of the state that listed them. (This is, most often, the US Office of Foreign Assets Control.) To date, the Council appears bent on inflicting what many see as tantamount to a criminal sanction without itself defining what the relevant crimes are (whether the crime of 'terrorism' or what constitutes 'material assistance' to a terrorist),[29] without benefit of individual due process, and while imposing the burden of proving innocence on those whom it chooses to punish.

The Council's carrot-filled legislative agenda, undertaken under resolution 1373 and its progeny, are also problematic. As noted, the CTC is attempting to convince states to change their national laws or operational practices in a number of specific ways, including by criminalizing certain acts, permitting the exchange of information and various forms of inter-governmental/inter-agency investigations, imposing certain border checks, and monitoring certain capital flows. States are required to report how they have complied with the

[29] Despite the claims of some, the Security Council has been no more successful than the General Assembly in producing a satisfactory definition of the crime of terrorism. Although often cited as providing such a definition, Para. 3 of S.C. Res. 1566 (8 October 2004), provides no such thing. In Para. 3, the Council:

> *Recalls* that criminal acts, including against civilians, committed with the intent to cause death or serious bodily injury, or taking of hostages, with the purpose to provoke a state of terror in the general public or in a group of persons or particular persons, intimidate a population or compel a government or an international organization to do or to abstain from doing any act, which constitute offences within the scope of and as defined in the international conventions and protocols relating to terrorism, are under no circumstances justifiable by considerations of a political, philosophical, ideological, racial, ethnic, religious or other similar nature, and *calls upon* all States to prevent such acts and, if not prevented, to ensure that such acts are punished by penalties consistent with their grave nature. [Emphasis in original]

This formulation, although a political useful compromise among the varying views among Council members, falls considerably short of defining a cognizable international or national crime. It does not clarify, for example, the ostensible crime that many of those on the Council's 1267 lists are alleged to have committed, namely providing financial support to terrorists, since it says nothing about what constitutes aiding or abetting for this purpose. Moreover, since the Council, in Para. 3, is only "recalling" that terrorism, as already defined in existing counter-terrorist conventions, is such a crime, it is apparently not itself suggesting a comprehensive definition of such a crime outside the specific acts covered by those treaties. It is also not clear that the Security Council, which has been as selective with respect to reacting to specific terrorist acts as has the Assembly, is indeed ready to treat any and all such acts, regardless of locale, alleged perpetrator, or motive, as "under no circumstances justifiable." Notably, by restricting its terms to "criminal" acts, the Council is apparently (but subtly) excluding from its definition the actions of states, even though the phrase "including against civilians" appears intended to define as terrorism violent acts directed at military personnel (as in occupied Iraq). To this extent, Para. 3 reflects the agreement within the International Law Commission to abandon the effort to define a category of state crimes while still permitting the United States to say that actions by Iraqi insurgents are the acts of 'terrorists.'

Council's demands, and the Council's designated law enforcement experts on the CTC react to these state reports of success or failure. Other Council experts are authorized to provide technical assistance to help states comply with the 'best practices' recommended by the CTC and its Executive Directorate. In addition, the Council relies on other forms of enforcement to get its way. The largess of certain UN members—particularly the United States—increasingly turns on how 'cooperative' a state is with respect to the Council's many counter-terrorist demands. In many ways, the Council's 1373 efforts resemble those pursued under rule of law development programs, whether pursued by the US Agency for International Development or by multilateral institutions such as the World Bank's International Finance Corporation.[30]

Opportunism by notorious human rights violators is one predictable result. The reports states have filed to the CTC concerning their own efforts to root out "saboteurs and terrorists" (as Cuba's original 143-page report puts it) have provided a boon to those only too willing to clamp down on political opponents; the opportunity to call these individuals 'terrorists' is manna from Grotius, at least from the perspective of certain rights-abusive regimes.[31] Thanks to the CTC, long-standing human rights violators such as China, Egypt, and Cuba have an effective new defense for their actions against political opponents: 'the Council made me do it.'[32]

Apart from opportunism, the Council's efforts to develop the rule of law in this area are not immune from criticisms that have been directed at other rule of law/development efforts. On the one hand, the Council has made great efforts to remain responsive to the needs of each state that is being asked to adopt new laws and measures. Indeed, the reason that the measures that states are required to adopt, under Resolution 1373, remain relatively vague—and do not include, for example, a definition of the specific terrorist crimes that states are being required to criminalize—responds to a perceived need to be flexible

[30] *See, generally*, E. B. Weiss *et al.* (Eds.), The World Bank, International Financial Institutions, and the Development of International Law (1999).

[31] *See* Report of the Republic of Cuba Submitted Pursuant to Paragraph 6 of S.C. Res. 1373, UN Docs/2002, 15, Annex, available at http://www.un.int/cuba/Pages/cubasreportonterrorism.htm. For other examples, *see* Human Rights Watch, Opportunism in the Face of Tragedy: Responses in the Name of Anti-Terrorism, at http://www.hrw.org/Campaigns/September11/opportunismwatch.htm.

[32] To be sure, the Council, as well as others, such as the UN Secretary-General, has warned against such opportunism. *See, e.g.*, S.C. Res. 1456, Annex (20 January 2003) (non-binding 'declaration' stating that states must ensure that their counter-terrorism measures are in accordance with international law, including human rights, refugee, and humanitarian law); Report of the Secretary-General, *supra* note 2, at Para. 140 (warning that it would be a mistake "to treat human rights as though there were a trade-off to be made between human rights and such goals as security or development") and Para. 144 (contending that human rights ought to be "mainstreamed" such that they play an active role, even with respect to the Security Council). But such rhetoric has not yet been followed up with concrete action to prevent cases of opportunism or punish the opportunists.

and require only those measures best suited to a state's particular context. There has clearly been an effort by the CTC to treat states with sensitivity and entice them to cooperate, rather than to dictate particular rules. For this reason, it has treated implementation difficulties as the product of lack of capacity or misunderstanding rather than lack of political will or fundamental disagreement. It has also given states some leeway on how to interpret the broad obligations imposed under Council orders.[33]

Yet the Council's efforts to remain the 'good cop' have been stymied by the origins of these efforts as well as by the fundamental mandate of the CTC. Its efforts to portray its 1373 efforts as reflecting generally desirable policies, and not simply the will of P-1 or other powerful Council members, must contend with the fact that the CTC's efforts were initiated by the United States as a result of 9/11 and to this day remain focused on only those terrorists groups of primary interest to the US and its allies. These realities, as well as the fact that the Council has undertaken such uniquely legislative (and expensive) efforts in response to this particular global threat (as opposed to the threats posed by AIDS, famines, or political turmoil elsewhere in the world), cast some doubt about whether the Council's counter-terrorist efforts truly reflect the will of the international community as a whole and are responsive to the diverse needs of all states.[34]

It is also not clear whether the CTC's own legal harmonization efforts with respect to counter-terrorism will be any more sensitive to human rights than the United States itself has been since 9/11. Thus far, despite calls by the High Commissioner for Human Rights and human rights NGOs to mainstream human rights concerns into the CTC's efforts, the Council has rejected demands that it give human rights concerns equal weight in its deliberations. Indeed, the initial response by the CTC to human rights complaints about its efforts was that such issues were none of its concern but belonged to those UN organs specifically charged with overseeing human rights.[35] As might be expected, given the CTC's limited criminal enforcement expertise and interests, states reporting to it have not been asked how well their new counter-terrorism laws or newly minted 'best practices' comport with their other international obligations, including human rights treaties. Of course, human rights critics

[33] *See, e.g.*, Rosand, *supra* note 17, at 581-585. Rosand also notes that the CTC, sensitive to the possible criticism that what the Council is demanding reflects the will and particular measures adopted by the United States, has also attempted to rely on best practices, codes, and standards that have already been developed in other multilateral contexts, such as within the ICAO. *Id.*, at 584.

[34] *Cf.* Report of the Secretary-General, *supra* note 2, at Para. 81: "We must respond to HIV/AIDS as robustly as we do to terrorism and to poverty as effectively as we do to proliferation".

[35] *See, e.g.*, Presentation by Amb. Jeremy Greenstock, Chairman of the Counter-Terrorism Committee, at a Symposium on 3-4 June 2002, available at http://www.un.org/spanish/docs/comites/1373/ViennaNotesF.htm (noting that monitoring states' compliance with their human rights obligations was outside the CTC's mandate).

of US actions in its territory, in Guantánamo, and elsewhere since 9/11 are not comforted by the possibility that the Council's template for global counter-terrorist legislation might, in subtle or not so subtle respects, indeed be based on US models for territorial or extra-territorial behavior.

Despite the CTC's efforts to be sensitive to particular context, its efforts may easily replicate in this area many of the flaws noted by Martin Krygier's description of prior flawed rule of law development efforts. The national laws and 'best practices' that the CTC is developing for global export may follow pre-determined scripts dictated by the Western-trained law enforcers that dominate that body. The CTC's models for counter-terrorism may package for export practices that, at best, do not transport well and, at worse, may endow with multilateral legitimacy operational habits that suit one state's counter-terrorism agenda. Given the lack of attention given to date to human rights concerns, the CTC's recommendations may themselves reflect unbalanced views on how to balance civil liberties with perceived threats or may reflect balances ill-suited to particular societies where the threat of terrorism remains low. If, as Palombella indicates, avoiding abuse of rights through the rule of law requires rules for balancing as well as a credible entity for applying them, the Security Council appears to lack the former and be a singularly dubious venue for the latter. And even with respect to states that face genuine threats of grave terrorist attacks, it may well be that the laws and administrative practices recommended by the CTC, even assuming these are sufficiently respectful of human rights in the context of societies with well developed, independent, and efficient judiciaries, may prove disastrous in societies with less well developed judicial (or other) checks on executive action.

Whether or not the CTC's best practices reflect those developed in other IGOs, such as the International Civil Aviation Organization (ICAO), its efforts rely on the legitimacy and efficacy of expert-driven, but fundamentally unaccountable, rules. The CTC's efforts, like many other rule of law efforts pursued by organizations as disparate as the World Trade Organization and the World Bank's International Finance Corporation, reflect the positivistic international lawyer's faith in the virtues of clarity, certainty, generality, and institutional autonomy. The Security Council's counter-terrorism efforts are pursued precisely because they enjoy greater legitimacy than, for example, US actions on Guantánamo. They are attractive because they *appear* to respect the ostensible line between law and politics; after all, these measures have been taken pursuant to the foremost source of consensual international authority (a treaty), purport to apply to all states equally, and require the votes of at least nine other states. Like the concepts of preventive use of force and responsibility to protect endorsed by the UN Secretary-General, these Council actions are, despite the qualms of some states and some scholars, generally perceived as internationally lawful alternatives to US unilateral action. They have also been justified precisely because they avoid—or make up for—the

evident flaws of the more 'democratic' General Assembly, which, as discussed, has been singularly unable itself to deal with terrorism and has yet to agree on a comprehensive definition of the term. Yet, for all their ostensible benefits, it is easy to see in these examples of Council action instances at the international level where, as Martin Krygier tells us, we may be losing sight of what the rule of law is *for*—that is, a constraint on, and not an enabler of, the deployment of arbitrary power.

Today all of the Security Council's counter-terrorism initiatives are becoming institutionalized. Recent resolutions of the Council have reinforced the 1267 Sanctions Committee's ability to oversee states' implementation. That committee is now charged with preparing written assessments of states' records of compliance, and the Council has also established an eight-member Analytical Support and Sanctions Monitoring Team to assist it in overseeing implementation of these sanctions.[36] The new team will focus on the issue of compliance and states' reports of compliance and travel to various states to meet with relevant officials to assist their efforts. In addition to the CTC's new support body, the Counter-Terrorism Executive Directorate, the Council has also created a new body to respond to its latest related legislative initiative: Resolution 1540's regime on access to weapons of mass destruction.[37] And yet another Council Resolution, 1566, has created yet another sub-body of the Council, a working group to consider expanding the sanctions regime of 1267 beyond Al Qaeda and the Taliban and to consider measures to assist the victims of terrorism (by providing victims compensation from assets seized from terrorists).[38] Should the effort to use frozen funds to compensate the victims of terrorism prove successful, the Council would be assisting indirectly what has heretofore been a controversial US unilateral initiative to limit the scope of sovereign immunity in order to permit suits to be filed in national courts against designated 'terrorist' states.

These institutional developments suggest that the aggrandizement of the Council's powers—its new legislative prowess at least with respect to counter-terrorism—is, as Levinson suggests is likely to be the case with respect to the Commander-in-Chief's powers to wage a never-ending war in response to a permanent emergency, likely to become permanent. (Indeed, there have even been suggestions that, given the proliferation of Council-generated sub-bodies, all of which are engaged in aspects of counter-terrorism, a permanent international counter-terrorism organization ought to be established.) These

[36] *See* S.C. Res. 1455 and S.C. Res. 1526, *supra* note 20.

[37] S.C. Res. 1540 (28 April 2004). As with respect to 1373, this resolution is another example of Council-generated global legislation. Resolution 1540 responds to the gaps in existing arms control regimes by requiring all states to refrain from supplying non-state actors with WMD-related equipment, imposes obligations on states to adopt national laws barring the financing of such transactions, and requires other measures to prevent the proliferation of WMDs. *See also* Rosand, *supra* note 17, at 546-551.

[38] S.C. Res. 1566 (8 October 2004).

measures are also likely, as are the embellishments of executive authority in the US, to be cited as precedents for other permissible delegations of power in response to the new global permanent threat to the peace. The threat of terrorism, which may produce an ever more imperial US presidency, may yet produce an ever more imperial Security Council. Nor are these the only contemporary examples of increasing challenges to human rights presented by the Security Council. I have argued elsewhere that the Council's counter-terrorism efforts are only one example of troublesome 'hegemonic international law'—that is, law that owes its existence to the initiative and support of hegemonic powers and that is multilateral more in form than in substance.[39]

4. The Broader Context

The Council's counter-terrorism efforts illustrate that as global organizations constructed by human rights lawyers, among others, become more effective law-makers and enforcers, they inevitably have the potential to violate human rights, as do governments. All international organizations, not only the UN, present potential examples of the dark side of rights.[40] Consider international financial organizations. At least some of the actions (and inactions) of the International Monetary Fund (IMF), undertaken to further rights to economic development and good governance (whether or not cast in terms of the right to 'economic' self-determination), may themselves violate the economic, social, and cultural rights recognized in the ICESCR, at least as much as do the actions of any one government. Some human rights organizations, such as OXFAM (Oxford Committee for Famine Relief), have suggested that the IMF is at least partly culpable for the human rights consequences of the East Asian crisis while others, such as Anne Orford, have suggested that the IMF's structural adjustment, stabilization, and 'shock therapy' initiatives contributed to the political destabilization and later ethnic horrors in the former Yugoslavia.[41] Indeed, human rights criticisms of the Fund's structural adjustment programs, and conditionality generally, have proliferated even as that organization has become more willing to consider the rights implications of its macroeconomic policies, as with respect to labor rights, the rights of political prisoners, and

[39] Alvarez, *supra* note 5 (enumerating other examples of Council decisions with potentially adverse human rights ripples, including its acquiescence in the use of force against Afghanistan, its apparent reformulation of Hague occupation law in the wake of Operation Iraqi Freedom, and its ceding to US requests that peacekeepers from non-ICC party states be excluded from the ICC's jurisdiction).

[40] For a general critique of these organizations from the standpoint of women's rights, *see, e.g.*, H. Charlesworth & C. Chinkin, The Boundaries of International Law 171-200 (2000).

[41] *See* M. Darrow, Between Light and Shadow: The World Bank, the International Monetary Fund and International Human Rights Law 54 and 106-110 (2003) (discussing OXFAM's critiques, among many others).

equitable concerns.[42] The World Bank's establishment of its Inspection Panel was itself an acknowledgment of persistent accusations that its infrastructure projects in particular have the potential to violate the rights of individuals, including indigenous populations in the path of one of the Bank's ambitious dams. And yet the World Bank Panel's procedures provide only a limited form of accountability, since under those procedures a complainant can insist that the Bank adhere to its own policies, but cannot secure compensation for injuries incurred. It has also been suggested that the actions of these international financial institutions, including their encouragement of privatizations of considerable activity once undertaken by government, have "hollowed out" the rights of people to freely determine their political status and freely pursue their economic, social, and cultural development by preserving only an "empty shell" of democratic governance, ironically all in the name of promoting democracy.[43]

We are also becoming more aware, thanks to media reports as well as the UN's own internal investigations, that human rights abuses can and do occur whenever the UN administers territory, either due to the inactions of UN peacekeepers or, in some cases, due to their deliberate actions. And there are growing challenges even with respect to those multilateral institutions designed to effectuate human rights, such as international criminal tribunals. The fairness of certain actions taken by the International Criminal Tribunal for the former Yugoslavia and the International Criminal Tribunal for Rwanda have come under fire, as have the balances struck between the rights for peace/reconciliation and the rights of victims of mass atrocity within the more innovative forms of hybrid tribunals (such as the Sierra Leone tribunal).

The reality as well as the potential for multilateral institutions to violate human rights in the name of defending them stems, in part, from the harsh alternatives. We worry that unless the international community acts, certain states will act alone. We believe that it is better to establish flawed international tribunals or have the Security Council wage a flawed 'war' on terrorism if the alternative appears worse: whether acts of vengeance by a post-1994 Rwandan government bent on revenge or the Bush administration's own unilateralist inclinations in waging the war on terrorism. We prefer to allocate responsibility for economic development to the 'international community,' at least as (inadequately and imperfectly) represented by the international financial institutions, than leave such matters to the will of the US Congress through its dictates to US assistance agencies.[44] The potential for abusing rights through international action is at least to this extent an unavoidable by-product of *realpolitik*. But to the extent the problem emerges from insufficient

[42] *See, generally*, Darrow, *id.*

[43] *See, generally, id.*, at 104-106 (discussing critiques by J. Hippler).

[44] *But see id.*, at 74-83 (discussing the "legitimacy" deficits of the IMF, including accusations that the Fund is essentially a conduit for the will of the US and the "Washington consensus").

doctrinal or theoretical attention to the application of human rights regimes to these institutions, scholars and lawyers have a responsibility to deal with the issue.

At present there are lively academic and diplomatic conversations concerning the 'accountability' of international organizations such as the UN, including organs such as the Security Council. Only some of these underlying debates about the need for greater 'transparency' or about proposed remedies for evident 'democratic deficits' are directed at the potential for abuse of rights through these organizations or through the international rule of law. The most prominent contemporary UN debate—concerning reform of the Council to include a greater number of permanent veto-wielding or non-veto-wielding members—has little direct bearing on the latter issue.[45] Such proposals, or even the ambitious one of establishing a second Assembly chamber where members are represented not on the basis of one state/one vote but population,[46] address an aspect of the unrepresentative or undemocratic nature of these institutions, and while related to the legitimacy concerns with IGO action, may do little to address the possibility that even a reformed, more 'representative' IGO organ might still violate human rights in the name of protecting rights to security or the rights of states.

More interesting in this respect are the respective efforts of the International Law Association (ILA) and the International Law Commission (ILC) to study the responsibility of international organizations as part of their respective long-term programs of work. The work of the ILA suggests that there is a convergence of views, at least within the academy, concerning general principles of good governance as well as the primary and secondary rules of IGO liability. Its most recent report on the subject of the "Accountability of International Organizations" contains a list of principles of good governance that it suggests all IGOs need to adhere to—including familiar principles of transparency, participatory decision-making, access, supervision and control, procedural regularity, and due diligence.[47] The scholars who drafted that Report also opine that IGOs are, like all other international legal persons, bound by general principles of international law, including human rights, and that a "transfer of powers to an IGO cannot remove acts of an IGO from the ambit of control mechanisms established by particular treaties nor can it exclude the responsibility of the States who transferred powers to an IGO."[48] Concerning the imposition of non-military coercive measures through IGO action, that Report urges IGOs to undertake a "human rights impact assessment"

[45] Council membership reforms are discussed by the Secretary-General, *supra* note 2, at Paras. 167-169.

[46] *See* A. Strauss & R. Falk, *For a Global Peoples Assembly*, International Herald Tribune, 14 November 1997, at 8.

[47] International Law Association, Report of the Seventy-First Conference (Berlin), Accountability of International Organizations, at 172 -183 (2004).

[48] *Id.*, at 185-187, 193.

when imposing sanctions, seek to ensure that these measures respect the right to life and the right to an adequate standard of living, and "establish the necessary mechanisms to ensure compliance with basic human rights guarantees, including the particular issues that arise in the context of listing individuals and entities for the purpose of targeted sanctions."[49] The Report also opines that the principles of state responsibility recently promulgated by the International Law Commission "are applicable by analogy, but with some variations, to the responsibility of IGOs," and that IGOs may incur international responsibility if they fail to comply with such general principles of law as the principle of good faith, unjust enrichment, estoppel, equality, non-discrimination, proportionality, and fair hearing; if their coercive measures are not in conformity with the international humanitarian law principles of proportionality and necessity; if the exercise of their discretionary powers results in a "sufficiently serious breach of a superior rule of law such as the right to life, food and medicine of the individual or guarantees for due process of law; or if their activities infringe the rights of third parties and the organization fails to take precautionary measures to avoid such injury."[50]

While these rules appear sensible, it is not at all clear that they reflect existing black letter rules that draw the uniform support of all governments, IGO officials, or indeed members of the Security Council, or whether, on the contrary, they are merely *lex ferenda*, that is, efforts to progressively develop the law. Despite recent efforts by the Council to be more transparent, its highly secretive practices, especially of its numerous sub-bodies engaged in counter-terrorism, would appear to violate virtually every one of the ILA's recommended principles of good governance. The actual practice of the Council has ignored, with apparent impunity to date, the ILA's principles concerning respect for human rights. While it is of course possible to contend that the Council's counter-terrorist efforts are therefore *ultra vires*, such a result would surely meet with the resistance of many, if not all, Permanent Council members, particularly P-1. This suggests that despite the ILA's best efforts, international law is still grappling with the many consequences of the International Court of Justice's Advisory Opinion in Reparation for Injuries, which recognized that the UN has a distinct legal personality.[51] As the Encyclopedia of International Law puts it, "the law on the responsibility of international organizations is still in a state of flux."[52] Although the ILA may indeed be correct in stating that like all international legal persons, international organizations are generally liable for breaches of international law, there are considerable uncertainties about

[49] *Id.*, at 194.
[50] *Id.*, at 198-200.
[51] Reparation for Injuries Suffered in the Service of the United Nations, 1949 ICJ 174 (11 April 1949).
[52] K. Ginther, *International Organizations, Responsibility*, 5 Encyclopedia of Public International Law 162, at 163 (1988).

what this means since it is not clear which international obligations apply to these organizations, and it is equally unclear where such claims could be brought.

The clearest way to indicate that IGOs, as international legal persons, owe a legal obligation is to point to a treaty. Yet at present, organizations like the UN usually cannot be parties to human rights treaties. While there is considerable logical appeal to the proposition that states should not be able to engage in collectively what they are individually barred from doing, IGOs are distinct legal persons whose international responsibilities are not identical to those assumed by their members. There are doctrinal difficulties in suggesting that all human rights obligations assumed by their state members (even assuming contrary to the facts that these are uniformly applicable to all members) should apply equally to all organizations that members form.[53] Other possibilities—such as imposing secondary member liability for what these organizations do—have also been resisted in practice on the grounds that public international organizations were established at least in part precisely to avoid joint and several liability.[54] Despite suggestions by some international judges, most governments are likely to resist the proposition that the IGOs that they are members of are legally merely their agents for purposes of liability. Further, even assuming that it were possible to determine which human rights obligations apply to organs like the Security Council or to individual UN employees or experts, the remedial hurdles are considerable, as even the ILA's Report acknowledges. Given the privileges and immunities of IGO officials and of the organizations as a whole, national courts are an unlikely place to seek remedies for the actions of IGOs, and the International Court of Justice is an awkward venue to raise such claims as well, since international organizations cannot be parties to contentious cases and can only ask for advisory opinions.[55]

The ILA's Report is best read as a useful compendium of *potential* doctrinal avenues that could suggest IGO liability in some cases where IGOs abuse human rights. It is also true that, as is the case with the European Community, nothing prevents any international organization from remedying the doctrinal uncertainties by choosing, via treaty, to clarify which obligations apply to the

[53] For an interesting attempt to draw implicit human and states' rights from the terms of the Charter and apply these as limitations on the Security Council's right of action, *see* E. de Wet, The Chapter VII Powers of the United Nations Security Council (2004).
[54] *See, e.g.*, Institute de Droit International, Session of Lisbonne – 1995, The Legal Consequences for Member States of the Non-fulfillment by International Organizations of their Obligation toward Third Parties, Art. 6 (general rule that members of an organization are generally not, merely because they are members, liable concurrently or subsidiarily for the obligations of their organizations). *But see* International Tin Council Appeals, [1988] 3 All ER 257, 307 CA.
[55] *See* International Law Association, Report, *supra* note 47, at 212-221 (discussing the possibility of remedies in national and international courts) and Appendix (discussing the role of the ICJ).

organization or its agents. Such a treaty could also provide remedial venues to resolve such claims. To date, it has been the UN's own voluntary assumption of responsibility, as with respect to its peacekeepers, that has helped to resolve some of the most prominent cases of UN liability.[56] It may also be possible, as the ILA suggests, to use the existing rules of state responsibility to impose liability on at least some states for abuses committed by the organizations of which they are members.[57] Article 16 of the ILC's rules of state responsibility anticipates, after all, state liability where states knowingly assist an act that would be unlawful if committed by the state. Similarly, Article 17 anticipates state liability where states direct or control such acts. Others have suggested that IGO actions may prompt state liability where a state's own acquiescence in the underlying act suggests that the state be seen as its co-author.[58] Some have suggested imposing IGO liability in cases where the UN has assumed a role as caretaker of a particular region or territory, as in UN nation-building efforts, on the basis that in such instances, the UN has stepped into the shoes of the former sovereign.[59] While all these theories are interesting, practice is generally lacking, at least with respect to the UN and certainly with respect to its principal organ, the Security Council. While European institutions have had to pay greater attention to these questions, including consideration of the extent to which EU institutions need to abide by human rights, global institutions have addressed these issues only piecemeal—by adopting guidelines and specialized treaties regarding the responsibility and accountability of UN peacekeepers.

A number of problems would need to be resolved if the international community were serious about making IGOs more accountable on human rights. We would first need to clarify which, of the ever-proliferating human rights norms now contained in dozens of treaties and Assembly declarations, ought to apply to UN bodies such as the Security Council. Conclusions based on 'general principles of law' or customary rules of law that usually rely on the practice of states inter-se raise more questions than they answer. Whether or not, as Wiktor Osiatynski indicates, we are misappropriating the language of rights,[60] we need to re-examine whether all the rights that have constitutionally

[56] *See, e.g.*, D. W. Bowett, United Nations Forces (1964); J. G. Gardam, *Legal Restraints on Security Council Military Enforcement Action*, 17 Mich. J. Int'l L. 285 (1996).

[57] *See* Annex, G.A. Resolution 56/63 (28 January 2002) (containing the ILC's Rules for the Responsibility of States for Internationally Wrongful Acts).

[58] *Cf.* Art. 8 of the Rules of State Responsibility, *id.* (providing that a state is responsible for the activities of those who act on its instructions or under its "direction or control"); Institute de Droit International, *supra* note 54, Art. 5(b) (providing that members of an international organization may be liable for the actions of the organization on the basis of acquiescence or abuse of right).

[59] *See, e.g.*, R. Wilde, *The Complex Role of the Legal Adviser When International Organizations Administer Territory*, ASIL Proceedings of the Annual Meeting, at 251 (2001).

[60] W. Osiatynski, *Beyond Rights*, in this volume.

extended in the context of states ought to extend equally to IGOs. Second, even if we were to assume that all the ICCPR's rights, for example, have to be respected by UN organs and their agents, there are significant issues of how to adapt these rights, which were designed for use against governments, to international organizations involving new actors, from international civil servants to designated experts on sanctions committees.

If we focus on the actions of the Security Council in its war on terrorism, for example, intriguing potential gaps in human rights law emerge. Consider Article 14 of the ICCPR, which provides a fairly comprehensive list of rights for the use of the criminal defendant. While this strikingly detailed list of protections is useful to those charged with a crime, it is not very useful to those, like those designated by the Council's 1267 Sanctions Committee, who face no such formal charges by any court, national or international. Article 14 does not contain a right to procedural due process for those who are not charged with a crime, even if they face deprivations of the use of personal bank accounts or the right to travel.[61] (Note that the most developed law on the right to property, that of the European Court of Human Rights, is extremely deferential to the rights of governments to regulate such rights "in accordance with the public interest."[62]) Should international human rights law provide procedural rights in cases in which the UN stigmatizes someone as a terrorist and deprives the individual of certain property rights without charging him with a crime? Does it matter for how long such sanctions remain in place? While the human rights advocate would surely say that the existing 1267 procedure, including its failure to accord individuals remedies for violations of due process, itself violates human rights, just precisely why this is so remains unclear, especially since even relatively sophisticated national legal systems, as in the United States, have not come up with clear answers about the nature of procedural or other protections that ought to apply when court-ordered sanctions involve a monetary or other penalty but not a period of incarceration. US courts are still struggling with determining the line between 'civil' and 'criminal' penalties as well as the procedural protections associated with each.[63]

[61] The only guarantee Art. 14 extends to those not charged with a crime is the right to a "fair and public hearing by a competent, independent and impartial tribunal established by law." Art. 14(1), ICCPR. This right applies, however, only to suits at law. *Cf.* International Law Association, Report, *supra* note 47, at 207 (suggesting that "a total lack of remedies would amount to a denial of justice, giving rise to a separate ground for responsibility on the part of the IGO").

[62] European Convention for the Protection of Human Rights and Fundamental Freedoms, Protocol No. 1, Art. 1 (1952). For a summary of some of the relevant European case law, *see* H. Mountfield, *Regulatory Expropriations in Europe: The Approach of the European Court of Human Rights*, 11 NYU Envtl. L. J. 137 (2002).

[63] *See, e.g.*, C. S. Steiker, *Punishment and Procedure: Punishment Theory and the Criminal-Civil Procedural Divide*, 85 Geo. L. J. 775 (1997).

Despite the ILA's efforts, there are substantial doctrinal and other hurdles for those intent on making the Council more accountable to human rights concerns:

- The UN Charter lacks a clear concept of 'détournement de pouvoir' as well as clearly defined institutional checks and balances. Even assuming that international lawyers and diplomats could agree that certain Council actions ought to be seen as ultra vires, it is not at all clear which entity, other than self-judging, self-interested states, could make such a determination. There is an absence of an established doctrine of judicial review, notwithstanding hints in certain contentious decisions and advisory opinions issued by the International Court of Justice.64 The General Assembly is limited with respect to what it can do in this respect, given the 'primary' responsibility over international peace and security accorded the Council under the Charter. And the office of the Secretary-General is, at most, a bully pulpit.
- The range of Council enforcement tools is limited, both in scope and possible modes of enforcement. The Council's many political and practical constraints as lawmaker (and not merely the need to avoid the veto), especially when its targets are primarily non-state actors, makes it an awkward instrument for nuanced counter-terrorism actions.65
- There are difficulties resulting from the need to secure political agreement within the Council. There is an unavoidable tendency for the texts of Council resolutions to permit creative, not to mention abusive, interpretations. Resolution 1373's lack of a definition of terrorism reflects the endemic difficulties in turning to the Council for this kind of legislative initiative.

These realities complicate efforts to remedy the human rights problems with the Council's listing of individuals under Resolution 1267. It is not difficult to draw up a list of potential remedies, consistent with the ILA's Report. These would include:

- judicial review of the Council's actions by national courts;
- greater procedural protections to be applied within the Council prior to listing and de-listing individuals for sanction, whether or not combined with 'sunset' provisions providing for automatic termination of sanctions over time;
- greater prior resort to or consultation with regional organizations like the European Union (to confirm whether certain individuals ought to be listed or de-listed);
- outright defiance, once sanctions are sought to be imposed, by UN members, on the contention that such civil disobedience by UN members is permitted when the Council purports to take *ultra vires* action not permitted by the Charter;
- implementing legislation by individual UN members providing that certain procedural rights must be respected, at least at the national level, prior to making sanctions effective on individuals; and
- resort to international review tribunals either specially created for this purpose or acceptance of de facto review by, for example, the International Court of Justice (through advisory opinions sought by the Council or the Assembly). As noted, challenges have been brought by individuals to the implementation of the Council's sanctions before the European Court of Justice (as in the pending *Aden* case). Comparable challenges might be brought before the European Human Rights Court, the Inter-American Court of Human Rights, or the more recently established African Court on Human and Peoples' Rights.66

But none of these remedies are, of course, anticipated by any explicit Charter provision. All require politically courageous initiative (most probably in defiance of at least some of the Permanent Members of the Council) and most of these proposals, especially the possibility of members' outright defiance on the basis that the Council cannot undertake *ultra vires* action, will be seen as dangerous precedents that could threaten the major accomplishment of the UN Charter (at least over the preceding League of Nations): namely, the Council's unchallenged legal domain over international peace and security. Even the prospect of judicial review over the Council's highly political actions by the International Court of Justice does not draw uniform support among international lawyers, some of who see in the proposal the potential unraveling of the Charter system.67

Apart from the very real operational hurdles, resolving these issues would also require some fundamental rethinking among international lawyers. For too long, many international lawyers, and even some diplomats, have adhered to an excessively minimalist conception of what 'multilateralism' entails. For too long, international human rights lawyers and advocates have tended to assume that all will be well if we simply turn over a human rights problem to established representatives of the international community, such as the UN.68 If, as Krygier indicates, development experts have sometimes confused the building of bricks and mortar courthouses for the rule of law, international lawyers have sometimes confused recourse to the UN for the international rule of law. International lawyers, like others, have not been immune from goal displacement. A real resolution of the potential threat to rights posed by

64 *See, generally*, J. E. Alvarez, *Judging the Security Council*, 90 AJIL 1 (1996).
65 For enumeration of some of the difficulties of using the Council as global law-maker, *see* S. Talmon, *The Security Council as World Legislature*, 99 AJIL 175 (2005).
66 For a discussion of these and other possible remedies, *see* J. E. Alvarez, *The Security Council's War on Terrorism: Problems and Policy Options*, *in* E. de Wet & A. Nollkaemper (Eds.), *supra* note 28, at 119.
67 For a summary of the many views on this question, *see, e.g.*, Alvarez, *supra* note 64.
68 *See generally*, J. E. Alvarez, *Multilateralism and its Discontents*, 11 EJIL 393 (2000).

IGOs would require seeing these multilateral venues more as social outcomes whose desirability turns on whether such recourse satisfies certain threshold conditions and less as a necessary and sufficient condition for legality.[69] We need to stop presuming that whatever the collective decides—even if it is the Security Council or a fatally flawed body such as the UN Commission on Human Rights—is invariably preferable to whatever any single government would do. After all, what makes us think that governments in the plural will respect human rights any more than governments in the singular, especially when some of the most powerful global institutions that we have are subject to hegemonic forms of control, and even those that are less susceptible to such control, such as the UN General Assembly, are 'accountable' only in the weak sense that they reflect the views of the majority of all *governments* on the basis of one state/one vote? What makes us think that the language of rights, when appropriated by IGOs, will not become more a tool of foreign relations than a weapon for the dispossessed?[70]

We need to start thinking much more seriously about how we patrol the ostensible agents of the international community itself and whether (or how) to render them accountable to human rights. This is especially true when we confront what Sanford Levinson calls a "state of permanent emergency."[71] The UN Charter is no clearer on how its 'constitutional' system resolves conflicts between states' and individuals' rights when such emergencies arise than is the US Constitution. The closest it comes to dealing with the issue concerns breaches or threats to the international peace. The Charter's Chapter VII authorizes the Security Council to exercise an imprecisely delimited global police power in such cases of global emergency, and most of us initially applauded when this scheme 'worked as intended' during the original Gulf War—even when, through Security Council Resolution 687, that body, acting in the name of the collective, effectively put Iraqi sovereignty into receivership. Only later, as a dozen years of Council sanctions wreaked havoc on the Iraqi people as well as Iraqi sovereign rights, did some human rights advocates begin to have second thoughts about whether a license to violate rights from the Council, even if issued in the name of peace and security, ought to be seen as an end in itself. Apart from some vague phrases in the UN Charter requiring the Council to act "in accordance with the Charter's Principles and Purposes" (24(2)), that instrument says nothing about the limits on that body's power to act; indeed, its Article 103 ostensibly permits the Council to trample on existing treaty rights pursuant to Chapter VII (and most international lawyers assume that the Council is similarly authorized to trump customary law (if not *jus cogens*) as well). There are few express limitations on what the Council can do pursuant to its authority to take any measure, whether or not involving the use of force,

[69] *Cf.* M. Krygier, *The Rule of Law: An Abuser's Guide*, in this volume.
[70] *Cf.* Krygier, *id.*
[71] Levinson, *supra* note 17.

in response to a threat or breach of the peace.[72] As with respect to the US Constitution, the prevailing view about the UN Charter among international lawyers is that its interpretation needs to be as purposive and teleological as the interpretation of any constitution or other 'living document' that needs to adapt to an ever-changing environment.[73] It is usually said that the Charter needs to be read to preserve the international system and not as a set of rigid constraints impermeable to change.[74] Formally, at the international level we have created—and endowed with the legitimacy of the international rule of law—an organ that can become, or is already becoming, a law unto itself, or as Levinson puts it, one that is capable of acting contrary to law if necessity demands.[75] Indeed, the Council would appear to have been given a more formal license to violate rights, both state and human, in the name of global emergencies than is the case of the President of the United States, who, as Levinson reminds us, has seized such powers from the silences or interstices of another 'living' instrument, the US Constitution.[76]

Further, given the United States' power, formal and informal, over the Council, the Council may easily become—if it is not already—an all-purpose tool to pursue the Bush administration's one-sided war on terrorism globally, and to do so with the full sanction of formal international law as legitimized by

[72] *See, e.g.*, Rosand, *supra* note 17. Although Rosand acknowledges that pursuant to Art. 24(2), the Council must act in accordance with the Principles and Purposes of the Charter, he points out that two of those principles and purposes—the injunction against interfering in the domestic jurisdiction of states and to act in conformity with international law—do not apply to Chapter VII actions taken by the Council. *Id.*, at 556. *But see* de Wet, *supra* note 53 (attempting to draw from the Principles and Purposes of the Charter certain limitations on the Council intended to protect both individual rights as well as the rights of sovereigns). Other international lawyers have argued for other limits on Council action. *See, e.g.*, Rosand *supra* note 17, at 557-559 (canvassing proposals to limit the Council on the basis that it can only adopt certain types of peace-enforcing measures rather than law-making or measures in response to discrete threats or arguments that it can only take proportionate actions). For an attempt to imply human rights limitations, as well as human rights obligations, in the context of international financial institutions, *see* Darrow, *supra* note 41, at 113-142.
[73] *See, e.g.*, Rosand, *supra* note 17, at 570. For an analysis of the role of such purposive interpretations in the IMF and the World Bank, *see* Darrow, *supra* note 41, at 113-194.
[74] *Cf.* Levinson, *supra* note 17.
[75] For a general discussion of this phenomenon, *see* J. E. Alvarez, International Organizations as Law-Makers 184-198 (2005).
[76] For a comparative analysis of numerous other national constitutions containing provisions to deal with various forms of 'emergencies' or 'crises,' *see* O. Gross, *Providing for the Unexpected: Constitutional Emergency Provisions*, Israel Yearbook on Human Rights 13 (2003). As Gross points out, some constitutions contemplate the possibility of "legislative" emergency powers even for the executive branch, as is arguably the case with the Security Council under Chapter VII. Others contemplate "whatever steps may be considered necessary," apparently including the violation of the constitution itself, pursuant to an emergency. *Cf.* Art. 103, UN Charter (providing that obligations under the Charter prevail over any other international agreement in case of conflict).

states' consent to the Charter. International lawyers have as yet no better tools to resist this development, so dangerous to the Council's long term legitimacy, than do US constitutional lawyers with respect to the US 'imperial' presidency since, after all, a 'threat to the peace' is whatever the Council says it is and even international judges appear ready to defer to such Council determinations.[77] For as long as we have had IGOs, we had accepted the possibility that these may become the instruments of the member(s) with the greatest power or mere multilateral amplifiers of state power.[78] Notwithstanding suggestions by some judges on the International Court of Justice,[79] we are still searching for the limits on the Council's 'emergency powers,' and we are no closer to agreement on who or what will apply such limits, or even whether the matter should be left to 'law' to resolve at all.

[77] *See* Dusko Tadic, Case No. IT-94-1-AR72, Appellate Chamber Judgment of 2 October 1995, at Paras. 28-32 (finding a Council finding of "threat to the peace" to be more political than a determination of "aggression" but nonetheless constrained by the Principles and Purposes of the Charter). *See also* de Wet, *supra* note 53, at 5.

[78] *See* H. J. Morgenthau, *Political Limitations of the United Nations*, *in* G. A. Lipsky (Ed.), Law and Politics in the World Community 143, at 150 (1953): "There is no such thing as the policy of an organization, international or domestic, apart from the policy of its most influential member [...]."

[79] *See* Provisional Measures Order of April 14, Case Concerning Questions of Interpretation and Application of the 1971 Montreal Convention Arising from the Aerial Incident at Lockerbie (Libya v. United States), 1992 ICJ 114, at 156 (concurring opinion of Shahabuddeen), at 174-175 (dissenting opinion of Bejaoui), and at 192-193 (dissenting opinion of Weeramantry).