INTERNATIONAL LAW ASSOCIATION

UNITED NATIONS REFORM STUDY GROUP

Accountability of the Security Council

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1. Security Council Activism

It is only recently that the problem of accountability has come to the fore in view of the use of unbridled powers by international organizations in a changing environment, thus increasing the potential for encroachment on the rights of states and individuals.

The Security Council's extensive operational activities – such as the expanded mandates of peacekeeping operations and the establishment of Chapter VII UN interim administrations with broad powers – have now the capacity to violate fundamental rules of human rights and international humanitarian law, or to cause damage, injury and death. The implementation of its decisions on sanctions, initially comprehensive, has had in the long-term extensive and lasting effects on the populations of targeted states. The subsequent move towards targeted sanctions against individuals rather than states, particularly in the context of counter-terrorism, while partly addressing the problems arising from comprehensive sanctions, has raised human rights issues of its own, such as due process and property rights, particularly where resulting from the establishment and maintenance under resolutions 1267 and 1390 of updated lists of specified individuals and entities linked to international terrorist networks whose funds are to be frozen. Accountability may also arise from the Security Council's extensive normative activity tantamount to legislation, i.e. enacting general open-ended regulations with no time limits binding on all member States, a legislative competence distinct from its enforcement powers on the basis of which it adopts temporary binding decisions in respect of specific crises under Chapter VII. This trend was initiated by S/RES/1373 (2001) in the face of the global threat of terrorism but has been extended to other areas, e.g. weapons of mass destruction, international humanitarian law etc. Where this affects treaty obligations, the Security Council may thus appear to bypass the *pacta tertiis* rule. Moreover, the Security Council as a non-representative body can hardly claim to fulfil the customary law requirements of general practice and *opinion juris.*

The Security Council's activism combined with the binding nature of its Chapter VII decisions and the hierarchical nature of the Charter as embodied in Article 103, has resulted in certain tensions between public policy concepts, in particular, between human rights and security.

The need for accountability has been addressed in some of the reform proposals, e.g. the 2005 Summit Outcome document has called for regular monitoring and review by the Council to ensure accountability for the way in which sanctions decisions are implemented. The High-Level Panel Report states in para.152: "(t)he way entities or individuals are added to the terrorist list maintained by the Council and the absence of review or appeal for those listed raise serious accountability issues and possibly violate fundamental human rights norms and conventions." The transposition of the concept of "rule of law" in the

international context which has been given substance within IOs and reflected in UN reform proposals, has also led to growing concern with issues of responsibility and accountability of international organisations.

The Security Council's decisions have led to challenges from various quarters, including from member states and judicial and quasi-judicial bodies, regarding the limits to its powers and its accountability.

2. The Notion of Accountability

A distinction has to be made between accountability (a political concept but which includes also legal mechanisms), liability arising from the damage ensuing from a lawful act, and responsibility as the legal consequences of a wrongful act. The concept of accountability of international organisations can be clarified by analogy with the domestic law notion of constitutionalism, with its obvious political/ideological connotations which have roots in democratic theory. Accountability of international organisations may be taken to mean the responsibility (in its broad meaning) of international institutions for the proper exercise of the power or authority which is granted to them, and which includes the constraints which are expressly or implicitly attached to these powers and the mechanisms by which these are controlled (reference may be made to the report of the ILA Committee on Accountability of International Organisations on Recommended Rules and Practices and to the ongoing work of the International Law Commission on the Responsibility of International Organisations - I will not treat the specific responsibility issues raised in the ILC Draft Articles which are the topic of another Study Group).

The accountability of the Security Council raises a number of questions, all of which cannot be addressed in this brief contribution. Among the most important are, firstly, whether there are legal constraints on its powers and competences and what the applicable law is, and secondly, – a distinct issue – whether there one can point to the existence of third party review of its acts. Finally, what proposals for reform of the current situation can be made?

3. Legal constraints on Security Council action

As the ICJ has stated, international organisations as international persons are "as such…bound by any obligations incumbent upon them under general rules of international law, under their constitutions or under international agreements to which they are parties." (*Interpretation of the Agreement of 25 Mach 1951 between the WHO and Egypt,* para.37). The ILC Report on Responsibility of International Organizations adds that the rules of the organisation (also rules of international law) include also the decisions and resolutions adopted in accordance with them, and established practice of the Organization. (See Giorgio Gaja's First and Second Reports).

The Charter has inbuilt legal constraints on the Security Council both substantive in the form of the Charter's purposes and principles (see Article 24 (1)) and procedural in terms of voting procedures. The former may be vague but have evolved over time and to the

extent that core human rights treaties may be said to give effect to the broad purposes of the United Nations, the Universal Declaration of Human Rights acting as the springboard, they do effectively set teleological limits on Council action. The general rules governing treaty law, which allows express derogation from (as opposed to violation of) general rules, except for peremptory norms, also govern the Charter's relationship with rules of customary international law, Finally, general principles of law, including administrative law, such as the concept of abuse of rights, *détournement de pouvoir*, the principle of good faith and delegation of powers may be relevant.

4. Judicial Review, Scrutiny and Control

Judicial review by the International Court of Justice

Recognition that the Council's powers are not entirely unlimited and may be exercised in contravention of the UN Charter leads naturally to the question of judicial review. This question, at issue in the *Lockerbie* case is more easily addressed if we are not seeking a constitutional type process of judicial review, with compulsory effect, since it is clear that no analogous procedure is to be found in the structure of the United Nations.

The ICJ, however, while disclaiming that it possesses such powers (*Namibia* Advisory Opinion, p.45) has exercised some form of judicial control indirectly over UN resolutions when the question is posed incidentally before it and for purposes of the exercise of its own jurisdiction (*Expenses, Namibia, Lockerbie, Wall*), although it has acted on the basis of *prima facie* validity (*Namibia*, p.22; *Wall Opinion*, para.35). The ICJ has an important role to play as a principal organ of the UN, bound both to give effect to UN resolutions and to guard Charter legality. The latter task appears to have been acknowledged by all the parties concerned (see dissenting Judge *ad hoc* Sir Robert Jennings in *Lockerbie* case: Security Council decisions and actions could not be regarded as "enjoying some sort of 'immunity' from the jurisdiction of the principal judicial organ of the United Nations").

Even the Security Council's subsidiary organ, the ICTY, in *Tadic*, did not consider itself debarred from reviewing a decision of the Council, at least for the purposes of confirming the Tribunal's own jurisdiction.

But there are also certain important limitations on the Court in matters of review of UN resolutions: the lack of an established procedure for judicial review and the need for a case-by-case jurisdictional basis, which makes the process incidental or fortuitous; the non-authoritative nature of the Court's pronouncements in this respect (advisory or only binding the parties before it (Article 59 Statute)); and the absence of a coherent theory of the legal effects of the illegal acts of international organizations. In regard to the latter, the Court is said to have made a distinction in the *Expenses* case, between procedural illegality - an act of an organ which exceeds its competence under the Charter - and substantive illegality, e.g. non-conformity with the Purposes and Principles of the Charter; only in the latter case would the validity of the act be in doubt (ICJ Rep. l962, p.l68), but the question remains unclear. This has led some commentators to uphold the right of last resort of

member states not to recognize the validity of an illegal resolution. But this may entail their responsibility under international law.

Review by regional and universal judicial and quasi-judicial bodies

Challenges in human rights judicial and quasi-judicial bodies have arisen in particular from the 1267 listing process and concern such rights as those of due process, including effective judicial review, respect for property, and the principle of proportionality.

Regional and domestic courts initially declined to offer remedies for individuals from potential abuses in implementation of Security Council decisions. The EU Court of First Instance in the *Kadi, Youssef* and *Awadi* cases did this mainly on two grounds. The first ground was by an automatic application of Article 103 of the Charter accepting the precedence of Security Council decisions over the fundamental rights protected by the EU, other than *jus cogens*; the latter had not been breached since the Court considered that there were appropriate procedures in the Sanctions Committee, even though these were political and diplomatic rather than judicial remedies. The second way remedies were avoided was through an unquestioning interpretation of the Court's mandate as lacking powers of even indirect judicial review over Security Council resolutions, unless – somewhat paradoxically – to ensure that they were not contrary to *jus cogens* (European Court of First Instance, *Ahmed Ali Yusuf and Al Barakaat International Foundation v. Council and Commission*, Case T 306/01; *Yassin Abdullah Kadi v. Council and Commission*, Case T 315/01, 21 September 2005). The choice the Court made in deciding to uphold the "public-interest objective of fundamental importance to the international community which is to combat by all means, in accordance with the Charter of the United Nations, threats to international peace and security caused by terrorist acts" over the fundamental human rights protected within the Community, illustrates the kinds of challenges posed by the collective security system in a rule of law context.

The decision by the European Court in the *Kadi* appeal (Court of Justice of the European Communities, *Yassin Abdullah Kadi and Al Barakaat International Foundation v Council of the European Union and Commission of the European Communities*, Joined Cases C-402P and C-415/05P, 3 September 2008) adopting a dualist view of the relationship between EU law and international law (that is, the view put forward by the Advocate General Maduro) overruled the judgment of the Court of First Instance, on the grounds that the EU Regulation implementing the Security Council Resolution did not sufficiently respect certain fundamental rights of the European Community, though it did not strike it down with immediate effect, aware of the problems this would create. Though rejecting its competence to review Security Council resolutions even in respect of *jus cogens* norms, however, it accepted indirect review of these in looking into the legality and validity of EU implementing regulations, stating: "…it is not a consequence of the principles governing the international legal order under the United Nations that any judicial review of the internal lawfulness of the contested regulation in the light of fundamental freedoms is excluded by virtue of the fact that that measure is intended to give effect to a resolution of the Security Council adopted under Chapter VII of the Charter of the United Nations" (para. 299). It also found that the contested regulation could not be considered to be an act directly attributable to the United Nations (para.314). (Though referring to the criteria laid down in

Behrami it came to different conclusions. *Behrami* is outside the scope of my contribution since it covers authorized action by the Security Council).

The European Court of Human Rights has also exercised some form of indirect review in considering in *Nalitelic v. Croatia* (Application No. 51891/99 (Decision as to Admissibility), ECtHR, 4 May 2000) that the ICTY offered sufficient procedural guarantees.

In conclusion, these challenges to the Security Council's decisions, whether before the EU courts or the Human Rights Committee, are concerned not with the question of the human rights limitations on the Council itself, but with the question of the individual responsibility of member States to respect their human rights obligations while implementing Security Council decisions. Thus the Human Rights Committee in *Sayadi* stated that it "could not consider alleged violations of other instruments such as the Charter of the United Nations, or allegations that challenged United Nations rules concerning the fight against terrorism" but that it was competent to pronounce on whether a State party had violated Covenant rights, "regardless of the source of the obligations implemented by the State party". In other words, the case before it concerned the compatibility of national measures implementing a Security Council resolution and not an interpretation of a provision of the Covenant impairing the provisions of the Charter (see Article 46 of the Covenant) (Communication no.1472/2006, Decision of 22 October 2008).

Review by domestic courts

Though implementing Security Council resolutions in domestic law may lead to conflicts between Security Council resolutions and constitutionally protected individual rights, in the rare instances of challenges raised in domestic courts, there has generally been refusal by these to control the legality of Security Council resolutions. They have based their refusal not on grounds of immunity, for challenges have been to the domestic law implementing sanctions, not the Security Council resolutions themselves, but rather by invoking the political question doctrine, the primacy of the Charter and the absence of competence to exercise judicial review of such resolutions. (see e.g. *Slobodan Milosevic v. The State of the Netherlands* (Judgment in interlocutory injunction), 31 August 2001, President of the Hague Distr. Ct, Kort Geding 2001/258, p. 688).

Political control by the General Assembly

Some mention must also be made of accountability before political organs. The General Assembly has encouraged the submission of Security Council special reports provided for under Articles 15 and 24(3) of the Charter. Through the Sixth Committee and Special Committee on Charter reform, the Assembly has tried to provide guidelines for the adoption and implementation of Council sanctions, as well as for Council transparency. This has led to a series of reports, such as from the Secretary-General and the Special Committee on the Charter of the United Nations and on the Strengthening of the Role of the Organisation, on means of improving the mechanisms and criteria concerning the implementation and lifting of sanctions.

The General Assembly has also a budgetary competence which it can and has exercised on at least one important occasion to curb the excesses by the Security Council - namely the financing of the ICTY. It could thus be in a position to invoke the accountability of the Council. Such political limits have in turn their political limitations. For example the General Assembly has not examined in substance the special reports presented by the Security Council under Article 24(3) and has not actively pursued its secondary responsibility in the maintenance of international peace and security.

5. Addressing accountability problems of the Security Council

A new reading of Article 1(1) of the Charter in light of the changing international legal system

The growing importance of human rights law has required a fresh reading of the collective security provision laid down in Article 1(1) of the Charter in the light of such concepts as human security – the various UN reform debates and proposals, including the 2007 World Summit Outcome are replete with such references. Moreover, there has been a recent linkage between collective security and principles of justice and international law (originally only associated with peaceful settlement of disputes); for not only has justice in the form of international criminal tribunals now been viewed as instrumental to peace maintenance, but also references to international law and in particular to States' human rights obligations, are now to be found in Council resolutions and form an important part of UN "rule of law" projects in the territorial administrations the Security Council has set up. The Council has also acquired a new human rights protection function, reacting under Chapter VII to fundamental violations of human rights, so that human rights has now become part of the peace maintenance function itself.

A new reading of Article 103

A new reading of collective security must also entail a fresh look at Article 103 to explore the limits set on its application beyond that of *jus cogens*, and to clear up some misunderstandings which have purported to considerably widen its scope.

Unlike Article 20 of the League Covenant which called for the abrogation of existing inconsistent obligations, Article 103 is not so much a hierarchical rule reflecting the *jus cogens* character of the Charter, as a conflict rule (see the VCLT provision on successive treaties). The concern at San Francisco was that treaties which were not intrinsically inconsistent with Charter obligations, such as a trade treaty, could become so in the event of a Security Council decision under Article 4l in a specific situation threatening the maintenance of international peace and security. The intention of this provision therefore was the temporary and reversible suspension of say a trade treaty until such time as the Security Council had restored the peace. Security Council practice shows that the few references to Article 103 in its resolutions were indeed made in this context, e.g. suspension of the Chicago Convention in the case of severance of air communications, or explicit calls to member States to apply sanctions notwithstanding any existing

international agreement. In view of this, the application of Article 103 to situations resulting in indefinite suspension of individual due process and property rights, amongst others, under international and regional human rights treaties arising from indefinite freezing of funds (which cannot be viewed as mere temporary administrative measures but have penal connotations) is contrary to the intent of Article 103 since tantamount to the nullification of treaty rights and therefore highly debatable.

It is also clear from the *travaux préparatoires* that Article 103, though no doubt intended to cover Security Council decisions, was not intended to cover customary international law (see UNCIO, summary report of 41st mtg. of coordination committee September 13, 1945) and therefore had a narrower scope of application. Moreover, since the Security Council can anyway derogate (expressly) from customary international law as in the case of the operation of any normal treaty, barring *jus cogens* norms, reliance on Article 103 in the case of conflicting customary international law is not necessary.

One would also have to demonstrate the applicability of Article 103 in particular situations, for it requires an assessment of whether a conflict does indeed exist. It is obviously no longer feasible to maintain the objectives of peace and security in a vacuum distanced from the evolution of the international legal system as a whole. The courts must look more carefully into the application of Article 103 in a particular case to examine whether there is room for harmonisation of human rights and security, seeing that the one has become an integral part of the other. A teleological reading of Security Council resolutions would have to act on the presumption that there is no "manifest intent" on the part of the Security Council to call on States to derogate from human rights treaties or from generally recognized principles of international law, in view of its new human rights protection functions.

Establishing procedures to address the lacuna of due process

The various challenges from regional courts and other quasi-judicial bodies have their uses in that they may spur the Council to further action to ward off such challenges. But ad hoc decisions by regional courts while important for clarifying fundamental principles, are not the solution for they are dependent on jurisdictional bases and individual mandates of such bodies. Moreover, they challenge not Security Council action but the actions of Member States or parties to human rights conventions and may present dilemmas to States in the implementation of their obligations under the Charter.

In consequence, therefore, effective mechanisms for accountability should be internalized within the UN - there is a need for a global approach and for harmonization of the different rules of the international legal system.

The General Assembly established from the start an administrative tribunal offering due process to members of its staff. Other IOs have internalized to varying degrees human rights and environmental standards against which their activities or the activities of their member States may be evaluated (most notably the World Bank in establishing the Inspection Panel, the WTO Appellate Body in e.g. the *Shrimp/Turtle* case). This underlines

the fact that the Security Council cannot remain outside such a process, e.g. where it concerns the treatment of individuals suspected of terrorist or other criminal activities.

In fact, the Security Council itself has ensured that the Statutes for its two international tribunals embed due process rights for individuals accused of international crimes and in its resolutions called on States to respect their obligations under international law, including human rights law, in all the measures taken to combat terrorism. The Council has also responded to some degree to external pressures for reform of its sanctions/counterterrorism decisions. The World Summit Outcome document has called on the Security Council "to ensure that fair and clear procedures exist for placing individuals and entities on sanctions lists and removing them, as well as for granting humanitarian exceptions" (paras. 85 and 109, respectively. See also 2005 Report of the Analytical Support and Sanctions Monitoring Team established pursuant to Security Council resolution 1526 (2004) (S/2005/83)). The Council has done so by instituting some changes to its Chapter VII actions, such as the shift from comprehensive to targeted sanctions.

However, in regard to the listing process where the lack of due process rights has been the most glaring, the 2006 amended guidelines within the Sanctions Committee for review of particular listings, the establishment of a Focal Point for De-listing based on Resolution 1730 (2006) within the UN secretariat, the appointment of an ombudsperson (SC Res.1904 (2009) to participate in the de-listing procedures, and the possibility for States to take up the diplomatic protection of their nationals, while constituting improvements and an acknowledgement of the need to ensure a modicum of "fair and clear procedures", fall far short of proper judicial remedies. The Council will not therefore be immune from further judicial challenges. But at least there has been the realization that an increasing perception of the illegitimacy of sanctions could seriously erode their effective implementation.

The problem is how to insist on limitations on the powers of international institutions without at the same time opening the door to unilateral determinations by States based on parochial interests and the hi-jacking of collective measures, which of course would constitute a set-back to the evolution of these organisations.