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GENERAL ARTICLES


By Erika de Wet* and André Nollkaemper**

A. Introduction

The aim of this article is to analyze the potential role of member states and in particular national courts in reviewing binding decisions adopted by or on behalf of the United Nations Security Council. The analysis is prompted by certain recent Security Council decisions that may cause conflicts with international human rights standards. Prominent examples are some of the Security Council Sanctions Committee’s decisions which were adopted in response to the terrorist attacks in the United States on 11 September 2001. These decisions imposed comprehensive economic sanctions against particular individuals who were suspected of maintaining links with international terrorist organizations, without allowing the individuals concerned to challenge the sanctions before an impartial tribunal.

The Sanctions Committee derived its competence to enact these measures from Resolution 1267 of 15 October 1999 and Resolution 1333 of 19 December 2000, respectively. Resolution 1267 was aimed at condemning the Taliban’s support for international terrorism and determined that the Taliban’s failure to stop providing sanctuary and training for international terrorists and their organizations constituted a threat to international peace.¹ The Chapter VII measures adopted in response to this threat included a request for Osama bin Laden’s extradition to a country where he had been indicted, as well as an air embargo against the Taliban and the freezing of its financial resources.²

In Resolution 1333 of 19 December 2000, the Security Council reaffirmed Resolution 1267. In addition, it determined that the Taliban’s refusal to stop providing sanctuary and training for international terrorists, as well as its refusal to turn over Osama bin Laden, constituted a threat to international peace and security.³ The resolution introduced an arms and air embargo against the Taliban. It also extended the financial embargo (i.e. the freezing of financial resources) to Osama bin Laden and individuals and entities associated with him and the Al’Qaida movement. The Sanctions Committee which was already established under Resolution 1267 was requested to maintain an updated list, based on information provided by states and regional organizations, of the individuals and entities designated as being associated with Osama bin Laden and the Al’Qaida movement.⁴ These additional measures

¹ These and all other SC resolutions cited in this article are available at: http://www.un.org/documents/sca/
⁴ Id., para. 8 lit. c.

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sanctuary and training for international terrorists and their organizations constituted a threat to international peace.¹ The Chapter VII measures adopted in response to this threat included a request for Osama bin Laden’s extradition to a country where he had been indicted, as well as an air embargo against the Taliban and the freezing of its financial resources.²

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were to be applicable for a period of 12 months, unless the Taliban complied with Resolution 1333 at an earlier stage, or unless it was extended by the Security Council. Following the terrorist attacks in the United States on 11 September 2001, the Security Council extended these economic measures (with an exception of the air embargo) for an indefinite period.\textsuperscript{9}

From a general perspective the freezing of financial assets belonging to specifically designated entities is a "smart sanction" that has gained general acceptance since the early 1990s.\textsuperscript{4} However, when a system of rules based on an inter-state paradigm establishes sanctions against individuals, fundamental legal rights of these individuals may be at risk.\textsuperscript{5} This is particularly the case where the competence of the Sanctions Committee to affect the rights of individuals is of a broad and sweeping nature, for example, by targeting individuals and undertakings that are "associated" with the Taliban, Osama bin laden and Al'Qaida.\textsuperscript{10}

Admittedly, such measures can be regarded as a justifiable preventative measure in the light of the serious threat that terrorism constitutes to international peace and security. At the same time, the individuals concerned are entitled to a fair hearing by means of which they can challenge the allegations against them. After all, the listing by the Sanctions Committee is a legal act with legal consequences. This requires an independent, impartial and even-handed procedure during which the evidence against potentially innocent victims of the listing procedure can be rebutted. The more drastic the scope and nature of the Sanctions Committee's action – in the present instance it resulted in the freezing of all assets and economic resources, except those needed for basic expenses –, the more compelling the obligation to provide for such a remedy will be.

\textsuperscript{1} See id., paras. 23-24.
\textsuperscript{2} Compare SC Res. 1388 of 15 January 2002, para. 1.
\textsuperscript{3} SC Res. 1390 of 16 January 2002, para. 3 also provided for a review of the sanctions after 12 months. However, at the end of this period the Security Council will either allow for these measures to continue or decide to improve them. The default position would thus be the continuation of the sanctions, as opposed to their termination, SC Res. 1452 of 20 December 2002, para. 1 lit. a and b eventually excluded funds necessary for basic expenses such as foodstuffs, rent, medical expenses etc, from the scope of the sanctions.
\textsuperscript{5} Brøg et al. (note 8), 319.
\textsuperscript{6} SC Res. 1333 of 19 December 2000, para. 8 lit. c and SC Res. 1390 of 16 January 2002, paras. 2 lit. a and 5 lit. a.

Neither the respective Security Council resolutions nor the Sanctions Committee itself provided for a legal remedy. According to the unpublished guidelines of the Sanctions Committee, affected individuals or undertakings can submit requests to be removed from the list to the Sanctions Committee via their respective Permanent Missions to the United Nations. These requests are, however, not reviewed by an impartial legal organ, but by the Sanctions Committee itself. This political organ thus has to act as judge in its own case, as the same members who initially suspected individuals or undertakings of involvement in international terrorism also have to consider the accuracy of that judgment.

In addition, the procedure by means of which the Sanctions Committee reviews the request for removal from the list could hardly be described as even-handed. Once the requests are circulated to the members of the Sanctions Committee, they have to communicate any objections to the Chair within two working days. Since the Sanctions Committee reaches decisions by consensus, it means that the removal from the list can be prevented by the objection of one single member. The meetings are further held behind closed doors and members do not have to give reasons for their objections. As a result, potentially innocent individuals can remain on the sanctions list and be deprived of their material resources for an indefinite period of time, without any evidence having been presented against them. International criticism of this state of affairs has prompted the Sanctions Committee to reconsider its procedures. However, no amendment has been adopted so far.

In this situation, individuals who are subjected to the sanctions will look elsewhere for procedures to protect their right. For example, three Swedish citizens whose assets had been frozen as a result of Resolution 1333 initiated proceedings before the Court of First Instance (CFI) of the European Court of Justice (ECJ) in December 2001. The central ground for their plea was that the freezing of their assets occurred in violation of the fundamental right to a fair and public hearing.\textsuperscript{11}

\textsuperscript{11} ECJ, Aden and others v. Council and Commission, CFI, initiated 10 December 2001, Case T-306/01. Their choice of forum was determined by the fact that in the European Union, SC Res. 1333 of 19 December 2000 was implemented by means of regulations of the Council of Ministers and the European Commission, respectively. See Council Reg. No. 467/2001 of 9 March 2001, O.J. 2001 L 67, 1 and Commission Reg. No. 2199/2001 of 13 November 2001, O.J. 2001 L 295, 1. Due to these regulations, the decisions of the Sanctions Committee became directly applicable throughout the European Union. At the time of writing it was still unclear whether the CFI would be willing to review the compatibility of the decisions of the Sanctions Committee with fundamental human rights norms. In a decision of 7 May 2002, the CFI had merely refused to award provisional measures in the form of a suspension of the mentioned Regulations vis-a-vis the individuals concerned, until a decision on the merits had been taken. According to the CFI, there was no risk of grave and irreparable damages as the claimants had access to social security and/or family benefits which provided their subsistence minimum. (An analysis of the implications of Security Council resolutions for European Union law and for the triangular relationship between the Security Council, the European Union and member states falls outside the scope of this article.)
Also, in the English courts a claim was brought to review a decision of the Secretary of State for Work and Pensions that implemented Resolution 1333 and in particular the related European Community Regulations. This emerging practice raises the question whether individuals can ask national authorities to review the evidence against them and, thereby, whether the state is authorized to engage in such a review.

Although several legal scholars have noted the possibility that national courts may be called upon to review the lawfulness of acts of the Security Council, none of them have thoroughly examined the competence of national courts to do this. This may also relate to the fact that the lack of national case law until recently made the question somewhat academic. However, the shift in focus of Resolution 1333, the likelihood that the approach of this resolution will be followed by future resolutions, and the fact that certain national courts are now indeed confronted with requests to review these resolutions, either directly or incidental to a review of national implementing legislation, makes it pertinent to examine the matter.

The purpose of the current article is twofold. It will first argue that when the Security Council authorizes binding decisions of a (quasi-)judicial nature, it is bound by due process norms. In this context particular reference is made to the freezing of assets of individuals associated with international terrorism. Thereafter the article discusses whether, since the Security Council has failed to provide those individuals affected with access to a fair hearing, member states have the authority and in certain circumstances arguably the obligation to review Security Council (authorized) decisions.

The article does not deal with judicial review of the Security Council by the International Court of Justice (ICJ). The persistent difficulties surrounding judicial review in contentious proceedings, \(^{17}\) and the difficulty to obtain judicial review by means of an advisory opinion, \(^{18}\) imply that the role of the ICJ in reviewing the legality of a Security Council resolution is likely to remain limited in future.

B. The Obligation of the Security Council to Respect Fundamental Human Rights

I. The Basis of the Obligation to Respect Human Rights

The Security Council’s obligation to respect human rights first and foremost follows from the purposes and principles contained in Articles 1 and 2 of the United Nations Charter (hereinafter: the Charter). \(^{19}\) Article 24 para. 2 explicitly states that the Security Council shall act in accordance with the purposes and principles of the organization when discharging its duties. \(^{20}\) The purposes and principles that are of particular relevance for this article are contained in Articles 1 paras. 1 and 3 and 2 para. 2 of the Charter. Article 1 para. 1 states that international disputes have to be settled in accordance with the principles of justice and international law. \(^{21}\) This

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\(^{19}\) Note that the article does not question whether the Security Council is competent under Chapter VII of the Charter to create a (quasi-)judicial body as a mechanism for maintaining or restoring international peace and security. This competence has been affirmed, \textit{inter alia}, by the International Criminal Tribunal for the former Yugoslavia in \textit{ICTY, Appeals Chamber, The Prosecutor v. Dinko Tadić, TT-94-1}, Decision on the Defense Motion for Interlocutory Appeal and Jurisdiction, 2 October 1995, para. 38, reprinted in: ILM, vol. 25, 1996, 35 (hereinafter: Tadić case).


\(^{18}\) Id., Chapter 2.


\(^{21}\) This is not affected by the fact that Art. 94 para. 2 of the Charter authorizes the Security Council to enforce a decision of the ICJ, where any of the parties to the dispute fails to comply with the ICJ’s judgment. This (in practice never utilized) power of the Security Council does
obligation, which is underpinned by principles of impartiality, independence and even-handedness, is strengthened when read together with Articles 1 para. 3 and 2 para. 2 of the Charter which oblige the United Nations to promote human rights and to respect the principle of good faith, respectively.

Since these purposes and principles are broad and vague, several authors question their utility in serving as limits to the Security Council’s enforcement powers. It has been argued that the collective reference to the purposes and principles in Article 24 para. 2 implies that the Security Council merely has to act in accordance with any one of them in order to fulfill its obligations under the Charter. This fact, combined with the breadth and dynamic nature of the purposes and principles, makes it unlikely that any act of the Security Council would fall outside of their scope. A reliance on the purposes and principles would therefore broaden the powers of the Security Council, rather than limit them.

These arguments are not convincing. First, the collective reference to the purposes and principles in Article 24 para. 2 relates to the fact that they are listed individually in Articles 1 and 2 of the Charter, which would make any repetition unnecessary. Acting in accordance with the purposes and principles would rather mean that the Security Council may not maintain peace and security at the complete expense of any of them. The Security Council has to balance the realization of its primary goal with the realization of the secondary goals contained in Articles 1 and 2 of the Charter. Although this implies a limitation of the secondary goals contained in the Charter, it may not lead to erosion of their core content. Economic enforcement measures under Chapter VII therefore may not lead to a complete erosion of the principles of justice and international law during dispute settlement, or undermine basic human rights norms and the principle of good faith.

not in itself bring about any modification of the rights or obligations of the states involved in the dispute. Instead, the modification is brought about by a binding judgment, which resulted from a judicial settlement procedure which the parties consented to. The Security Council can merely enforce this modification if and to the extent that it was consented to. See Gaetano Arangio-Ruiz, On the Security Council’s Law-Making, Rivista di Diritto Internazionale, vol. 83, 2000, 624.


23 During the debates of the Committee on the Structure and Procedure of the Security Council at San Francisco, the delegate of the United States, in particular, stressed that the Security Council was bound by the purposes and principles of the Charter. In his opinion the principles of equal rights, self-determination and the promotion and encouragement of respect for human rights and fundamental freedoms for all without respect to race, language, religion

In spite of the broad language of Article 1 para. 3 of the Charter, the core content of the human rights norms in question can be drawn from the rights guaranteed in the International Bill of Rights, i.e. the Universal Declaration of Human Rights of 1948, the International Covenant on Civil and Political Rights of 1966 (ICCPR) and the International Covenant on Economic, Social and Cultural Rights of 1966.

These documents represent an elaboration upon the Charter’s original vision of human rights found in Article 1 para. 3 and Articles 55 and 56. The human rights contained in these documents thus constitute the human rights that, under Article 1 para. 3, the United Nations has to promote and respect.

In addition, the principle of Article 2 para. 2, which requires that the obligations under the Charter are performed in good faith, implies that the United Nations conform to the human rights standards that have been developed within the framework of the organization. Under Article 55, the United Nations shall promote respect for those human rights. The organization has created an extensive system for monitoring their implementation. By promoting human rights in this manner, the United Nations created the expectation of respect for these rights on the part of the organization itself. The obligation to act in good faith obliges the member states, or sex constituted the highest rules of conduct. If the Security Council violated the principles and purposes of the Charter it would be acting ultra vires. See United Nations Conference on International Organization, vol. 11, 1945, 378. See also Dupa Ahande, The International Court of Justice and the Security Council: is there Room for Judicial Control of Decisions of the Political Organs of the United Nations?, ICLQ, vol. 46, 1997, 319; Barbara Lorinsen, Bindende Resolutionen des Sicherheitsrates, 1996, 54.

24 The text of these and all other UN human rights documents cited in this article are available at: www.unhchr.ch.


27 Art. 2 para. 2 obliges members to fulfill their obligations under the Charter in good faith. At first glance it seems as if this obligation is addressed to the individual member states rather than the organization. However, when one reads it together with the first sentence of Art. 2, it becomes clear that the members have to act in good faith both when acting individually and as an organ of the United Nations. This introductory sentence explicitly states that the organization and its members shall act in accordance with the principles contained in that Article. See also ICJ, Conditions of Admission of a State to Membership in the United Nations (Article 4 of the Charter), Advisory Opinion of 28 May 1948, ICJ Reports 1948, 57; Herbst (note 17), 359-361.

28 Michael Freis, Sicherheitsrat der Vereinten Nationen und internationaler Gerichtshof, 1998, 82-83; compare also Ahande (note 23), 324.
acting alone or in the context of an organ of the United Nations, to fulfill legally relevant expectations that are raised by their conduct with regard to human rights standards accepted in the framework of the organization. 24 On the basis of the principle of good faith, one can therefore argue that organs of the United Nations, including the Security Council, will be estopped from behavior that violated the rights protected in these treaties. 25

The term estoppel, in its meaning as a principle that precludes a state from denying before a tribunal the truth of a statement of fact made previously by that state to another, 26 has mainly been applied to inter-state relations. However, it is a general principle of law and as such can also be used to bind organs of international organizations to their previous actions. 27 Moreover, the application of the principle of estoppel is not limited to cases in which the party to whom a statement has been made has acted to its detriment, or the party making the statement has secured some benefit (so-called ‘equitable estoppel’). 28 It also applies to cases in which one party has made statements and requirements of consistency and protection of expectations preclude from it later denying these statements. 29 The principle of estoppel has an objective nature, in that it would be the objective assessment of whether an organ of the United Nations acted in accordance with the meaning and spirit of good faith, 30 rather than that organ’s subjective perception of its integrity, that matters. 31

In summary, therefore, the Security Council is bound by fundamental human rights for two separate, albeit closely related, reasons. 32 First, it concerns norms which constitute elements of the purposes of the United Nations. In addition, the United Nations has committed itself to these norms in a fashion that has created a legal expectation that it will honor them when authorizing (quasi-)judicial measures as a mechanism for restoring international peace and security. Any behavior to the contrary would violate the principle of good faith to which the organization is bound in terms of Article 2 para. 2 of the Charter. 33

One manifestation of the obligation to respect human rights in the practice of the Security Council is the humanitarian exemptions clause that has consistently been included in United Nations sanctions regimes. 34 Despite the fact that these exemp-

24 Jörg P. Müller, Article 2 (2), in: Bruno Simma (note 17), 93.
25 Fiona (note 27), 82; see also Akeste (note 23), 323. He claimed that it would be anarchistic if an organ of the United Nations were itself empowered to violate human rights, when the whole tenor of the Charter is to promote the protection of human rights by and in states.
27 Herbst (note 17), 363.
28 Bin Cheng, General Principles of Law as applied by International Courts and Tribunals, 1953, 143–144.
29 Id., 147; Georg Schwatnerberger, International Law as applied by International Courts and Tribunals, 1945, 392–394. The principle in this form was accepted, inter alia, by the Permanent Court of International Justice in Legal Status of Eastern Greenland, Judgment of 5 April 1933, Series A/B, No. 53, 21, 62, and in the case of the European Commission of the Danube between Galatz and Braila, Advisory Opinion of 8 December 1927, Series B, No. 14, 3, 23. In the latter case the PCJ stated that where states, acting on a multilateral convention to which they were all parties, had concluded certain arrangements, they could not, as between themselves, contend that some of its provisions were void and being outside the mandate of that convention. It might be argued that if the Security Council were to violate fundamental human rights, this would constitute a case of equitable estoppel as the Security Council would be securing a benefit in the form of an aggravation of its powers.
30 Müller (note 30), 229–230. But see Nigel White, To Review or Not to Review? The Lockerbie Cases Before the World Court, JFL, vol. 12, 1999, 419, who submitted that a lack of good faith would only be a justifiable limit to Security Council action if it can be explained why all its members went along with the resolution, in spite of them being aware that it was in bad faith. This argument cannot be accepted, since determining the subjective motives for state action is a virtually impossible task based on speculation.
31 Compare the cautious approach of Herbst (note 17), 363. He stated that the principle is applied restrictively in that it does not foreclose a future expectation of an abstract nature. For example, in SC Res. 984 of 11 April 1995, para. 2, the Security Council stated that its nuclear weapon state permanent members will act immediately in accordance with the relevant provisions of the Charter, in the event that non-nuclear weapon states, who are parties to the Treaty on the Non-Proliferation of Nuclear Weapons, are the victim of an act of aggression in which nuclear weapons are used. One could be tempted to read this as a self-imposed, binding obligation to intervene in the case of a nuclear attack on a non-nuclear state. However, Herbst suggests that due to the general and abstract nature of the declaration, it is unlikely that states could rely on the estoppel principle if the Security Council refrained from intervening in the described circumstances.
32 The separate argument that the Security Council can be bound by customary human rights law does not need to be considered here, as that body of law would be overruled by resolutions adopted under Chapter VII.
33 The conclusion that the organs of the United Nations are required to comply with human rights appears to be accepted by states; see, e.g., the position of Ireland in the case Eur. Court H.R., Bosphorus Hazar Yollari Turizm ve Ticaret Anonim Sirketi (“Bosphorus Airways”) v. Ireland, Admissibility Decision of 13 September 2001, available at: http://hudoc.echr.coe.int. Ireland stated: "That the UN provides equivalent protection is demonstrated by Articles 13 (3) and 55 of its Charter, the Universal Declaration of Human Rights of 1948 and the International Covenants on Civil and Political Rights and on Economic and Social and Cultural Rights of 1966.
34 To name but a few examples see SC Res. 253 of 29 May 1968, para. 3 lit. d et seq. (Southern Rhodesia); SC Res. 986 of 14 April 1995, para. 1 et seq. (Iraq); SC Res. 757 of 30 May 1992, para. 4 lit. c et seq. (Former Yugoslavia); SC Res. 841 of 16 June 1993, para. 7 (Haiti).
tions have often proved to be insufficient in practice, they do at the very least reflect some formal recognition of the Security Council's acceptance of basic human rights obligations.

II. Human Rights Pertaining to the Anti-Terrorism Resolutions

Of the human rights thus binding on the United Nations, one is of particular relevance to the resolutions and decisions that seek to address the problem of terrorism: The right of individuals to a fair hearing in regard to decisions that affect their individual rights and obligations. Article 14 para. 1 ICCPR provides that in the determination of any criminal charges against individuals, or of their rights and obligations in a suit of law, everyone should be entitled to a fair and impartial hearing by a competent, independent and impartial tribunal established by law.

Although the wording of this provision could be interpreted as merely containing procedural guarantees in relation to judicial proceedings, it is submitted that also the right of access to a fair hearing forms a part of the guarantee of Article 14 para. 1. This would certainly be the case with respect to the determination of any criminal charges against a person. Were this not the case, a state could do away with its criminal courts, or transfer their jurisdiction to determine certain categories of criminal charges to bodies which do not possess the minimum attributes of a judicial tribunal. It would be inconceivable that this article should describe in detail the procedural guarantees afforded to parties facing criminal charges without protecting that which alone makes it possible for the parties to benefit from such guarantees.

With regard to non-criminal proceedings ("suit of law"), Article 14 para. 1 would, at the very least, guarantee equal access to courts. The Human Rights Committee has observed that a situation in which an individual's attempts to seize the competent jurisdictions of his or her grievances are systematically frustrated runs counter to the guarantees of Article 14 para. 1, as the notion of equality before the courts encompasses the very access to the courts.

As far as criminal proceedings are concerned, it is noteworthy that the Human Rights Committee has not yet interpreted the concept of "criminal charge." As this term corresponds literally with that in Article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms of 1950 (hereinafter: the European Convention), the Strasbourg jurisprudence may serve as guidance in this regard. According to the European Court of Human Rights (hereinafter: ECHR), the nature and severity of the threatened sanction, as well as the type of sanctioned offence is to be drawn upon in evaluating whether a criminal charge exists. For Article 6 to apply in virtue of the words "criminal charge," it suffices that the offence in question should have made the person concerned liable to a sanction which, due to its nature and degree of severity, places it within the "criminal" sphere.

In the case under discussion, the freezing of assets was undertaken in response to the alleged involvement of those individuals in international terrorism. In addition, it would constitute a sanction belonging to the criminal sphere, in light of its punitive nature, severity, as well as the stigmatization resulting from it. It is therefore fair to conclude that the freezing of the assets of the individuals concerned can qualify as a punitive sanction and the underlying decision as a criminal charge. In addition, the listing by the Sanctions Committee may directly be the basis for criminal charges at the national level.

Alternatively, individuals may seek to contest the freezing of assets on the basis that it denies them equal access to courts for the purpose of determining their rights in a suit of law. The Human Rights Committee has adopted a broad interpretation

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41 See extensively de Wet (note 15), Chapter 6.
45 Id. See also Manfred Nowak, UN Covenant on Civil and Political Rights: CCPR Commentary, 1993, 241.
of the term 'suit at law.' For example, in *Y.L. v. Canada* the Human Rights Committee regarded a claim for a disability pension by a former Army member as constituting a suit at law. The same applies for situations where individuals had allegedly been subjected to illegal expropriation and property confiscation. One could therefore argue that a challenge to the de facto expropriation resulting from the freezing of assets would constitute a 'suit at law.' In addition, the fact that this particular category of persons are denied access to a legal tribunal in order to contest the legality of the action would undermine the principle of equal access to courts, which is entrenched in Article 14 para. 1.

As far as the actual procedural guarantees are concerned, Article 14 para. 1 provides an institutional guarantee in the sense that rights and obligations in civil suits or criminal charges are to be heard by a competent, independent and impartial tribunal established by law. The terms competent and established by law are effectively synonyms, aimed at ensuring that the jurisdictional power of a tribunal is determined generally and independent of the given case, i.e. not arbitrarily or by a specific administrative act. Courts and tribunals must also be independent and judges may not be subjected to political directives. Impartiality, for its part, relates to the personal neutrality of a judge towards a particular case. Judges are not impartial where they are biased, i.e. where they have a personal interest in the case before them. In addition to these institutional principles, the principle of equality of arms between the parties constitutes the most important element of a fair hearing. One example thereof would be that the inspection of records or submission of evidence must be dealt with in a manner equal to both parties.

At this point it must be noted that the Security Council may derogate from the rights protected by Article 14 on the basis that its decisions presuppose the existence of an emergency situation in the form of an international threat to peace and security. This is the logical conclusion to be drawn from Article 4 para. 1 ICCPR, which allows states to derogate from the right to a fair trial (and other derogable rights contained in the ICCPR) in times of emergency. However, there is increasing support for the proposition that the core elements of the right to a fair hearing in Article 14 para. 1 are to be considered as non-derogable. In its recent General Comment on States of Emergency, the Human Rights Committee noted that in situations of armed conflict, common Article 3 of the Geneva Conventions of 1949 explicitly guarantees the core elements of the right to a fair trial and there would be no justification for derogation from these guarantees during other emergency situations.

Moreover, if one accepts the derogability of the right to a fair hearing, this derogation is subjected to a strict principle of proportionality. States may only derogate from their obligations to the extent strictly required by the exigencies of the situation.
One may argue that a more lenient proportionality principle should apply to the Security Council in order to enable it to fulfill its special role in the maintenance of international peace and security in an efficient manner.\textsuperscript{43} One example of this leniency would be to permit the freezing of assets of those suspected of involvement with international terrorism as a preventative measure. This would allow the Security Council to reverse the presumption of innocence, as the onus would be on the suspects to prove that they are not involved in international terrorism.

In the case of member states it is highly unlikely that such a drastic measure would be in conformity with Articles 4 and 14 ICCPR.\textsuperscript{44} However, in the case of the Security Council such a drastic limitation of the right to a fair hearing could arguably be justifiable in the light of the gravity of the threat posed by international terrorism, the difficulties involved in combating terrorism due to its hidden nature, as well as the need of the Security Council to act efficiently in the interest of international peace and security. For the same reasons the Security Council could exclude the press and the public from the hearings of the individuals concerned and could arguably even require that the outcome not be made public. This would imply a more lenient approach regarding the publicity of hearings than with respect to states. Whereas the second sentence of Article 14 para. 1 ICCPR does allow states to exclude the public from hearings under certain circumstances, they are nonetheless obliged to make public the judgment, except where the interests of juvenile persons, matrimonial proceedings or guardianship disputes require otherwise.

At the same time, however, this right to derogation may not result in a complete negation of the right to a fair hearing. The essence of this right implies that those suspected of involvement with international terrorism must (at least) afterwards be granted access to an independent, impartial and even-handed forum where they can rebut the allegations against them. It appears that none of the arguments underpinning the right to derogate from Article 14 in the interest of peace and security can support a denial of access to a fair hearing after the decisions to freeze assets have been taken. Such a denial would be disproportionate and not in conformity with Article 4 ICCPR. It would further be counter-productive, as the withholding of evidence by intelligence services would also severely undermine the ability of national authorities to prosecute suspected terrorists in an efficient manner.

If one applies these principles to the case at hand, it may be concluded that the freezing of assets of those appearing on the list of the Sanctions Committee in accordance with Resolution 1333, can trigger the rights protected by Article 14 ICCPR. As a result, the Security Council is obliged to provide or allow for an independent, impartial and even-handed review of the Sanctions Committee's decisions vis-à-vis the affected individuals.

It would be within the discretion of the Security Council to determine whether this review mechanism should be of a centralized or decentralized nature. In the former instance the review would be exercised by the United Nations itself, for example, in the form of a quasi-judicial review board. As noted earlier, the resolutions at issue do not provide for such a mechanism and the procedure within the Sanctions Committee cannot be considered satisfactory in terms of the requirements of the ICCPR. In the latter instance, the review would be exercised by the domestic courts of the member states. Resolution 1333 does not provide for this possibility either. This raises the question whether, despite the absence of express authorization, national courts nonetheless can provide for review. This question is examined in Sections D-F.

C. Due Process and *jus Cogens*

In addition to the limitations of the powers of the Security Council flowing from the purposes and principles of the Charter and from the principle of good faith, the powers of the Council are also limited by rules of *jus cogens*.

Although the Security Council may deviate from customary international law or treaty law when maintaining international peace and security,\textsuperscript{45} most authors agree that these deviations find their limits in peremptory norms of international law, otherwise known as *jus cogens*.\textsuperscript{46} This position is often justified with the argument that states cannot confer more powers to organs of international organizations than they can exercise themselves. Since states may not deviate from peremptory norms

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\textsuperscript{43} This was confirmed by the Human Rights Committee, General Comment No. 5, Derogation of Rights (1981), para. 3, and id., General Comment No. 29 (note 62), para. 2 and para. 4 (2000). This is also recognized in the case law of the ECHR on Art. 6 para. 1, which is comparable to Art. 14 ICCPR. See, e.g., Eur. Court H.R., Watie and Kennedy v. Germany, Judgment of 18 February 1999, para. 59, available at: http://hudoc.echr.coe.int. The ECHR held that a limitation to Art. 6 para. 1 will not be compatible with this Article if it does not pursue a legitimate aim and if there is no reasonable relationship of proportionality between the means employed and the aim sought to be achieved.

\textsuperscript{44} For example, with respect to economic sanctions it would be appropriate to apply the more flexible proportionality principle as developed by the law of armed conflict. See *Erika de Wet*, Human rights limitations to economic enforcement measures under Art. 41 of the United Nations Charter and the Iraqi sanctions regime, JJL, vol. 14, 1991, 292-296.

\textsuperscript{45} In General Comment 29 (note 62), para. 16, the Human Rights Committee indicated that the presumption of innocence has to be respected during a time of emergency.

\textsuperscript{46} For a discussion see *de Wet* (note 15), Chapter 5.
of international law themselves, they would not be able to permit organs of the United Nations to deviate from these norms. This argument presupposes that the delegation of powers by member states to the organization is not a once-only event that coincides with its creation. Instead, it is an ongoing inter-action as a result of which the powers delegated to the organization are afterwards limited by the development of *jus cogens*. An organ such as the Security Council therefore has to take into account the evolution of new *jus cogens* norm when adopting enforcement measures.

If the delegation of powers consisted of a single action that did not provide for any ongoing inter-action (i.e. "progressive limitation"), the Security Council would not be bound to those *jus cogens* norms which developed after the entering into force of the Charter. These norms would only limit the powers of member states when acting individually and would not affect the powers previously conferred on the Security Council. As a result, states could instrumentalize the Security Council to undermine their most fundamental international obligations, as the norms of *jus cogens* would not apply when they are taking collective action as members of the Security Council. For example, provided that the requisite majority in the Security Council could be secured, states could engage in apartheid, slavery or even genocide in the name of the maintenance of international peace and security. In order to avoid such a clearly unacceptable situation, the conferment of powers on the Security Council has to be regarded as an ongoing inter-action, to the extent that these powers are afterwards limited by the development of *jus cogens*.]

Whether *jus cogens* also provides limitations relevant to the anti-terrorism resolutions of the Security Council is a matter for debate. In addition to the well-established *jus cogens* norms of the prohibition of the unilateral use of force, the right to self-defense, the prohibition of genocide, respect for the basic norms of humanitarian law, the right to self-determination, and basic human rights such as the prohibition of racial discrimination, torture and slavery, it may be argued that at least in the context of criminal prosecution the core elements of a right to a fair hearing have also acquired *jus cogens* status.

Support for this conclusion could be drawn from the fact that these guarantees have, in practice, achieved a non-derogable status under the ICCPR, as they are essential for ensuring the enjoyment of other non-derogable rights and to provide an effective remedy against their violation. While the categories of *jus cogens* and non-derogable rights are not identical, there exists a close relationship between non-derogable rights and peremptory norms of international law. This was explicitly acknowledged by the Human Rights Committee, which described the proclamation of certain rights as being of a non-derogable nature as a recognition, in part, of their peremptory nature. The Human Rights Committee also stated that the category of peremptory norms extended beyond the list of non-derogable provisions as given in Article 4 para. 2 ICCPR. States may in no circumstances invoke this Article as justification for, inter alia, deviating from fundamental principles of fair trial. The *jus cogens* status of these norms also finds support in certain statements of the International Criminal Tribunal for the former Yugoslavia (ICTY), notably in the *Tadić* decision. The Appeals Chamber regarded it as "essential" that the principles of fairness and even-handedness as provided for in Article 14 ICCPR are guaranteed by a judicial forum such as the ICTY. The Secretary-General also hinted at the

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44 See in particular *France* (note 67), 662.
45 Compare Vera Goralland-Debbas, *Judicial Insights into Fundamental Values and Interests of the International Community*, in: Alexander S. Møller et al. (eds.), The International Court of Justice. Its Future Role after Fifty Years, 1997, 363. *Jus cogens* is a dynamic concept, the content of which evolves in accordance with the changing requirements of the international community.
46 *Akande* (note 23), 320; *Fraas* (note 27), 78; *Herbst* (note 17), 377; *Lorimer* (note 23), 53.
47 According to Jost Delbrück, Article 24, in: *Simma* (note 17), 404, one cannot describe the conferment of powers on the Security Council as a "delegation" of powers. The Security Council is an organ of the United Nations which acts on behalf of the organization and not on behalf of the member states. Its actions and decisions are attributed to the United Nations organization as a whole and not to individual members, such as the members of the Security Council. However, even if one accepted this argument, it would not alter the fact that the member states remain the primary source of the powers vested in the Security Council. The Charter cannot grant the Security Council more powers than the member states intended it to have, nor can it enable the Security Council to do anything which the member states cannot do themselves. Compare *Gill* (note 17), 68; see also Danesh Sarooshi, *The United Nations and the Development of Collective Security*, 1999, 27. See also *ICJ*, *Legality of the Use by a State of Nuclear Weapons in Armed Conflict*, Advisory Opinion of 8 July 1996, ICJ Reports 1996, 66; *Tadić* case (note 14), para. 29.
peremptory nature of these norms, when stating that full respect for the internationally recognized rights of the accused as con-tained in Article 14 ICCPR would be "axiomatic" at all stages of the ICTY's proceedings. 9

Although there is little support in terms of express recognition of the jus cogens quality of the right to a fair trial, in the light of the above one could argue that in the context of criminal proceedings the right to a fair hearing constitutes a norm of jus cogens which has to be respected by states and organs of the United Nations alike. That would provide additional ground for the argument that the Security Council acted illegally in enacting the anti-terrorism resolutions without creating possibilities for independent review.

The fact that the Security Council has not provided for a fair hearing for those individuals whose assets have been frozen in accordance with Resolution 1333 thus means that it has violated the purposes and principles of the Charter as concretized by Article 14 ICCPR, the obligations to act in good faith and arguably a norm of jus cogens.

D. The Right of States to Review Security Council Resolutions

Given that the Security Council has not provided for a right to a fair hearing by the United Nations itself, the question that now has to be answered is if and to what extent member states are allowed to provide for review. The authors take the position that when the Security Council does not provide for a fair hearing under the circumstances outlined above, member states of the United Nations retain, under certain conditions that protect the interests of effectiveness of the organization (see Section F), the right to review resolutions of the Security Council.

At this stage, a clarification of the term 'review' and its application to the relationship between the United Nations and member states is necessary. In legal terms, the term 'review' is commonly used to refer to the judicial consideration of a decision by a lower court or an administrative authority by a higher court. Coupled to this notion of review is that the reviewing institution can annul, set aside or declare illegal the contested act. Clearly, it is not possible to construe the powers of national authorities vis-à-vis the Security Council in those terms. This construction would mean legal review of acts of a higher authority by a lower authority. It also might be taken to imply, though it does not necessarily carry that implication, that lower authorities would have to power to annul or invalidate the reviewed act of a higher authority. These constructions do not fit in the system of international law - nor, for that matter, in any legal system. The authors use the term 'review' in a wider sense, referring to a process in which authorities of a state can, on the basis of a fair hearing, adjust the implementation of the decision, without that leading to annulment or invalidation.

The question whether there is a role for unilateral authority of member states to refrain from full application of Security Council resolutions if they may violate human rights is a highly complex one. 8 It involves a balance between the importance of the effectiveness of international organization, in particular in the sphere of peace and security, and the need of any legal system to attach consequences to what may appear as unlawful acts. 8 Most fundamentally, the position that member states of the United Nations retain, under certain conditions the right to review Security Council resolutions is based on the maxim that any restricted delegation of power must have some system of control for ensuring that the institution to whom the power is delegated functions the way it was designed to. 86 Given that the Security Council itself has not provided for a system of control, review by member states is the last option to provide the necessary control over the exercise of power by the Security Council. Two arguments provide specific legal authority for the proposition.

I. Powers of Review Based on Article 25 of the Charter

The first argument can be derived from Article 25 of the Charter. This provides that members of the United Nations agree to accept and carry out the decisions of the Security Council "in accordance with the present Charter."

The normal consequence of this Article is that member states are bound by Security Council decisions and cannot unilaterally suspend such decisions. Only the Security Council (and not member states) is competent to terminate measures adopted under Chapter VII. This reasoning was reflected by the reaction of the General Assembly and the Security Council to the United Kingdom's unilateral lifting of the mandatory sanctions against Southern Rhodesia in 1979. 87 These

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86 Jennings (note 82), 85.
sanctions were imposed by the Security Council in reaction to Southern Rhodesia's illegal secession in 1965. When this rebellion finally ended in 1979, the United Kingdom lifted the sanctions unilaterally on 12 December 1979. The General Assembly responded by adopting Resolution 34/192 of 18 December 1979, which affirmed that it was within the exclusive authority of the Security Council to revoke mandatory sanctions imposed by that organ and that any unilateral action in that regard would violate states' obligation under Article 25 of the Charter. The Security Council, for its part, still considered it necessary to terminate the sanctions in Resolution 460 of 21 December 1979, despite the United Kingdom's unilateral lifting of the sanctions a week earlier. This illustrates that both the General Assembly and the Security Council regarded the Security Council itself as the entity exclusively competent to end economic measures adopted under Chapter VII and that member states are not allowed to suspend such measures unilaterally.

However, it is submitted that this operation of Article 25 is confined to measures that are adopted in accordance with its purposes and principles of the Charter. At first sight Article 25 can be confusing as it is not clear whether the phrase "in accordance with the present Charter" refers only to the member states or the organization as well. If it referred only to the member states they would be obliged to carry out decisions of the Security Council under all circumstances. If, however, the phrase referred to the organization as well, the member states would only be obliged to carry out those decisions that were adopted in accordance with the Charter, i.e. in accordance with its purposes and principles and the norms of jus cogens.

If one reads Article 25 together with the first sentence of Article 2 para. 5 of the Charter, it becomes clear that the latter approach is to be preferred. Article 2 para. 5 determines that all members shall give the United Nations every assistance in any action it takes "in accordance with the Charter." From this formulation it clearly follows that the organization has to act in accordance with the Charter. In addition, a closer look reveals that the "action" that has to be in accordance with the Charter refers to enforcement action under Chapter VII. At first glance, Article 2 para. 5 seems to convey a general obligation for member states to give assistance to the organization. However, since this general obligation is already conveyed by Article 2 para. 2, Article 2 para. 5 must have a narrower scope of application, if it is not to be regarded as merely repetitive and therefore redundant. The reference to "enforcement action" in the last sub-sentence of Article 2 para. 5 indicates that only "action" taken by the Security Council according to Chapter VII could have been envisaged here.

Consequently one can conclude that the obligation to assist the organization in the first part of the sentence only concerns decisions by the Security Council under Chapter VII as far as they were taken in accordance with the Charter. Thus, since Article 2 para. 5 obliges states to respect Chapter VII resolutions that were adopted in accordance with the Charter, the logical implication is that they are not bound to do so where this is not the case. It then becomes illogical to see how member states can be obliged in terms of Article 25 to follow binding resolutions which are not in accordance with the Charter.

In summary therefore the letter and spirit of Articles 25 and 2 para. 5 of the Charter permit member states of the United Nations to refuse to implement binding Security Council resolutions, where their illegality is beyond doubt and it is clear that the Security Council has no intention of revoking the illegal resolution.
II. Powers of Review Derived from Member States' Own Human Rights Obligations

The second line of argument supporting the right of member states to engage in review is that the member states themselves are obliged under international law to ensure that fundamental human rights are respected. Under customary law, the ICCPR, or applicable regional human rights treaties, they are obliged to ensure, \textit{inter alia}, the protection of the right to a fair hearing. If member states choose to transfer certain powers to international organizations and the exercise of those powers may result in a violation of the human rights that they are obliged to guarantee, they have to secure that proper judicial avenues at the international level are available. If not, the final responsibility for the human rights violation in question continues to rest with the member states.

This has been underlined by the ECHR in \textit{Waite and Kennedy v. Germany}. This case involved a labor dispute between the applicants, and the European Space Agency (ESA). When the German courts granted the ESA immunity from jurisdiction, the applications argued that Germany thereby violated their 'right to a court' under Article 6 para. 1 of the European Convention. The Court held:

Where States establish international organizations in order to pursue or strengthen their cooperation in certain fields of activities, and where they attribute to these organizations certain competencies and accord them immunities, there may be implications as to the protection of fundamental rights. It would be incompatible with the purpose and object of the Convention, however, if the Contracting States were thereby absolved from their responsibility under the Convention in relation to the field of activity covered by such attribution.\(^{102}\)

The responsibility of member states for the protection of human rights by international organizations to which they have transferred powers was also recognized by the ECHR in the \textit{Matthews} case.\(^{103}\) In this case, the applicant had applied to the Electoral Registration Officer for Gibraltar to be registered as a voter at the elections to the European Parliament. The Electoral Registration Officer declined to do so, because the European Community Act on Direct Elections of 1976 (a treaty instrument agreed by all European Community member states) did not include Gibraltar in the franchise for the European parliamentary elections. According to the applicant, this violated Article 3 of Protocol No. 1, which provides that the contracting parties undertake to hold "free elections at reasonable intervals by secret ballot, under conditions which will ensure the free expression of the opinion of the people in the choice of the legislature." The ECHR held that while the European Convention did not exclude the transfer of competencies to international organizations, states party must continue to secure the rights under the European Convention. Member states' responsibility therefore continues even after such a transfer.\(^{104}\)

The Court observed that in respect of the obligations of states under the European Convention,

\[\text{[\ldots]}\]there is no difference between European and domestic legislation, and no reason why the United Kingdom should not be required to "secure" the rights in Article 3 of Protocol No. 1 in respect of European legislation, in the same way as those rights are required to be "secured" in respect of purely domestic legislation. In particular, the suggestion that the United Kingdom may not have effective control over the state of affairs complained of cannot affect the position, as the United Kingdom's responsibility derives from its having entered into treaty commitments subsequent to the applicability of Article 3 of Protocol No. 1 to Gibraltar, namely the Maastricht Treaty taken together with its obligations under the Council Decision and the 1976 Act.\(^{105}\)

From these cases it follows that where States establish international organizations and attribute powers to them in order to pursue or strengthen their cooperation in certain fields of activities, they may remain responsible under international human rights law for the consequences of the exercise of the powers by the international organizations.\(^{106}\)

This conclusion is based on the fact that the obligation of the European Convention predates the later transfer of competencies to, respectively, the ESA and the EC. Moreover, the ECHR's conclusion that the European Convention would prevail over later treaty obligations between the same parties might be based on two arguments. First, the obligations to respect the human rights laid down in the European Convention are not simply obligations existing between the states parties that can be terminated at any moment in favor of subsequent treaty obligations.\(^{107}\) The normal conflict rule applying between parties that later treaties prevail over earlier ones\(^{108}\) therefore would not automatically be applicable. Second, the ECHR did not appear to approach the matter in terms of a conflict between treaties, but as a matter of state responsibility which is not affected by any of the rules of treaty on the relationship between incompatible treaties.\(^{109}\)

From these cases one could infer that the responsibility securing human rights would only apply to treaty obligations entered into after the entry into force of the

\(^{102}\) \textit{Waite and Kennedy v. Germany} (note 63), para. 67.


\(^{104}\) \textit{Id.}, para. 32.

\(^{105}\) \textit{Id.}, para. 34.


\(^{107}\) In \textit{Eur. Court H.R., Loizidou v. Turkey}, Judgment of 23 March 1995, Series A, No. 310, \textit{para. 75}, the Court described the Convention as "a constitutional instrument of European public order (ordre public)."


\(^{109}\) \textit{Id.}, Art. 73; see also \textit{ICJ, GaboKosovo-Nagymaros Project (Hungary v. Slovakia)}, Judgment of 25 September 1997, \textit{ICJ} Reports 1997, 7, 38.
European Convention (or the ICCPR), and thus would not be relevant to the Charter of the United Nations. However, that would appear to be a too narrow conclusion. The same matter of state responsibility can arise in case of a conflict between human rights obligations and a subsequent binding decision of an international organization. Even though the decisions of the United Nations (i.e., the Security Council) are adopted by only fifteen members, they are decisions of the organization as a whole for which all members who are party to the ICCPR remain responsible, if and to the extent that these decisions violate fundamental human rights. Any other conclusion would create a dangerous loophole by which member states, by exercising powers in the context of an international organization rather than unilaterally, could evade international responsibility for their obligations to respect human rights.110

In some member states, the obligation to review international acts and to deny them effect when they breach fundamental rights may follow from national constitutional law. An example are the decisions of the German courts to the effect that the constitutional power to transfer sovereign powers to international organizations under Article 24 of the German Basic Law is limited by the necessity to respect the human rights of individuals.111 If such rights are affected, national courts must, as a matter of reasons the legislature of certain states can deny domestic legal effect to international acts is not derived from national constitutional law but from public international law itself.112 Member states may be held responsible under international law for an infringement of human rights by international organizations to which they have transferred powers. If follows that member states are obliged to take all necessary measures to prevent the infringement. With the exception of the five permanent members, states will most likely not be able to exercise control within the Security Council. However, by reviewing the compatibility of the resolutions with fundamental human rights and refusing to apply them when violations are found, member states can still provide the necessary protection. Anything less would imply that courts (or other state organs) are participating in an internationally wrongful act committed by the Security Council.113

The two arguments considered here (based on the interpretation of Article 25 of the Charter and the human rights obligations of member states) are closely related. On the one hand, the argument based on the human rights obligations of the members provides authority to member states to carry out the review in the context of Article 25 of the Charter. On the other hand, the argument that the Security Council itself has contravened the Charter by failing to respect fundamental human rights allows states to give effect to their human rights obligations even when that means non-implementation of a Security Council decision. For in the absence of a finding that the Security Council overstepped its powers, any international legal requirements of member states to respect human rights would be overruled by the decisions of the Security Council under Article 103 of the Charter.114 That conflict rule would not be applicable when the Security Council itself has acted in contravention of the Charter or violated a norm of jus cogens.

The consequences of the combination of the two legal bases illuminated above are twofold. First, member states have the power to enter into a review of the decisions of the Security Council. Second, in case they find that application of a resolution would clearly not find factual evidence that supports the decisions, and subject to the conditions to be discussed in Section F, members are to refrain from giving

110 Compare paras. 3 and 17 of the Commentary of the International Law Commission (ILC) to Art. 7 of the draft Articles on State Responsibility as adopted on first reading (in second reading numbered as Art. 5), Yearbook of the International Law Commission, vol. 1974-II, 277-283. The ILC applied the same principle to the transfer of competencies for exercising governmental authority to entities separate from the state machinery.


113 Note that a national court will only be able to review the SC decisions on the grounds considered here if the human rights prescriptions have been made valid and directly applicable in the national legal order concerned. In some states, like the United States, this will effectively preclude review directly on the basis of international human rights law. This leaves the options of denial to implement because of invalidity of the SC decision and/or incompatibility with national constitutional law.


115 Art. 103 of the Charter reads as follows: "In the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail."
The question whether states should review Security Council decisions may arise either for national political organs or for national courts. For the organs, it may arise when the state has to determine whether and how it will implement the Security Council decisions.

A review of state practice of implementation by Security Council by political organs lies beyond the scope of this article. However, by way of illustration it can be noted that implementing legislation in the Netherlands preserves the right to refrain, in exceptional circumstances, from giving effect to Security Council resolutions or other obligations whose authority stems from the Security Council. Article 9 of the Sanctions Act 1977 provides that the minister may grant exemption or dispensation from rules and regulations that implement Security Council resolutions. Unqualified implementation of the resolutions apparently is considered undesirable, and the political organs retain the powers to adjust or even deny implementation in particular factual circumstances.

E. Special Considerations Applying to the Position of National Courts

The question of review may also arise when a private individual raises the matter before a national court. The role of courts may be triggered by an action contesting the adoption of the implementing measure itself, an action against a state under civil law (in tort), or a defense in criminal law when the state institutes criminal proceedings against individuals listed as aides to or members of terrorist organizations. The courts may then be required to review, as an incidental question, the legality of the Security Council decisions or, in the alternative, the legality of an unqualified application of those decisions in cases where the factual basis of a freezing of assets may be wanting.

Although the recorded practice of national courts reviewing Security Council resolutions is limited, the authors were able to identify some cases where national courts were confronted with a challenge to Security Council resolutions. Most of these cases related to the establishment of the ICTY and International Criminal Tribunal for Rwanda (ICTR), respectively. These cases do not display a uniform pattern. In some of them the courts presumed the right to review (the application of) an act of the Security Council. One example is the decision of the President of the District Court of The Hague regarding the claim of former President Milosevic of the Federal Republic of Yugoslavia in connection to his arrest and transfer to the ICTY. After his arrival in the Netherlands, where he was detained in the detention facilities of the ICTY, Mr. Milosevic requested a Dutch Court in summary proceedings to order the state of the Netherlands to release him. One of the grounds invoked by Mr. Milosevic was that the ICTY lacked a legal basis, as the Security Council did not have the competence to establish a criminal tribunal in terms of Chapter VII of the Charter. In rejecting this claim the Dutch court relied on the Appeals Chamber of Tadic’s decision on the defense motion for interlocutory appeal on jurisdiction in the Tadic case. It accepted the conclusion of the Appeals Chamber that the Security Council had the power to establish the Tribunal as a measure for maintaining or restoring international peace and security. Interestingly enough, in referring to the Tadic case, the Dutch court did engage in a substantive discussion of the claim and did not take the position that a national court would as a matter of principle be incompetent to review a Security Council decision.

Another example is the decision of the Bundesgerichtshof of Switzerland in the case of Rukundo. This decision involved a request by the ICTR for the transfer of Mr. Rukundo by the Swiss authorities. Mr. Rukundo alleged, inter alia, that the procedure before the ICTR would not satisfy the fair trial standards under the ICCPR. The Bundesgerichtshof first emphasized that Switzerland would not support international proceedings that did not guarantee those basic human rights in the ICCPR and the European Convention that constituted elements of the international order public. However, it then continued by stating that the conformity of the procedures of the ICTR with international human rights standards had to be presumed, and that the defects that had been put forward were not of such a nature that that presumption could be rebutted.
Whereas the courts in the above decisions apparently considered themselves to be in a position to review the legality of acts of the Security Council, other courts have expressly denied the power to do so. In some cases this position can be explained by their relationship with the executive or legislative branches. In matters of foreign relations generally, courts tend to defer to the political branches of government. One example is the decision of the United States Supreme Court in Ntakirutimana v. Reno. Mr. Ntakirutimana challenged the decision that he was to be extradited to the ICTR. Also in this case, the purported lack of competence of the Security Council to establish a criminal tribunal and the resulting illegality of the ICTR constituted one of the grounds of the claim. The United States Supreme Court declined to discuss the merits of that argument, as it regarded the assessment of the legality of acts of the United Nations as a matter for the executive branch, not for the courts. It added:

It would be an unwarranted departure from the Judicial Branch's traditional restraint if the courts attempted to supervise the decisions of the United Nations or to confine the United Nations to what they believe to be its lawful jurisdiction, for such actions would directly interfere with the Executive Branch's conduct of foreign relations.

The implications of this decision for international law call for a few comments. First, the United States Supreme Court in Ntakirutimana v. Reno did not take the position that as a matter of international law any review of the Security Council's action was not allowed. It only observed, that in the constitutional framework of the United States, any such review was a matter for the executive branch. Second, as a matter of international law, the distinction between the executive and the courts is irrelevant. Both organs are, as organs of the state, directly bound by international law. Deference by the courts to political organs cannot excuse them from their obligations under international law. Whatever the merits of the domestic separation of powers concerns, under international law the state (and therefore its individual organs) is responsible if actions of its organs resulted in a violation of international law. The International Law Association indeed has acknowledged that courts should determine matters of international law independently of the position of the political branches. From this perspective, the approach of the Dutch court in the Milosevic case and the Swiss Court in the Rukundo case is preferable to that of the United States Supreme Court in the Ntakirutimana case.

In addition to separation of powers concerns, reluctance of courts to enter into a review of decisions of international organizations can in some cases be explained by considerations that pertain to the relationship between courts and international organizations. Courts have developed a variety of abstention doctrines to legitimize deference to international organizations. For instance, it has been argued that acts of international organizations are comparable to acts of foreign states and for that reason should be subjected to the act of state doctrine. In an inter-state context this doctrine entails that national courts should not exercise judicial review of acts of foreign states. When applied to acts of international organizations, it implies that national courts would have to abstain from passing judgment on acts of international organizations. There is some judicial practice to support this position. Alternatively, it has been argued that national courts should consider disputes involving the legality of acts of international organizations as non-justiciable. It is submitted that these arguments do not present independent international legal barriers to a review of decisions of international organizations by national courts. Neither the act of state doctrine nor the concept of non-justiciability is a principle of international law. While it is recognized that courts should proceed with great caution (see further Section F below), as a matter of international law none of these abstention doctrines can be determinative in precluding a role for national courts.


Resolution No. 18/98, Le Droit International devant les juridictions nationales, reproduced in: Report of the International Law Association, Report of the Sixty-Eighth Conference, 1998, 28; see also Conforti (note 123), 7-25, calling the dependency of the judiciary on the executive to implement international law "not only anachronistic" and without "any real justification."

Reinisch (note 111), 35 et seq.; id., (note 13), 867.


E.g., New York County, Supreme Court, International Tin Council v. Amalgamated Int'l Tin Workers Union of North America Local No. 224, 25 January 1988 (in the circumstances of the case, the act of state doctrine was not considered applicable as it concerned commercial transactions). But see comment by Steven R. Ratner, AJIL, vol. 82, 1988, 837 noting that the act of state doctrine does not apply in this case, because the ITC is not a foreign sovereign and the doctrine pertains only to the governmental acts of a foreign state.

In the Tin Council dispute the English High Court refused to make a winding-up order against the International Tin Council, because it considered such matters "not justiciable by national courts. They must be solved by diplomacy, not domestic litigation." See Reinisch (note 13), 867.

National courts do review the compatibility of acts of foreign states with international law. E.g., in the Netherlands: Hoge Raad, United States v. Bank voor Handel en Scheepvaart NV, 17 October 1969, Nederlandse Jurisprudentie 1970, 428; see also Jennings (note 80), 79; Frederick Alexander Mann, Studies in International Law, 1973, 378-379. There is no substantial evidence that other states would find such practice to be in violation of international law.
In conclusion, the limited practice of national courts does not yield any convincing international legal arguments against the authority of national courts to review acts of the Security Council, or that would require them to assume a role in the “slavish and mechanical” application of international decisions regardless of the circumstances.

F. The Risks of a Breakdown of the Charter System

If a national court were to enter into a review of a decision of the Security Council and to determine that either the decision as a whole or its application in a particular case would violate fundamental international human rights, the general consequence would be that courts refuse to apply these decisions. The precise consequences will depend on the circumstances of the case and more in particular on the nature of the claim that is put before the court. A variety of scenarios emerge.

When a challenge is directed against the legality of a resolution of the Security Council as such, as was the case in the challenges brought by Mr. Milošević and Mr. Nsukurumansana and a court were to find the resolution to be illegal, it would most likely simply decline to apply that resolution in the case at hand and consider any results that would follow from it as non-existent in law.

Clearly, a national court of one member state could not annul a decision of an international organization. That follows, inter alia, from the fact that the legal competencies of member states on an organization are defined by the constitutive documents of that organization. If member states were able to exert additional unilateral powers through their courts, that would change the constitutionally agreed sharing of power within the organization. This also follows from the principle of the ‘parallelism of competence.’ This principle, which is a general principle of administrative law, determines that when a constitution invests a certain decision-making competence in a given organ, without expressly stipulating how such a decision may be revoked, the power of revocation lies with the same organ.

If one applies this principle to the Charter (i.e. the constitutive document of the United Nations), it would mean that only the Security Council can terminate enforcement measures under Chapter VII, since the Charter does not provide any other procedure for doing so.

A different scenario emerges when a challenge is not directed against the legality of a resolution of the Security Council as such, but against the application of a resolution vis-à-vis a particular individual or organization, for instance by the freezing of assets. In such a case, courts may review the merits of that claim, and in particular whether there is sufficient evidence against that particular individual or organization. A finding that there is not sufficient evidence may result in the non-application of the sanction against that individual or organization. Also in this case, review would not have any consequences for other states or for the resolution as such – such effects could only be produced at the international level.

Entrusting member states with the control of Security Council resolutions or the application thereof may come at a cost. It may undermine the efficiency of the Charter system, as it would open the door for states to evade their Charter obligations by forwarding pre-textual arguments of illegality.

A comparison with the European Community may help to illuminate this point. In the joined cases Zuckerfabrik Süderdithmarschen and Zuckerfabrik Soest, the ECJ held that when Member States have serious doubts as to the validity of a Community measure, they may suspend the enforcement of the national law adopted in the implementation of the Community measure in question. However, the national court must then bring the matter before the ECJ to enable that court to review the legality of the Community measures. As no comparable procedure is available within the United Nations system, it means that there is no compulsory control over national decisions not to implement a Security Council decision. This could lead to the danger of a fragmented international legal order and undermine the effectiveness of decisions taken to protect the international public interest.

It must be acknowledged that for the overall system and for the effectiveness of the organization, it would be preferable to provide for review and remedies at

135 Schermers/Blokker (note 129), 838.
136 This argument is also pertinent to the question of immunity of international organizations, and as such recognized in national courts. See, e.g., US Court of Appeals DC Cir., Broadbent v. OAS, 628 F.2d 27. The ECtHR stated in Waite and Kennedy v. Germany (note 63) para 63: “The attribution of privileges and immunities to international organizations is an essential means of ensuring the proper functioning of such organizations, free from unilateral interference by individual governments.” See also Retnisch (note 111), 239-240.
138 Compare Reschke (note 137), 136. See also the discussion of the termination of Resolution 253 (1968), supra, D.1.
139 Debus (note 71), 414; Christian Walter, Constitutionalizing (Inter)national Governance - Possibilities for and Limits of the Development of International Constitutional Law, German Yearbook of International Law, vol. 44, 2001, 170, 197.
141 The emerging need for national courts to review the validity of international acts adds another compelling argument to the already strong case for a comparable system of preliminary rulings before the ICJ. Cf. Schreuer (note 134), 183.
international rather than at national level. Indeed, it could be said that once a proper international mechanism would exist, the legal basis for review by national courts would cease to exist. In that respect one would hope that the present situation is a transitional one and that eventually proper international mechanisms of control will be introduced. However, until such international (judicial) procedures are available, states themselves will be called upon to determine the legality of the application of Security Council decisions.

In this situation, the risks to the cohesion of the international system can be mitigated by several factors. First, the threshold for declining to execute a resolution is high. The presumption of legality attached to Security Council resolutions, combined with the requirement that member states execute their obligations in good faith, oblige them to make a very strong case before refusing to implement a Security Council resolution.

Second, member states should first put the matter before the Security Council itself and allow it the opportunity to take the necessary remedial measures. The opportunity for submitting pre-textual arguments of illegality is thus limited by the fact that states could only reject Security Council resolutions as a “right of last resort.” It is to be recognized, however, that the hurdles for remedial action in the Security Council are high. A resolution terminating the enforcement measures will have to be taken under Chapter VII of the Charter. According to the rule of the “parallelism of forms,” the same type of act by the same organ is required to revoke the decision that had been taken. The fact that the Security Council has since 1990 consistently terminated its enforcement measures by means of Chapter VII resolutions reflects that this rule is quite well established in the Chapter VII enforcement system.

As a Chapter VII resolution can only be adopted if there is consensus amongst the five permanent members to this effect, the termination of enforcement measures can be blocked by the “reverse veto” of a permanent member.

Third, it would appear preferable that the task of review is given to independent courts rather than to the political organs of a state. Only if a domestic court were to find the suspects innocent of involvement with international terrorism, the decision to freeze their assets should be revoked. Member states would then effectively interpret the relevant Security Council resolutions and decisions of the Sanctions Committee as implying the right to provide a national remedy. By interpreting these measures in a way that gives due consideration to basic due process principles rather than by rejecting them outright, member states would honor the presumption of legality attached to Security Council resolutions, whilst also giving effect to the purposes and principles of the Charter.

Alternatively, if states were to exercise their right of review and non-implementation by means of a political act, this should preferably be done within a representative group such as regional organizations. For example, subsequent to the Lockerbie incident the Organization of African Unity (OAU) threatened to terminate the sanctions against Libya after December 1998, unless the impasse regarding the extradition of the suspects was negotiated. This decision carried considerable weight, as it was taken by the entire membership of the organization. It was also only adopted after nine years of fruitless protests against the illegality of the relevant Security Council resolutions and after it became clear that the contentious proceedings before the ICJ had reached an impasse. As a result, it can serve as a credible example of an exercise of the “right of last resort.” A similar collective review could be carried out in the framework of the European Union.

These safeguards may go some way towards striking a balance between the importance of the effective maintenance of international peace and security and the need for any legal system to attach consequences to unlawful acts. In striking this
balance, much will depend on the standards of impartiality, knowledge of public international law and more generally judicial skills of national courts.\textsuperscript{155}

G. Conclusion

During the last decade the United Nations' strategy for economic enforcement measures has undergone considerable evolution. Whilst the early 1990s will, inter alia, be remembered for the adoption of a broad, all-inclusive and open-ended economic regime against Iraq, the pendulum had progressively swung towards more tailored sanctions by the end of the decade. This move towards tailored sanctions was motivated by the realization that the general, broad economic embargoes imposed against countries such as Iraq, Haiti and the former Yugoslavia tended to be largely ineffective, as well as harmful to the civilian population. The freezing of the assets of individuals who were identified directly by the Security Council as being "associated" with international terrorism replaces primitive and blunt collective responsibility with the modernity and nuance of forms of individual responsibility.\textsuperscript{156} This could be seen as another step towards a more effective and just collective enforcement system.

These new forms of sanctions also drastically transform the relationship between the United Nations and the legal order of its member states. The direct sanctioning of individuals weakens the traditional control that states could exercise over the implementation of international sanctions affecting individuals within its territory. Under the new type of Security Council sanction as set forth in Resolution 1333, the national legal order no longer retains control over the question which individuals are subjected to the norms of international law.\textsuperscript{157} In the core area of the traditional functions of the state (providing security to citizens and imposing sanctions on individuals that threaten that security), public authority has been transferred from the state to (or rather usurped by) the Security Council.

This usurpation comes at a price. While the exercise of public authority in these areas has now in part been transferred to the Security Council, this has not been accompanied by a parallel transfer of the hard-won limits to the exercise of that public authority. By directly identifying those suspected of involvement in international terrorism and by leaving states no discretion in determining the conditions under which their assets are to be frozen, the Security Council obstructed the ability of states to give due effect to a fundamental human right to which member states and the Security Council are bound. Transferring public authority without installing proper procedures for securing human rights is retrogressive. It nullifies much of the potential progress of individual and direct as opposed to collective and indirect sanctioning and reinstates absolute public power over individuals.

It is therefore critical to reestablish the balance between power and control. The preferred solution would be for the Security Council to provide all individuals whose assets were frozen in accordance with Resolution 1333 with legally adequate procedures and remedies through which allegations of involvement with international terrorism can be rebutted. This could be a centralized review mechanism that guarantees a fair (albeit in camera) hearing in accordance with international human rights standards at the international level. Such a system would enhance uniform interpretation and international cohesion which, in turn, would strengthen the efficiency of the United Nations collective enforcement system.

In the alternative, the Security Council could grant states the discretion to provide for a fair review mechanism on the national level. It seems to have followed this option in Resolution 1373 of 28 September 2001, which obliged member states to criminalize the financing of international terrorism. Whilst this resolution imposed far-reaching obligations on member states in the field of criminal law, it did so in terms which were broad enough to allow for their implementation in accordance with the principles of Article 14 ICCPR.\textsuperscript{158}

Where the Security Council shows itself unwilling or unable to provide for a fair hearing in any of these forms - as was arguably the case with Resolution 1333 - member states will have several options. On the one hand, they could refrain from implementing the resolution until the Security Council has explicitly provided for an international or national review mechanism. In the alternative, states have the right to provide for the right to a fair hearing at the domestic level, as this is mandated by the Charter as well as their international human rights obligations. Courts that are confronted with requests to quash the national measures that implemented the decisions of the Security Council can resort to incidental review of the latter. This could either take the form of an open challenge to their legality, or of a "fundamental rights friendly" interpretation that would allow for certain exceptions to the Security Council decisions.\textsuperscript{159}

\textsuperscript{155} Schreuer (note 134), 183.
\textsuperscript{156} Compare Hans Kelsen, Law and Peace in International Relations. The Oliver Wendell Holmes Lectures, 1940-1941, 1942, 97-98 and Antonio Cassese, International Law, 2001, 6-8, who both view this development as an significant advance in international law.
\textsuperscript{158} For a discussion of the implementation of these measures within the European Union (and particularly Sweden), see Bring et al. (note 8), 321 et seq.
\textsuperscript{159} See, e.g., the Othman case (note 12). Although acknowledging the sweeping nature of the obligation to freeze the assets of the targeted individuals, the English court stated that member states were entitled - and perhaps even bound - to ensure that this did not mean that the individual claimant had no means of support.
The potential risk that such unilateral review poses to the erosion of the international peace and security system should be balanced against the positive contribution that national review may provide. The possibility of review on the national level could serve as an incentive for the Security Council to draft its resolutions in accordance with human rights standards. This would, in turn, make it even more difficult for states to claim the illegality of Security Council resolutions for pretextual reasons. Without control, which in these circumstances can only be exercised by member states, the paper restrictions on the power of the Security Council would disappear and the limited power that has been delegated to it may become absolute. This would threaten liberty and the functioning of the system itself. The efficiency of the Charter system for the maintenance and restoration of international peace and security will ultimately depend on its legitimacy, which will be seriously undermined by enforcement measures that violate the very norms on which the United Nations are based. A cautious review of binding Security Council decisions under such circumstances would therefore protect the efficiency of the organization in the long run, rather than undermine it.

160 Reisman (note 82), 1.
161 Compare Reinisch (note 111), 388, for a similar conclusion in the context of immunity of international organizations.