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Anti-Terrorism Resolutions: The Security Council's Threat to the UN System

by Fraser Galloway

Abstract

The United Nations Security Council's anti-terrorism regime constitutes a serious threat to the legitimacy and unity of the United Nations system as a whole. Recent European Court of Justice jurisprudence emphasises that Security Council resolutions which breach human rights norms will not be enforced by member states. The Security Council has insufficient internal checks to ensure that it passes resolutions which sufficiently respect human rights norms. Judicial review is therefore required on the part of the International Court of Justice to ensure that the Security Council passes resolutions which remain effective and do not bring the United Nations system into disrepute.

Introduction

Security Council resolutions regarding terrorism have been subject increasingly to the scrutiny of regional organisations, particularly EU courts. The most notable recent example is perhaps the *Kadi*[1] case in which the ECJ ruled that direct adoption of Security Council resolutions by European member states breached fundamental rights. It appears likely that the Security Council will be subject to increasingly frequent review by regional courts. It is submitted that such a trend creates a challenge to both the legitimacy and unity of the UN system.

To address this challenge, this article argues that the ICJ should assert the power of judicial review so that Security Council resolutions are reviewed within the UN system, rather than the UN as a whole being subject to external criticism. The article is argued from the perspective of the UN and assumes that it benefits the Organisation to uphold both the legitimacy and unity of the UN system. Part I considers the evolving role of the Security Council since the end of the Cold War. Part II examines the human rights limitations to which the Security Council is subject. Finally, Part III proposes a judicial review model for holding the Security Council to account.

I: The Security Council's Threat to the UN System

The Security Council has been described as "the most powerful multilateral political institution" [2], a particularly apt description since the end of the Cold War. Since then, both the Security Council and the resolutions it passes have changed profoundly:

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“In its first 44 years, 24 Security Council resolutions cited or used the enforcement powers contained in Chapter VII of the UN Charter; by 1993 the Council was adopting that many such resolutions every year. The Council has also expanded the range of its activities, including the establishment of international criminal tribunals, the maintenance of complex sanctions regimes, the protection of civilians, and the temporary administration of territory.” [3]

Since 9/11, anti-terrorism resolutions have perhaps been the principal manifestations of the Security Council’s newfound authority. Anti-terrorism is an issue which unites disparate member states as, by definition, all non-state actors threaten the legitimacy of nation states and their governments. The international fluidity of terrorist movements which disregard national borders is a further incentive for co-operation: one reason for Russia’s condoning the US-led invasion of Afghanistan was awareness that Afghan terrorism also posed a threat to Russian security by destabilising Chechnya. [4] A number of these anti-terrorism resolutions are markedly different to those traditionally passed by the Security Council and raise concerns that the Security Council is acting in its own intergovernmental interest, not merely to the potential detriment of unrepresented member states, as in the 1990s, but also to the detriment of individual liberty. These resolutions can be broadly divided into those of a legislative and judicial character.

A. The Security Council as Legislator

Professor Stefan Talmon provides a definition for resolutions, which may be considered international legislation:

“The hallmark of any international legislation is the *general and abstract character* of the obligations imposed. These may well be triggered by a particular situation, conflict, or event, but they are not restricted to it. Rather, the obligations are phrased in neutral language, apply to an indefinite number of cases, and are not usually limited in time.” [5]

Resolution 1373 (2001), passed on 28th September 2001, is the archetypal legislation meeting this definition. It “[d]ecides that all States shall...” *inter alia*:

“Freeze without delay funds and other financial assets or economic resources of persons who commit, or attempt to commit, terrorist acts or participate in or facilitate the commission of terrorist acts; of entities owned or controlled directly or indirectly by such persons; and of persons and entities acting on behalf of, or at the direction of such persons and entities, including funds derived or generated from property owned or controlled directly or indirectly by such persons and associated persons and entities...”

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Given the primacy of the UN afforded to the Organisation in the Charter, member states are subject to a *prima facie* obligation to adhere to this resolution. [6] Such a resolution was revolutionary, especially given the judgment by the ICTY only six years previously that, “There is...no legislature, in the technical sense of the term, in the United Nations system...That is to say, there exists no corporate organ formally empowered to enact laws directly binding on international legal subjects.” [7] The impetus for this reversal was a combination of the Security Council’s ability to act through newfound consensus and the necessity of the Security Council to act due to the realisation, following 9/11, of the scale of threat which international terrorism posed. Security Council members required an immediate response to a sudden attack and the Council’s exercise of powers under Chapter VII provided “...the only available means of promptly producing general international law”. [8]

While the motivations for the Security Council’s producing such broad legislation are clear, the effects can be damaging. Such an example is India, an important case study for the ramifications of Security Council resolutions because it is the world’s most populous nation without permanent membership of the Security Council and therefore represents the most prominent example of the Council’s democratic deficit. Resolution 1373 played a substantial role in framing the debate on India’s anti-terrorism laws, which were consequently augmented by the Prevention of Terrorism Act 2002 (“POTA”) [9]. Upon the bill’s introduction to Parliament, Home Minister L.K. Advani asserted that the Security Council’s adoption of resolution 1373 rendered it India’s “duty to the international community...to pass [POTA].” [10] This view was echoed in civic society: retired Major General Ashok K. Mehta wrote in 2001 that, “All states are required by United Nations Security Council resolution 1373 to promulgate anti-terrorism laws within 90 days and report completion to the Secretary-General. POTA need not, therefore, be made such a big political issue.” [11] Even an opponent of the bill acknowledged that POTA was an obligation of international law. [12] POTA was therefore enacted against a backdrop of perceived Security Council coercion.

Since its enactment, POTA has become synonymous with human rights abuses and, in 2004, was the subject of a People’s Tribunal headed by former Law Minister Ram Jethmalani. [13] Among the tribunal’s findings were arbitrary enforcement by state governments; discrimination against Dalit and tribal communities; discrimination against religious minorities; violations of rights of free speech and association; malicious prosecution; police misconduct; unlawful preventative detention; and intimidation against lawyers. [14] Despite these findings, and a growing political controversy, international law obligations continued to cause concern during debates on repeal of the Act. It was stated in Parliament that India “had committed to the enactment of an anti-terror law” upon the Security Council’s adoption of resolution 1373, and that repeal might violate the resolution. [15] One Member of Parliament even stated that the UN had endorsed POTA. [16]

The reason for this statement was perhaps that, during the enactment of POTA, each of the

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compliance reports which India is required to submit to the Counter Terrorism Committee (“CTC”) under resolution 1373 had implied that India’s anti-terrorism laws were required by the resolution. [17] The CTC has refrained from questioning whether member states’ descriptions of anti-terrorism laws are accurate and “...in failing to conceptualize its obligations with appropriate reference to maintaining fundamental human rights standards, the CTC may itself be prompting outcomes that are detrimental.” [18] Resolution 1373 does not explicitly refer to any human rights considerations in complying with the anti-terrorism provisions of the resolution and the CTC’s own legal expert has acknowledged that aspects of anti-terrorism laws enacted by states to comply with resolution 1373 would “not be fully compatible with human rights concerns”. [19] Accordingly, the CTC’s first chair, Sir Jeremy Greenstock, stated that, “Monitoring performance against other international conventions, including human rights law, is outside the scope of the [CTC’s] mandate.” [20]

The Security Council is therefore responsible for drafting a resolution which, when transposed into Indian domestic law, gave rise to serious human rights violations. Although subsequent resolutions have attempted to address human rights concerns, [21] this episode demonstrates the potential for damage to the reputation of the whole UN system when the Security Council attempts to draft and enact legislative resolutions.

B. The Security Council as Judge

The second type of resolution which the Security Council has increasingly passed since the Cold War is exemplified by resolution 1390, which provide for ‘smart sanctions’ against individuals, particularly the freezing of funds of suspected terrorists linked to Osama bin Laden, Al-Qaeda or the Taliban, and requiring states to adopt appropriate measures against individuals designated by the UN Sanctions Committee. [22] This resolution, as incorporated into EU law by a Council Regulation[23], was the subject of judicial review before the ECJ in the landmark *Kadi*[24] case. The CFI held that, due to UN supremacy, established by Articles 25 and 103 of the Charter and incorporated into EU law by Article 307 EC, the Court could not indirectly review the Security Council by questioning the legality of the Regulation, unless the Regulation compelled member states to breach norms of *jus cogens*. The ECJ, however, rejected the CFI’s monist approach and held that the EU constitutes an “autonomous legal order” [26] in which the ECJ has jurisdiction to review Council Regulations, regardless of international agreement. [26]

Applying the facts of the case, the ECJ held that, by the inclusion of the appellants’ names on the sanctions list, the rights to be heard and to an effective remedy were “patently not respected” [27]. The latter required that the reasons for the measures and evidence against the applicant be communicated “within a reasonable period”, especially considering the severity of the complete loss of access to financial means to which listed persons are subject. [28] The

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defendants sought to apply the German Federal Constitutional Court case *Solange II*[29], whereby the ECJ should defer to the UN, provided that the UN sufficiently protect human rights. The defendants submitted that fundamental rights were adequately protected by the UN Sanctions Committee re-examination procedure. Significantly, the ECJ considered the protections offered by the Sanctions Committee and, accordingly, “A future *Solange* deference therefore seems to be clearly possible if the remedies available at the UN level are reinforced.” [30] On the facts, however, the ECJ held that the remedies available were insufficient and, therefore, the resolution, as incorporated by the Regulation, breached EU law.

In rights-based legal jurisdictions, particularly the EU, judgments which condemn the Security Council for breaching human rights norms serve to question the legitimacy and unity of the UN system. ECJ condemnations are particularly damaging as “...the standards and values enforced by the ECJ are also those pursued by the international legal order.” [31] If Security Council resolutions are held to be unlawful in jurisdictions other than the EU, the uniform applicability and enforcement of international law emanating from the Council is threatened. Secretary-General Annan was aware of the Security Council threat to the legitimacy of the UN system as a whole and, in 2006, cautioned that sanctions will only remain useful if they are effective and seen to be legitimate. [32]

Resolutions adopted in 2006 marked modest progress in requiring individuals to be informed of their designation on a list and outlining criteria to be considered in a request to be removed; [33] however, “None of these moves addressed the foundational concern that individuals were having their assets frozen without any formal process for review of how that decision was made, or the circumstances in which it could be revoked.” [34] That some states are hesitant to submit new names for inclusion on the sanctions lists is evidence that the legitimacy and unity of the UN system is still being challenged. [35] Accordingly, the consideration which the ECJ gave to the *Solange II* principle in *Kadi* should be seized as an opportunity by the UN to re-establish its legitimacy: if it passes resolutions conforming to human rights norms, national and regional courts are unlikely to challenge them; the universality of resolutions and of the UN system will therefore be upheld.

II: Human Rights Limitations on the Security Council

There are, however, limited means available within the UN system to ensure that Security Council resolutions uphold human rights norms. The Security Council’s power derives substantially from Article 39, which gives it discretion to make determinations as to whether an act or situation constitutes a “threat to the peace”; “breach of the peace”; or “act of aggression”. Once such a determination is made, the Security Council may act to counter such challenge to international peace and security. Despite possessing the ability to decide its own jurisdiction, the

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Security Council is not an organ with unlimited powers: it is limited by the Charter, by general international law and by *jus cogens* norms.

The principal limitation on the Security Council within the Charter is Article 24(2), which provides that, in maintaining international peace and security, the Security Council “shall act in accordance with the Purposes and Principles of the United Nations”. As one of the Purposes of the UN, Article 1(4) provides for international co-operation “in promoting and encouraging respect for human rights”. Article 55 similarly declares, “the United Nations shall promote... universal respect for, and observance of, human rights and fundamental freedoms...” There is, however, a lack of clarity as to which human rights the Security Council must respect. T.D. Gill has suggested, “the Council will *at a minimum* be bound by the rules of human rights contained in the International Bill of Rights from which no derogation is permitted in time of emergency and armed conflict”. [36] Dapo Akande submits that “...human rights norms which have entered into the corpus of general international law are binding on the Security Council and also that by Articles 1(4) and 55(c), human rights obligations (such as various human rights treaties) adopted within the United Nations system are binding on the Organisation even if they are not yet accepted by all member States”. [37] There is therefore no consensus as to human rights limitations on the Security Council’s powers.

The overwhelming problem with holding the Security Council to account, however, is that there is no sovereign authority to adjudicate and enforce the Security Council’s compliance with Charter and international law. The limitations on the Security Council have been insufficient to avoid regional organisations having serious misgivings about some of the resolutions passed. Such lack of accountability and recourse on the international plane is forcing individuals to seek judicial remedies in member states and regional organisations, thereby constituting a serious threat to the legitimacy and unity of the UN system. It is therefore vital that more active judicial intervention be considered as a serious proposal to limit the excesses of the Security Council.

III: A Way Forward

Since 9/11 and the resultant demand for action, the judiciary has played an important role in liberal democracies worldwide in preventing legislative excesses; [38] the ICJ has not acted as a corresponding limitation at the UN to the growing power of the Security Council.

A threshold consideration is whether current international law supports any form of judicial review. Neither the Charter nor the ICJ Statute directly addresses this question. [39] Since its inception, the ICJ has been equivocal over whether it has the power of judicial review, but Thomas M. Franck has argued famously that the 1992 *Lockerbie* case marks the point at which the ICJ established for itself judicial review powers analogous to those of the United States Supreme Court established in *Marbury v. Madison*. [40]

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The *Marbury* analogy suggests that the ICJ has both concurrent jurisdiction with the Security Council and power to declare the Council's resolutions *ultra vires*. In the 1962 *Certain Expenses* case, the ICJ held that it had authority to offer an opinion on whether peacekeeping costs constituted expenses "... 'decided on in conformity with the provisions of the Charter', if the Court finds such consideration appropriate". [41] In the 1970 *Namibia* case, the ICJ started from the premise that "the Court does not possess powers of judicial review or appeal in respect of the decisions taken by the United Nations organs concerned", before ruling explicitly on the validity of the acts in question that the Security Council resolution was in accordance with the Charter. [42] Indeed, Judge Dillard expressed a strong opinion that "it is not in the long-range interest of the United Nations to appear to be reluctant to have its resolutions stand the test of legal validity when it calls upon a court to determine issues to which this validity is related" [43].

Both *Certain Expenses* and *Namibia* therefore suggest that the ICJ has implicitly accepted that it may consider the validity of a Security Council resolution when giving an advisory opinion, which may be requested only by a UN organ. [44] *Lockerbie* is important because for the first time a significant proportion of the ICJ held that its power of judicial review also extends to contentious disputes between states and therefore may be binding on parties. It also suggests a growing acceptance by the ICJ that judicial review should not be limited only to when it is implicitly or explicitly requested by a UN organ as to the legal effect of that organ's acts. [45] While in the *Lockerbie* majority opinion, the court did not have the opportunity to rule conclusively that it had *ultra vires* review powers, [46] in *Namibia* Judge de Castro had stated explicitly that, "the Court, as a legal organ, cannot cooperate with a resolution which is clearly void, contrary to the rules of the Charter, or contrary to the principles of law." [47] Thus, *Certain Expenses*, *Namibia* and *Lockerbie* confirm that the ICJ may, in principle, review the legality of a resolution.

Standing, however, is a major obstacle for a more interventionist court. In this crucial aspect, the *Marbury* analogy does not hold because neither an individual, nor a state, can bring a case of judicial review at will. Article 96(a) provides that, "The General Assembly or the Security Council may request the [ICJ] to give an advisory opinion on any legal question". Clearly, the Security Council cannot be relied upon to challenge its own resolutions at the ICJ. The General Assembly therefore has a responsibility to challenge the legality of Security Council resolutions, which threaten the legitimacy, and unity of the UN system.

Assuming the General Assembly request an advisory opinion, the ICJ may answer only insofar as it is a "legal question". [48] Controversy exists as to whether measures taken under Chapter VII, relating to the Security Council's determining "the existence of any threat to the peace, breach of the peace, or act of aggression" [49] can be properly described as a legal question upon which the ICJ may express an opinion. In his dissenting opinion in *Lockerbie*, Judge Weeramantry attempted to address this question by distinguishing between those resolutions taken under

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Chapters VI and VII of the Charter. The judge held that the ICJ had power to review the legality of resolution 731 as it was passed under Chapter VI of the Charter; [50] conversely, he acknowledged that resolution 748 was explicitly passed under Chapter VII and that “the Council and no other is the judge of the existence of affairs which brings Chapter VII into operation”. [51] Furthermore, Judge Weemantry noted that when Chapter VII is in operation “...the door is opened to the various decisions the Council may take under the Chapter”. [52]

It is important to distinguish between the two parts of Article 39: the determination of the existence of an international crisis and measures taken in response thereto. [53] It is submitted that, while the existence of a threat is a political decision which the Security Council is best placed to make, the ICJ can serve a constructive role in ensuring the Security Council’s responses in the resolutions it passes do not undermine the Purposes and Principles upon which the UN system is founded. It is probable that the ICJ could develop jurisprudentially a series of legal tests, particularly proportionality, to prevent the Security Council undermining the legitimacy of the UN. [54]

On a strictly legal basis, the effect of an ICJ decision that the Security Council resolution is *ultra vires* would be limited. If the decision arose in response to an *ad hoc* General Assembly request for judicial review under Article 96, it would, like any other advisory opinion, have no binding effect. The ICJ has no judicial review powers in the sense of authority to quash Security Council resolutions. [55] Moreover, the ICJ did not inherit the common law doctrine of *stare decisis*, which ensures that a ruling of unconstitutionality in practice becomes binding in future cases. [56]

These ICJ limitations suggest that it does not have powers of judicial supremacy analogous to the contemporaneous powers of the United States Supreme Court. A better analogy is with the traditional ‘Jeffersonian’ doctrine of concurrent review whereby no single UN organ has the final say on interpretation of the Charter and that the legal opinion of the Court should be respected in the case it resolves but not necessarily in future cases. [57] This interpretation sits better with the Charter and with the generally respected reasoning expressed previously in *Certain Expenses* that “each organ must, in the first place at least, determine its own jurisdiction.” [58]

The reality of the relationship of UN organs is of complementary institutions functioning in “fruitful interaction” rather than of political organs subject to judicial supremacy. [59] The UK’s long held doctrine of parliamentary sovereignty is analogous to the Security Council in that Parliament determines its own jurisdiction. However, the ECHR requires that Parliament not pass laws which undermine its enumerated human rights. A compromise reached by section 4, HRA 1998 is that, if an Act of Parliament is fundamentally incompatible with the ECHR, UK courts will issue a declaration of incompatibility. These are non-binding opinions, which state that the UK is in breach of the values it is committed to upholding. It is then the right of Parliament to bring the law into conformity with the ECHR.

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Applying this model to the UN system, a declaration that the Security Council is acting *ultra vires*, or even the threat thereof, would have significant influence on Council resolutions regardless of its binding effect. Given that the Security Council has no autonomous enforcement powers, it relies on maintaining the confidence of member states. The *Bosnia Genocide* case demonstrates how easily the Security Council and the UN as a whole can be undermined if its resolutions are deemed illegal and illegitimate. [60] Indeed, as Jose Alarez notes, “given the level of compliance with the Court’s advisory opinions and the difficulty of enforcing its contentious judgments, the Council’s options might, in practical terms, be as constrained by an advisory opinion as they would be by an adverse decision in a case like Lockerbie.” [61] The General Assembly, if it is serious about defending the interests of the UN system, should therefore request, either directly or through the HRC, that the ICJ judicially review Security Council resolutions such as 1373 and 1390.

Conclusion

Whereas the Security Council’s Cold War history was defined by deadlock, its post 9/11 histories is currently defined by its unprecedented expansion. Unchecked power in the hands of the Security Council has allowed anti-terrorism resolutions to be passed which not only undermine the legitimacy and unity of the UN system in the international legal order, but which could be counter-productive to the Council’s own aims. Placing questions of interference with individual autonomy on the legal plane reinforces the gravity of the consequences of Security Council resolutions which fail to give due regard to human rights: “[l]egal language carries, virtually *in ossibus*, the idea of legal restraints.” [62] That member states take seriously the question of legality is demonstrated by the angry reaction of the US government to Secretary-General Annan’s unilateral declaration that the Iraq war was “illegal”. [63] *Kadi* indicates that regional organisations will not submit to the derogation of fundamental rights. If the UN system fails to acknowledge this, it is likely to conflict with member states, some of which it is dependent upon for its continued effectiveness, and consequently UN law will fragment across member states, to the detriment of international anti-terrorism.

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*All Articles refer to the UN Charter unless otherwise stated.

9/11 – Coordinated terrorist attacks in New York, Virginia and Pennsylvania, USA, 11th September 2001.

ABILA – American Branch of the International Law Association.

Agenda for Peace – Report of the Secretary-General, *An Agenda for Peace, Preventative Diplomacy, Peacemaking and Peace-keeping*, 1992, U.N. Doc. A/47/277 – S/24111

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Certain Expenses – *Certain Expenses of the United Nations (Article 17, paragraph 2, of the Charter)*, (Advisory Opinion), ICJ 1962, 151.

Charter – Charter of the United Nations, signed at San Francisco, 26th June 1945 and entered into force on 24th October 1945.

CFI – Court of First Instance (the General Court since 1st December 2009)

EC – Treaty Establishing the European Community, as amended.

ECHR – Convention for the Protection of Human Rights and Fundamental Freedoms, signed at Rome, 4th November 1950, and entered into force on 3rd September 1953.

ECJ – European Court of Justice

EU – European Union

HRA 1998 – Human Rights Act 1998

HRC – Human Rights Council, see General Assembly resolution 60/251 (2006).

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ICJ – International Court of Justice

ICJ Statute – Statute of the International Court of Justice

ICTY – International Criminal Tribunal for the Former Yugoslavia

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Montreal Convention – Montreal Convention for the Suppression of Unlawful Acts against the Safety of Aviation, signed at Montreal on 23rd September 1971, 24 UST 564, TIAS No. 7570.

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POTA – Prevention of Terrorism Act 2002

Tadic – *Prosecutor v. Tadic*, Appeal on Jurisdiction, No. IT-94-1-T, (2nd October 1995), 35 ILM 32 (1996).

UK – United Kingdom

UN – United Nations

UN Conference – United Nations Conference on International Organization, San Francisco, 26th June 1945.

US/USA – United States of America

Vienna Convention – Vienna Convention on the Law of Treaties, 23rd May 1969, 1155 U.N.T.S. 331. N.B. The Convention entered into force on 27th January 1980 and has been ratified by 110 states as of October 2009.

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[6]Articles 25 and 103.

[7]*Tadic*, Appeal on Jurisdiction, No. IT-94-1-T, para.43.

[8]Bianchi, Andrea, *Assessing the Effectiveness of the UN Security Council's Anti-Terrorism Measures: The Quest for Legitimacy and Cohesion*, (2006) EJIL, 881, 889.

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[21]E.g. Resolutions 1456 (2003); 1566 (2004); and 1624 (2005).

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[26]*Ibid.*, paras.284-5.

[27]*Ibid.*, para.334.

[28]*Ibid.*, para.348.

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[32]UN Security Council, 5474th Meeting, 22nd June 2006, U.N. Doc. S/PV.5474 (2006), pp.4-5.

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[35]*Ibid.*, p.72.

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[41]*Certain Expenses*, ICJ 1962, 157.

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[43]*Ibid.*, 151-152.



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[46]*Lockerbie* ICJ 1992, 126.

[47]*Namibia*, ICJ 1971, 180.

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[51]*Ibid.*, 176.

[52]*Ibid.*

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[55]Akanke, *Judicial Control*, p.333.

[56]Watson, *Constitutionalism*, p.40.

[57]*Ibid.*, pp.39-40.

[58]*Certain Expenses*, ICJ 1962, 168.

[59]*Lockerbie*, ICJ 1992, 138.

[60]ICJ 1993, 3. Following Judge Lauterpacht's judgment that Security Council resolution 713 (1991) had the indirect effect of calling on UN members to become supporters of genocidal activity and therefore to breach a *jus cogens* norm, the Organisation of the Islamic Conference, Croatia and Malaysia declared that the ban was illegal and the US Congress overwhelmingly passed a bill (vetoed by President Clinton) requiring the United States to lift the arms embargo on Bosnia.

[61]Alvarez, *Judging the Security Council*, p.8.

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