U.S. POLICIES TOWARDS AND IN THE U.N. SECURITY COUNCIL

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REMARKS

For at least twelve years, Security Council reformers have proposed many ways to enlarge the size and diversify the composition of that body. The goals of these proposals, two of which were endorsed in the Secretary-General's 2004 *Report on High Level Panel on Threats, Challenges and Change*,[1] were to make the Council more representative of the broader membership, especially of the developing world, while at the same time not impairing the decision-making abilities of the Council. Everyone recognizes that the trick is how to best balance those two competing goals.

The next President of the United States (U.S.) should take another look at the Council reform proposals contained in the High Level Panel report. That report outlined two models for Council reform, A and B, and any new administration should re-examine whether a serious diplomatic effort to push these is worthwhile. Under both proposals, the Council's membership would expand to twenty-four states, consisting of six states each from the regions of Africa, Asia/Pacific, Europe, and the Americas; neither proposal would modify nor expand the number of veto-holding states.[2] The only difference between A and B consists of the proportions of new seats that would be permanent, renewable, or non-renewable. The new President should also take seriously the Panel Reports' recommendations on how to better institutionalize Art. 23 of the United Nations (U.N.) Charter—which suggests that the Council's membership should recognize states who contribute the most to the U.N. financially, militarily, and diplomatically.[3] At the same time, there is no reason to assume that political realities have shifted to make enlargement of the Council any more likely now than before. It may be that enlarging the Council in the current climate among the P-5 may aggravate the Council's paralysis. For this reason, I will not dwell further on the prospects of reforming the Council which require amending the U.N. Charter.

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1. UNITED NATIONS, A MORE SECURE WORLD: OUR SHARED RESPONSIBILITY, REPORT OF THE SECRETARY-GENERAL'S HIGH-LEVEL PANEL ON THREATS, CHALLENGES AND CHANGE (2004).

2. *Id.* at 80–81.

3. *Id.* at 82.

But even if the Council's membership is not enlarged, the next U.S. Administration should continue to push for having those elected non-permanent members of the Council be, in their respective regions, among the top three financial contributors to the regular budget, the top three voluntary contributors, or the top three troop contributors to U.N. peacekeeping. Other proposals in the Secretary-General's High-level Report are also worth supporting for the sake of greater accountability—such as its proposal for the introduction of a scheme for "indicative voting" whereby Council members can call for public indication of positions on proposed action, but where indicative "no" votes would not have veto effect.[4]

At the same time, the next Administration needs to go beyond these well-worn reform proposals. The United States needs to address the credibility/legitimacy concerns faced by the Council both when it fails to act and when it acts pursuant to Chapter VII and purports to enact global legislation. Most of the attention has rightly been on finding ways to overcome Council paralysis. This is understandable, given the Council's many failures to act throughout the Cold War and its more recent failings. The Council has undermined its legitimacy when it has failed to take action to respond to clear threats to the peace or breaches of the peace, most notably with respect to Kosovo and Darfur, but some might add other notable cases of the Council's passivity—as with respect to Iran.

While some would propose remedying the problem of Council inaction by establishing a new legal principle—the Responsibility to Protect—I am not sure that we really need new law as far as the Council is concerned. I think that the Council's failure to act in the case of Darfur, for example, is a failure of political will, not law. Determining what constitutes a "threat to the international peace" (a term subject to no pre-established definition under pre-Charter international law) is a matter for the Council to determine. No one would suggest that it is barred from responding to humanitarian crises, even by authorizing force pursuant to such a determination. Legal problems arise precisely when the Council fails to act and some are tempted to act unilaterally.

With respect to the Council's inaction problem, our moderator, Tom Franck, has characteristically made valuable pragmatic suggestions that are worth considering anew. Back in 2002, in the wake of Kosovo, Tom Franck suggested on the pages of the American Journal of International Law that the Council can avoid accusations of being a paper tiger by incorporating pre-authorizations to use force into its Chapter VII resolutions as appropriate.[5] Under Franck's proposal, the Council would indicate when a material breach

4. *Id.*

5. Thomas M. Franck, *Inspections and Their Enforcement: A Modest Proposal*, 96 AM. J. INT'L L. 899 (2002).

of its sanctions program would authorize the use of force by a regional grouping or a coalition of the willing. Under his proposal the Council members (or the P-5) would decide by informal arrangement that in such cases, decisions on whether a subsequent triggering material breach had occurred would be taken by a majority of any nine Council members without exercise of the veto. As Franck indicated, there is a precedent for such an informal defacto amendment of the deployment of the veto: long ago the Council decided that procedural matters could be decided by nine of its members (without exercise of the veto).[6] One could imagine other informal agreements by the P-5 not to exercise the veto with respect to other issues as well, but of course, the prospect of such agreements would turn on relations among the P-5.

If Franck's proposal was to be adopted, we could be spared cases where—as with respect to Iraq in 2003—a country attempts to auto-interpret prior Council resolutions as a license for war or numerous instances where the Council's bark has lacked bite. As we all know, the Council's legitimacy as collective enforcer of the peace—and the U.N.'s credibility as a whole—suffers when either of these occur.

The next Administration also needs to concern itself with the legitimacy of the Council when it undertakes binding Chapter VII action. It is especially important that the next Administration carefully consider when it wants to use the Council to impose law on the world. As many here know, the Council has sought to impose counter-terrorism legislation on all states through Council Resolution 1373 and its progeny. It has done similarly with respect to weapons of mass destruction under Resolution 1540 and related resolutions. It has imposed financial and travel sanctions on designated organizations and individuals under resolution 1267 and other related resolutions, and it appears to have licensed a kind of "transformative occupation law" with respect to Iraq in resolution 1483 and later resolutions.[7] All of these have triggered legitimacy concerns. The Council was never intended to displace the vehicle par excellence for multilateral cooperation—namely negotiations leading to the conclusion of a treaty. It is a political body and does not have either the bureaucratic apparatus of an administrative agency that engages in rule making, or the democratic credentials of a legislature charged with the making of law in a liberal state. The potential for the Council to overstep when it engages in global law-making was given clear voice recently when a Grand Chamber of the European Court of Justice held, in the *Kadi* case, that the Council's counter-terrorism sanctions on individuals, as implemented by European law, were incompatible with the due process and property rights accorded persons under

6. *Id.* at 900.

7. For a summary of all of these Council actions, see José E. Alvarez, *Hegemonic International Law Revisited*, 97 AM. J. INT'L L. 873 (2003).

the European Convention on Human Rights.[8] Although the ruling sent shock waves among international lawyers, who had become accustomed to the notion that the Council is not subject to judicial review by anyone, the Court's finding that it is not legitimate to brand people as terrorists or terrorist sympathizers and penalize them by denying them access to bank accounts without showing them the evidence of their wrongdoing or giving them the benefit to rebut that evidence, should not, on proper reflection, have surprised anyone.

The Court invalidated the European regulation implementing the Council's 1267 sanctions, but allowed the European Council three months to find an accommodation. I would predict that the U.N. Security Council will find a way to incorporate the procedural rights that the European Court insisted on—perhaps by borrowing from the procedural protections contained in the United Kingdom's Prevention of Terrorism Act of 2005 (which uses special advocates to represent the interests of affected parties).[9]

The next Administration needs to heed the broader lessons of the *Kadi* decision. The Council, especially when it acts as law-giver and not mere enforcer of the peace, cannot afford to be a law onto itself. *Kadi* tells us that at a time when all international organizations are under pressure to act pursuant to law and are increasingly expected to be held politically accountable, the Council is increasingly likely to be subjected to the political (and legal) checks and balances that other international legal regimes face.[10] This is particularly true when the Council seeks to bypass the state and act directly on individuals. The Council is increasingly expected to act not only in accord with the vague "principles and purposes" of the U.N. Charter, but also in conformity with fundamental principles of international law, especially human rights. The next Administration may need to accept that the Council too is a creature and a subject of law, which cannot simply be used as a tool of hegemonic power sans restraint. The *Kadi* case also implies that it would behoove the Security Council to engage in greater consultation with other bodies—including human rights experts and the General Assembly—before it engages its all too powerful Chapter VII powers. Michael Reisman's proposal to establish a Chapter VII Consultation Committee consisting of a designated sub-group of the General Assembly is certainly worth considering in this respect.[11]

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8. Case C-402/05 P, Kadi v. Council E.U. & Comm'n of the E.C., 2008 ECJ II-3649, ¶ 284, http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:62005J0402:EN:HTML (last visited Feb. 17, 2009).

9. For a description of the operation of the United Kingdom Act, see generally JOINT COMMITTEE ON HUMAN RIGHTS—NINETEENTH REPORT, 2006–07, HL 157/HC 790, *available at* http://www.publications.parliament.uk/pa/jt200607/jtselect/jtrights/157/15702.htm (last visited Feb. 17, 2009).

10. *See* Case C-402/05, *supra* note 8.

11. *See* W. Michael Reisman, *The Constitutional Crisis in the United Nations*, 87 AM. J. INT'L L. 83, 99 (1993).

The next Administration should also not lose sight of the fact that the Security Council plays a singularly significant internal function at the U.N. As U.N. observers have long recognized, the Council—and particularly the P-5—have in the past effectively determined who will be selected as the U.N.'s Secretary General. Despite what the Charter anticipates, the General Assembly tends to ratify whatever choice emerges from within the Council. As John Bolton's recent memoir, *Surrender is Not an Option*, reminds us, in the course of the bargaining among the P-5 over the selection of U.N. Secretary-General, other deals are struck—such as whether the incoming Secretary-General will replace all high ranking U.N. officials or which high level secretariat slot will be accorded to which P-5 member in exchange for their vote.[12] This vote-trading among a select group is not pretty. It does not necessarily elevate merit as the criterion for selection. Even if we accord a discount for its self-serving nature, John Bolton's depressing memoir of the selection of Ban Ki-Moon tells us that the next Administration can do much to improve how the next U.N. Secretary-General or other high level U.N. officials are selected. Bolton suggests that Ban Ki-Moon was selected because, among other things, Secretary of State Rice did not want a "strong" Secretary-General.[13] Bolton tells us in no uncertain terms that he pushed for Ban Ki-Moon precisely because he would not be what he calls a 'secular pope' and was the best option given the non-negotiable demand that it was 'Asia's turn.'[14] Along the way, Bolton disparages the "High Minded" who are "always exhorting the U.N. to conduct an 'open and transparent job search'" and who urge broad consultation.[15] He praises the side-lining of the General Assembly with respect to such decisions, suggesting that it was a good idea to give that unruly body a 'take–it–or–leave–it' choice with respect to the selection of Secretary-General.[16] While I mean no disrespect to the current Secretary-General, I would hope that the next Administration does the opposite of what Bolton suggests. (This would not be a bad idea as a general piece of advice on all matters relating to the U.N., but I digress.) One way that the U.N. can be reformed must surely be to get the best and the brightest to run it. Given its inordinate power, the United States—and the U.N. Security Council—can do much to make sure that this occurs.

Thank you.

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12. JOHN BOLTON, SURRENDER IS NOT AN OPTION: DEFENDING AMERICA AT THE UNITED NATIONS AND ABROAD 273–90 (2007).

13. *Id.* at 279.

14. *Id.* at 278–84.

15. *Id.* at 279–80.

16. *Id.* at 279.