

Terrorism and the separation of powers in the national and international spheres

CH POWELL*

ABSTRACT

The United Nations Security Council produces a list of terrorist organizations and persons and requires states to take certain measures against these entities. This article focuses on the 'listing' aspect of the South African legislation, that is, its adoption of the Security Council list and the measures that may be taken against the entities placed on the list. The article considers various objections to the listing procedure, including those based on human rights, on the doctrine of separation of powers and on the rule of law. The main discussion centres on the doctrine of separation of powers, arguing that the doctrine has a role to play in both domestic and international law, and exploring the extent to which the anti-terrorism regime, and the listing process in particular, infringes the doctrine. The final section of the article explores the options available to South African courts should they be faced with a challenge to the decisions of the United Nations Security Council.

Introduction

South Africa's anti-terrorism legislation improved considerably during its long and controversial drafting.¹ Earlier versions included detention without trial, a unique regime for search and seizure, collection of evidence and preventive measures, and an extremely broad definition of the offence of terrorism.² The Protection of Constitutional Democracy

* BA LLB (UCT) LLM (Humboldt, Berlin), *Senior Lecturer, Department of Public Law, University of Cape Town*. This article grew out of a seminar presented at the University of Cape Town in April 2005. Thank you to those who made comments at the seminar, especially Kent Roach. Thank you, too, to Michael Osborne for his ideas on impermissible delegation of legislative power in South Africa, and to Tom Bennett for his comments on an earlier draft of this paper.

¹ For the drafting history of the legislation, see South African Law Commission Report (Project 105) *Review of Security Legislation (Terrorism: Section 54 of the Internal Security Act, 1982 (Act No 74 of 1982))* (2002); H Strydom 'South Africa's response to international terrorism' (2002) 27 *South African Yearbook of International Law* 82 at 96-7; C Powell 'Terrorism and governance in South Africa and Eastern Africa' in VV Ramraj, M Hor and K Roach (eds) *Global Anti-Terrorism Law and Policy* (2005 forthcoming); K Roach 'A comparison of South African and Canadian anti-terrorism legislation' the preceding article in this issue.

² The nadir of South Africa's search for a definition was contained in the 2003 draft, which defined terrorism as 'an unlawful act, committed in or outside the Republic'.

against Terrorist and Related Activities Act,³ which came into force in May 2005, has dropped detention without trial, incorporated its preventive and investigative measures almost completely into an existing criminal procedural framework⁴ and contains a highly detailed, albeit broad, definition of terrorism.

There is still, however, cause for concern. Among the troubling features in the Act, Kent Roach notes an overbroad definition of terrorism, buttressed by negligence-based liability for terrorist offences. Furthermore, suspicion of terrorism triggers extensive investigative powers on the part of the prosecuting authority and a severe regime of asset forfeiture, generally without sufficient judicial control. Finally, an extensive reporting obligation rests on any private person who suspects a terrorist act will occur or has occurred.⁵

This article analyses the anti-terrorism programme with particular emphasis on its effect on the relationship between the three branches of government. It identifies an increase in executive power at both the domestic and the international level, chiefly through the lens of the 'listing' mechanism, which was introduced by the Security Council in 1999.⁶ While the rights implications of this listing mechanism are briefly considered, the main aim of this discussion is to explore possible limits to executive power in domestic and international governance.

The influence of the executive is not as apparent in South Africa's new anti-terrorism Act as it is in the legislation of some other states. The South African Act does not allow preventive or investigative detention,⁷ assign to the executive the power to determine terrorist status and dispose of terrorist property or grant the executive immunity for acting against terrorism.⁸ But it is nonetheless clear that all the troubling features listed above serve to support the police, either directly or by easing the load of the prosecution in a criminal trial. A more subtle and pervasive executive

³ Act 33 of 2004; Proc R18 in Government Gazette 27502 of 15 April 2005. In this paper, the Protection of Constitutional Democracy against Terrorist and Related Activities Act will be referred to as the 'new Act' or the 'anti-terrorism Act'

⁴ Section 22 of the new Act brings chap 5 of the National Prosecuting Authority Act 32 of 1998 into operation. Chapter 5 is itself not immune to criticism. See Roach op cit (n1).

⁵ See Roach op cit (n1).

⁶ See Security Council Resolution (hereafter SCR) 1267 of 1999, available at <http://daccessdds.un.org/doc/UNDOC/GEN/N99/300/44/PDF/N9930044/pdf?OpenElement>, accessed 20 June 2005.

⁷ Compare, for example, the legislation in the United States of America, Australia and Canada. See W Banks 'United States responses to September 11' in Ramraj, Hor and Roach op cit (n1); S Less 'Country report on the USA' in C Walter et al (eds) *Terrorism as a Challenge for National and International Law: Security versus Liberty?* (2004); G Williams 'The rule of law and the regulation of terrorism in Australia and New Zealand' in Ramraj, Hor and Roach op cit (n1); Roach op cit (n1); and K Roach 'Canada's response to terrorism' in Ramraj, Hor and Roach op cit (n1).

⁸ Compare the examples of Uganda and Tanzania in Powell op cit (n1).

bias, however, is produced when the Act gives effect to decisions made in the international arena. The executive is the organ responsible for foreign affairs. It forms the interface between states and between its own domestic law and international law. When international law and foreign political pressure drive the anti-terrorism programme, there is therefore a danger of executive bias from the outset.⁹

The 'listing' provisions in our legislation are a mechanism whereby Parliament gives effect to the decisions of an outside body which itself has strong executive powers – that is, the Security Council of the United Nations.¹⁰ This procedure, dating back to Security Council Resolution (hereafter SCR) 1267 of 1999, tasks the so-called '1267' Committee with drawing up lists of Al-Qaida linked persons and entities. A range of Security Council Resolutions then imposes obligations on states to take particular measures against entities on the list.¹¹

Listing under South African domestic law

The South African Act gives effect to the Security Council list in four sections. Under s 25, the President 'must' publish the list in the Government Gazette and 'other appropriate means of publication', after which s 26 requires that the list be tabled in Parliament for Parliament's 'consideration and decision'. The wording of s 26 suggests that Parliament has some discretion – and the section also empowers Parliament to 'take such steps as it may consider necessary' in responding to the list. However, it is unclear what 'steps' Parliament could be expected to take, so the appearance of discretion may be illusory. It is also highly unlikely that s 26 allows Parliament to amend the list.¹²

Once proclaimed by the President under s 25, the Security Council list has severe consequences.¹³ Under s 4, it is an offence to provide any form of economic or service support for the benefit of an entity on this list.¹⁴ This offence is negligence-based (criminal liability is incurred if the person 'knows or ought reasonably to have known' that the support will benefit a listed entity),¹⁵ and it carries a maximum penalty of a R100 million fine or 15 years' imprisonment.¹⁶ Secondly, s 23 allows the National Director

⁹ See the conclusion in Powell op cit (n1).

¹⁰ For a discussion of the 'executive' nature of the Security Council, see below.

¹¹ The listing procedure is described in more detail below.

¹² Roach op cit (n1) suggests that s 26 allows the legislature to ratify (or not to ratify) the list, but notes that the criminal consequences of the list's proclamation by the President under s 25 is not affected by Parliament's decision.

¹³ Although possibly not as severe as the Security Council requires. See the description of the Security Council measures attaching to listed entities below.

¹⁴ Section 4(1)(a)-(f) and 4(1)(iii) of the new Act.

¹⁵ See the comment by Roach op cit (n1) on the negligence-based offences in the new Act.

¹⁶ Section 18(1)(c) of the new Act.

of Public Prosecutions to apply to court *ex parte* for an order preventing a person from dealing with his or her property, or freezing the property. To obtain the order, the National Director of Public Prosecutions needs to prove merely that the assets in question are controlled by an entity identified by the United Nations Security Council as Al-Qaida.¹⁷ It is not necessary to show that the assets will in fact be used for a terrorist purpose, or that the entity identified by the United Nations Security Council is in fact a terrorist organization.

Sections 4 and 23 threaten a range of constitutional rights, including the presumption of innocence (s 35(3)(b)), the right not to be deprived of one's property (s 25), the right to a hearing (s 34) and the right to dignity (s 10).¹⁸ The success of a rights-based challenge to these provisions is, however, difficult to predict. Under s 36 of the South African Constitution,¹⁹ any right in the Bill of Rights may be limited by a law of general application which meets certain requirements. When applying this limitations clause, courts have to consider, amongst other factors, the purpose of the limitation, the relation between the limitation and its purpose and the question whether there are less restrictive means to achieve the purpose. Depending on a court's view of the nature of the threat posed by terrorism and the efficacy and necessity of swift preventive and criminal action against it, the provisions might survive constitutional review.

A useful indicator for challenges to the new anti-terrorism Act might be found in a comparison with the challenges posed to the Prevention of Organised Crime Act (hereafter POCA).²⁰ This is because the new Act subjects terrorist suspects to the regime applicable to organised crime under POCA, and will therefore face similar constitutional challenges to those faced by POCA. Unfortunately, the POCA case law provides little guidance on the constitutionality of the Act, as there have been few successful challenges to it and the judgments have generally focused on the merits of the particular cases rather than the question of constitutionality. However, judgments which have upheld POCA²¹ appear to be based in part on a strong approval for the *purpose* of the Act, that is, the eradication of organised crime.²² This approach might seem to presage a slightly less sympathetic response to legislation against

¹⁷ Section 23(1)(b) of the new Act, referring to s 25 of the same Act.

¹⁸ All the sections referred to are from the Constitution of the Republic of South Africa Act 108 of 1996.

¹⁹ See above (n18).

²⁰ Prevention of Organised Crime Act 121 of 1998.

²¹ *Director of Public Prosecutions: Cape of Good Hope v Bathgate* 2000 (2) SA 535 (C), 2000 (2) BCLR 151 (C) (hereafter *Bathgate*); *NDPP v Pbillips* 2002 (4) SA 60 (W); *NDPP v Rebuzzzi* 2002 (1) SACR 128 (SCA); *NDPP v Mobamed* 2003 (2) SACR 258 (T).

²² An approval expressed clearly in *Bathgate* *supra* (n21) at para 86, which emphasises the importance of the fight against organised crime in its limitations analysis. See also Powell *op cit* (n1) and C Powell 'South Africa's legislation against terrorism and organised crime' [2002] *Sing JLS* 104 at 111.

terrorism,²³ as organised crime is a far greater problem within South African society.²⁴ However, the case law also connotes a commitment to taking on South Africa's responsibility for eradicating an international problem, rather than a merely domestic one.²⁵ If the perceived needs of the international community motivate the courts when they consider the anti-terrorism legislation, they may well respond to it sympathetically.

In the case of ss 4 and 23, however, the source of the rights infringement is only tangentially the South African Parliament. The body which has designated the listed entities as terrorist is the United Nations Security Council. This may play a role in a limitations clause analysis,²⁶ but it also grounds a second constitutional challenge: it can be argued that ss 4 and 23 constitute an impermissible delegation of legislative power.

Because the South African Constitution vests the power and duty to legislate in the legislature, our Constitutional Court has, on several occasions, invalidated legislation which would have entrusted another body with legislative power.²⁷ Although this is an unsettled area, case law suggests a number of factors which courts will take into account in determining whether the legislature may delegate powers to an outside body. The Constitutional Court generally requires the delegatee to be responsible to Parliament²⁸ and constrained in the exercise of his or her power by guidelines from Parliament.²⁹ In addition, the case law is more sympathetic to delegation which does not affect individual rights.³⁰

These factors suggest that both ss 4 and 23 of the new Act may be unconstitutional. The two provisions delegate power to a body which is not

²³ See Powell op cit (n22) at 118.

²⁴ See J-F Bayart, S Ellis and B Hibou *The Criminalization of the State in Africa* (1999) 49-68; C Powell and I Goodman 'Reconciling the fight against terrorism and organised crime with Banjul' in J Cilliers and K Sturman (eds) *Africa and Terrorism: Joining the Global Campaign* (2002) 43.

²⁵ See *Bathgate* supra (n21) and *NDPP v Mobamed* 2002 (4) SA 843 (CC) at para 14 in which Ackermann J commented that '[t]he rapid growth of organised crime, money laundering, criminal gang activities and racketeering... is... a serious international problem and has been identified as an international security threat'. See further *Mobamed* supra (n25) at paras 14-16.

²⁶ The limitations clause is inward-looking, geared to balancing the needs of South African society. It could, therefore, be argued that a limitation imposed by a body without South Africa's particular situation in mind has less weight in a limitations clause analysis. See further Powell op cit (n22) 118 n 119.

²⁷ *Executive Council, Western Cape Legislature v President of RSA* 1995 (4) SA 877 (CC) (hereafter *Executive Council I*); *Executive Council, Western Cape v Minister of Provincial Affairs and Constitutional Development* 2000 (1) SA 661 (CC) (hereafter *Executive Council II*); *Dawood v Minister of Home Affairs* 2000 (3) SA 936 (CC); *Janse van Rensburg v Minister of Trade and Industry NO* 2001 (1) SA 29 (CC).

²⁸ *Executive Council I* supra (n27); *Executive Council II* supra (n27).

²⁹ *Executive Council I* supra (n27); *Dawood v Minister of Home Affairs* supra (n27); *Janse van Rensburg v Minister of Trade and Industry NO* supra (n27).

³⁰ *Dawood v Minister of Home Affairs* supra (n27); *Janse van Rensburg v Minister of Trade and Industry NO* supra (n27).

responsible to Parliament and they provide no guidelines for designating entities as terrorist. Furthermore, South Africa's legislation attaches severe consequences to listing with a considerable effect on individual rights.

Section 25 does not give the President any discretion to proclaim the Security Council list, which makes it clear that the President is merely the instrument by which the decision of the Security Council gains force in South African domestic law. The above analysis is therefore based on the assumption that the Security Council, rather than the President, is the delegatee of the legislative power. However, even if the President were to be seen as the delegatee, the delegation would remain constitutionally suspect. To pass constitutional muster, it is not sufficient that the delegatee be accountable to Parliament through the usual mechanisms of executive accountability. If it were, all subordinate legislation would automatically be acceptable, which has not been the approach of our courts.³¹ Instead, the other factors listed above might still weigh against the delegation. It is submitted that the complete lack of guidelines and the severe consequences of listing would be sufficient in themselves to render the delegation unacceptable.

In addition to ignoring the division between legislative and executive functions, ss 4 and 23 of the new Act also usurp judicial power by allowing bodies other than the courts to make a finding equivalent to a finding of guilt. The sections can thereby be said to have revived the so-called 'bill of attainder'. This mechanism, obsolete and discredited in the United Kingdom and constitutionally prohibited in the United States of America, allowed the monarch, executive or parliament to proceed against specific individuals without referring the matter to the courts.³²

Finally, the blurring of the lines between the executive and the other two branches of government is also vulnerable to a more general constitutional challenge. The doctrine of separation of powers, implicit in our Constitution,³³ underlies both the prohibition on the delegation of legislative power and the prohibition on bills of attainder. It will also ground a constitutional challenge in its own right.³⁴

³¹ Indeed, in *Executive Council I* supra (n27), the Constitutional Court invalidated the delegation even though the delegating legislation created additional mechanisms to hold the President accountable to Parliament for his use of the delegated power.

³² DM Walker *The Oxford Companion to Law* (1980) 91-2 and 130. See also D Dyzenhaus 'The rule of (administrative) law in international law', IIIJ working paper 2005/1 (Global Administrative Law Series) (www.iiij.org) 19-22.

³³ *In re: Certification of the Constitution of the Republic of South Africa* 1996 (4) SA 744 (CC), 1996 (10) BCLR 1253 (CC) at paras 110-113; *South African Association of Personal Injury Lawyers v Heath* 2001 (1) BCLR 77 (CC) (hereafter *Heath*) at paras 21-22; *Executive Council I* supra (n27).

³⁴ See *Heath* supra (n33) at para 20 for challenges based on implicit provisions of the Constitution.

Whether for its rights infringements, its delegation of legislative power and its usurpation of judicial power, or its more general infringement of the doctrine of separation of powers, the Protection of Constitutional Democracy against Terrorist and Related Activities Act may be held to be unconstitutional to the extent that it gives effect to the listing system used by the United Nations Security Council. Should our Constitutional Court³⁵ make such a finding, however, it would *prima facie* be forcing South Africa to contravene her international obligations.

South Africa will, however, be contravening international law only if the Security Council 'listing' obligations are themselves valid. The next section investigates whether South Africa's refusal to act on a Security Council listing will violate international law by examining whether the listing itself complies with international law.

Listing under international law

As many of the arguments in this section criticise the listing procedure, it is important to understand how this procedure works. It is carried out by the '1267' Committee, popularly named after the Security Council Resolution which established it.³⁶ This committee includes an entity on its list of organizations and persons once one or more states have submitted the name of the entity, once the name has been circulated to other states, and if no objection has been received within 48 hours. The delisting procedure is more onerous. It requires negotiation between the government which wants to remove the name and the original 'designating' government.³⁷

Gutherie describes the listing procedure in the following terms:

'The requirements for adding names are... vague and relatively standardless.... Furthermore, the de-listing procedures are inadequate. There is no opportunity for sanctioned individuals to directly contest their inclusion on the list. They must first get the support of the state of their nationality or residence. If cooperation is not forthcoming from those countries, then the Committee has provided no avenue for an individual to come before the Committee directly. In addition, consensus decisions mean that any one state can prevent de-listing, and the state is not required to provide any reasoning or justification.'³⁸

³⁵ Under s 167(5) of the Constitution, the Constitutional Court would have to confirm any order of invalidity made by the Supreme Court of Appeal, the High Court or a court of similar status before that order has any force.

³⁶ SCR 1267 of 1999. See above (n6).

³⁷ The delisting procedure was added only after Sweden challenged the listing of three of its nationals. See B Kingsbury, N Krisch and RB Stewart 'The emergence of global administrative law', IILJ working paper 2004/1 (Global Administrative Law Series) (www.iilj.org) 19 n 21 and the authorities listed there; P Gutherie 'Security Council sanctions and the protection of individual rights' (2004) 60 *NYU Annual Survey of American Law* 491 at 511-3.

³⁸ Gutherie *op cit* (n37) 513-4.

Since 11 September 2001, particularly serious consequences have attached to appearing on the list: under the relevant Security Council Resolutions, states are required to freeze the financial assets of entities appearing on the list, deny them entry into and transit through their territories and prevent them from selling and supplying military equipment, whether such sales and supplies are carried out from their territories or even by their nationals outside their territories.³⁹

On many readings of the United Nations Charter, the obligations imposed on states by the Security Council with respect to the listed entities would be valid and binding. Under the United Nations Charter, member states agree to abide by decisions of the Security Council,⁴⁰ but there is a second and stronger source of obligation when the Security Council acts under Chapter VII of the Charter. This chapter, which is triggered by the Security Council's finding that there is a threat to the peace, a breach of the peace or an act of aggression, gives the Security Council wide powers to 'decide' what measures are to be employed to give effect to its decisions, including the use of force.⁴¹ The United Nations Charter provides no guidelines for what constitutes a threat to the peace, breach of the peace or act of aggression, nor does it place a limit on which 'measures' might be taken. There is also no review mechanism in the Charter by which a second body may determine whether the finding of a breach or threat to the peace or the measures taken under Chapter VII are valid. The Security Council acted under Chapter VII when it set up the '1267' Committee and when it passed the Resolutions which detail the measures to be taken against the listed entities. The Chapter VII basis of the procedure would therefore seem to put the entire mechanism beyond question.

There is, however, a growing body of scholarship which suggests legal grounds on which decisions of the Security Council, including Chapter VII decisions, can be challenged. It is argued that there is a limit to the powers of the Security Council and that legal consequences attach should the Security Council act beyond its powers. In the field of anti-terrorism measures, these arguments rely on human rights law as well as principles of constitutional and administrative law.

The listing procedure and the measures following from it threaten various rights recognized by international human rights law, especially the right to property⁴² and a range of trial and procedural rights. In the case of civil proceedings, international human rights law protects the right to

³⁹ Paragraphs 2(a) to (c) of SCR 1390 of 2002, reaffirmed by SCR's 1455 and 1456 of 2003 and SCR 1526 of 2004. All these resolutions can be found at <http://www.un.org/documents/scres.htm>, accessed 20 June 2005.

⁴⁰ Article 25 of the United Nations Charter.

⁴¹ Articles 41 and 42 of the United Nations Charter.

⁴² Protected by art 17 of the Universal Declaration of Human Rights (hereafter UDHR).

a fair and public hearing before an independent and impartial tribunal.⁴³ If the measures are considered criminal in nature,⁴⁴ then persons listed by the '1267' Committee have been denied their right to be presumed innocent until proven guilty.⁴⁵

Like domestic human rights law, international human rights law contains general limitations clauses,⁴⁶ which have led to discussion of whether some of the rights infringements in the listing process can be justified as a limitation permitted by international human rights law in the special circumstances of terrorism.⁴⁷ The question which must be answered before this, however, is whether the Security Council is subject to international human rights law at all.

The Security Council has repeatedly declared its respect for human rights,⁴⁸ but whether it is legally bound by the regime is a different question altogether. As noted above, the United Nations Charter seems to allow the Security Council to act almost without restraint. However, those who argue that it is nonetheless bound by the human rights regime point out that the Security Council, like the United Nations as a body, is bound by the Charter, which has as one of its fundamental principles the protection of human rights.⁴⁹

The institutional argument: Separation of powers in the international sphere

Particularly since September 11, 2001, the Security Council has begun to perform legislative and judicial functions in its anti-terrorism programme. The judicial function is apparent from the role of the '1267' Committee in deciding which persons and entities should be deemed to be terrorist – a

⁴³ Protected by art 14(1) of the International Covenant on Civil and Political Rights (hereafter ICCPR). E de Wet and A Nollkaemper 'Review of Security Council decisions by national courts' (2002) 45 *German Yearbook of International Law* 166 at 181-4 argue that due process rights have achieved *jus cogens* status.

⁴⁴ A controversial question. See Guthrie op cit (n37) 503-6; De Wet and Nollkaemper op cit (n43) 176-7; I Cameron 'Report to the Swedish Foreign Office on legal safeguards and targeted sanctions' (October 2002) para 9.5, available at <http://www-hotel.uu.se/juri/sii/pdf/sanctions/pdf>, accessed 20 June 2005; and *Aden v Council of the European Union (Proceedings for Interim Measures)*, case no T-306/01, 7 May 2002, ECR II-02387 at para 74.

⁴⁵ Protected by art 14(2) of the ICCPR and art 11(1) of the UDHR.

⁴⁶ Article 29 of the UDHR and art 19(3) of the ICCPR.

⁴⁷ Or as a permissible derogation. See generally Guthrie op cit (n37) and De Wet and Nollkaemper op cit (n43).

⁴⁸ See Guthrie op cit (n37) 499 n 37.

⁴⁹ *Case concerning Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Request for the Indication of Provisional Measures)* 1992 *ICJ Reports* 1, dissenting opinion of Judge Weeramantry; De Wet and Nollkaemper (n43) 171-6.

decision equivalent to a finding of guilt.⁵⁰ An illustration of the legislative function is the Security Council's new use of its Chapter VII powers.

As Paul Szasz explains, previous use of the mandatory Chapter VII powers was restricted to particular conflicts or situations, when, for example, the Security Council imposed sanctions against a state⁵¹ or non-state entity⁵² to force it to comply with international law.⁵³ In David Dyzenhaus's view, these decisions did not appear to be legislative in nature because of their particularity and temporality.⁵⁴ On the other hand, where the Security Council did decide on measures with respect to an open-ended problem, such as the position of children and civilians in armed conflict, these measures were not phrased in compulsory terms. Instead, the Security Council would 'call upon' or 'urge' states to comply with its decisions. Once again, the measures did not appear to produce binding legislation.⁵⁵

However, SCR 1373 of 28 September 2001,⁵⁶ passed in the wake of 11 September 2001, decided that 'all States shall' take a range of actions, including actions against the financing of terrorism. There is no time limit to this Resolution, and it is not confined to a particular conflict. Instead, it is aimed at an undefined threat – that of 'global terrorism'. Szasz argues that this Resolution can therefore be said to 'establish new binding rules of international law – rather than mere commands relating to a particular situation'.⁵⁷ The binding nature of the new rules is underscored by the mechanism which SCR 1373 creates to monitor compliance.⁵⁸

At the outset, it must be noted that organs of the United Nations cannot be described in terms of the neat domestic categories of legislature, judiciary and executive. For this reason, it has been argued that the doctrine of separation of powers, a doctrine of municipal law, has no application in the international sphere.⁵⁹ In the main bodies of the United Nations there is some resemblance to the trias politicas – the International Court of Justice is expressly declared to be the chief judicial organ of the United Nations, the General Assembly is a plenary body with the power to discuss

⁵⁰ See Dyzenhaus's discussion op cit (n32) 19.

⁵¹ See, for example, SCR 418 of 1977, which imposed an arms embargo against South Africa, and SCR 421 of 1977, which set up a sanctions committee on South Africa

⁵² See, for example, SCR's 864 of 1993, 1127 of 1997 and 1173 and 1176 of 1998, which imposed sanctions against the Angolan rebel movement, Unita, and its leaders.

⁵³ PC Szasz 'The Security Council starts legislating' (2002) 96 *American Journal of International Law* 901 at 901-2.

⁵⁴ Dyzenhaus op cit (n32) 14.

⁵⁵ Szasz op cit (n53) 901-2.

⁵⁶ SCR 1373 of 2001, accessible at <http://daccessdds.un.org/doc/UNDOC/GEN/NO1/557/43/PDF/NO155743.pdf?OpenElement>, accessed 20 June 2005.

⁵⁷ Szasz op cit (n53) 902.

⁵⁸ Article 6 of SCR 1373. See above (n56).

⁵⁹ FA Vallat 'The General Assembly and the Security Council of the United Nations' (1952) 29 *British Yearbook of International Law* 63. See also WM Reisman 'The constitutional crisis in the United Nations' (1993) 87 *American Journal of International Law* 83

all matters⁶⁰ (and it functions on a potentially universal suffrage⁶¹) while the Security Council is a specialised body with the primary function of maintaining peace and security. In order to perform this function, it enjoys executive powers, including that of coercion.⁶²

Despite these similarities, it is difficult to draw an analogy between the institutions at the domestic level and those at the international level. This is chiefly because the functions and powers of the three United Nations bodies differ widely from their domestic counterparts. A central problem is that the International Court of Justice has far more restricted a jurisdiction than the courts in a domestic system, as its jurisdiction over states depends on their consent, and there is no express provision in the Charter giving it the power to pronounce on the legality of acts of the Security Council or General Assembly. Similarly, the United Nations General Assembly has no express legislative powers and, unlike a legislature in a domestic system, it has no supervisory powers over the Security Council. Finally, the Security Council itself seems to be both less and more powerful than the executive in many domestic systems. On the one hand, its enforcement powers are limited to collective peace and security, and states retain their sovereignty in all other areas of international relations. The Security Council also has no hand in the running of the United Nations' administration or in formulating policies that guide the United Nations as a body. On the other hand, the Security Council itself has enjoyed the freedom to decide when peace and security are threatened, and has used its mandatory powers to intervene in states where there was no apparent threat to international peace and security,⁶³ to set up international criminal tribunals,⁶⁴ to promote regime change in Iraq⁶⁵ and even to determine borders.⁶⁶

Nonetheless, the doctrine of separation of powers remains relevant to the international sphere. Whatever the differences between the United Nations bodies and the *trias politicas* of a domestic system, the most important common factor is also, it is submitted, one of the central motivations for the doctrine of separation of powers: that is, the coercive and enforcement

⁶⁰ Article 10 of the United Nations Charter.

⁶¹ Under art 19 of the United Nations Charter, states which are more than two years in arrears with their contributions to the body lose their vote.

⁶² See the discussion of the Security Council's 'Chapter VII' powers above.

⁶³ For example, SCR 1529 of 2004 on Haiti.

⁶⁴ SCR 827 of 1993 and SCR 955 of 1994. Both resolutions can be found at <http://www.un.org/documents/scres/btm>, accessed 20 June 2005.

⁶⁵ See Reisman op cit (n59) 86.

⁶⁶ SCR 687 of 1991. See also Reisman op cit (n59) 86. Many of the factors weighed up in this paragraph are discussed in S Chekera 'Institutional arrangements under international organisations: Application of the doctrine of separation of powers. A critical analysis of the application of the doctrine to the United Nations, European Community and the African Union: To be or not to be?', unpublished LLM dissertation, University of Cape Town, 2005.

power of the executive. The first theorist⁶⁷ to suggest separating these three branches did so with the primary object of preventing tyranny.

Writing in a time of monarchy, Montesquieu's rationale for the doctrine of separation of powers rested on the argument that there can be no liberty if the powers of any two branches of government are joined in one person.⁶⁸ However the other branches of the governmental system are structured, liberty is imperilled, according to Montesquieu, whenever a single branch performs two or more of the three different functions he proposes in his analysis. This is precisely what happens when the Security Council exercises legislative and judicial functions, particularly when it is supported by Chapter VII powers and is making decisions which affect the rights of individuals and not simply those of states.

In domestic legal systems, courts and jurists are usually prepared to read a provision or principle into a constitution, a statute or the common law if they encounter a 'gap' in the legal system. Similarly, some judges and jurists who have considered the constitutional design of the international arena have been prepared to read both powers and limitations into the United Nations Charter. So, for example, the court in the *Legal Consequences* case was willing to determine the legality of a Security Council Resolution,⁶⁹ and the International Criminal Tribunal for the former Yugoslavia held in *Tadic* that the Security Council would not have had the power to set up a tribunal which did not satisfy certain due process requirements.⁷⁰ On the other hand, one of the most common arguments against the doctrine of separation of powers relies on the fact that the constitutive treaties do not give the International Court of Justice the power of review over the Security Council and place almost no limits on the powers of the Security Council itself.

The difference in these two sets of legal reasoning seems to stem from diverging conceptions of international law and the international

⁶⁷ Although John Locke's suggestion of a division of powers between governmental bodies predates Montesquieu, it was Montesquieu who proposed the three branches of legislature, executive and judiciary. See Montesquieu *De l'Esprit des Lois* (1748) and MJC Vile *Constitutionalism and the Separation of Powers* (1967) 21-52.

⁶⁸ Montesquieu op cit (n67) cited in P Leyland, T Woods and J Harden *Textbook on Administrative Law* (1994) 19.

⁶⁹ *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)* 1971 *ICJ Reports* 16, especially the separate opinion of Judge Petren. See also the dissenting judgment of Judge *ad hoc* El-Koshi in the *Lockerbie* case supra (n49) at 102-3.

⁷⁰ *Prosecutor v Tadic (Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction)*, case no IT-94-1-AR72, 2 October 1995, reprinted in (1996) 35 *ILM* 32. The International Criminal Tribunal for the former Yugoslavia (ICTY) held that the Court, as a judicial organ, must be independent from the Security Council (paras 5-22) and also implied that the Security Council was bound, in creating the Court, to respect certain trial rights (para 42).

community. Dyzenhaus's analysis would suggest that the difference in approach proceeds from a disagreement about the completeness of international law:

'Lauterpacht's... view is very much a common law one which contests the idea that the international domain is a lawless state of nature where the only obligations are those to which states consent. According to it, there are no black holes in international legal order except in so far as international actors have failed to design the institutions appropriate for maintaining legal order or in so far as states have failed to submit to the jurisdiction of existing institutions.'⁷¹

Dyzenhaus demonstrates that positivists and natural lawyers across a wide jurisprudential spectrum have supported the view that international law is a complete legal system,⁷² which suggests that apparent lacunae in the system should be resolved through the application of legal reasoning. Dyzenhaus, who suggests a range of administrative law restrictions on the exercise of public power in the international sphere,⁷³ argues that only natural law provides a coherent basis for reading these principles into international law. However, a positivist perspective also reveals that the formally recognised norms of international law provide an incomplete description of the current legal regime. Setting out their proposed study of 'global administrative law', Benedict Kingsbury, Nico Krisch and Richard Stewart comment:

'The formal sources of global administrative law include the classical sources of public international law - treaties, custom, and general principles - but it is unlikely that these sources are sufficient to account for the origins and authority of the normative practice already existing in the field.'⁷⁴

Ultimately, then, lawyers must be lawyers when they apply international law, and resolve apparent gaps and lacunae through legal reasoning. An existing body of international law - that it, international human rights law - suggests that ambiguous provisions or silences should be interpreted to limit the powers of the Security Council rather than to give it free reign.

In addition to human rights law, the concept of the rule of law and the principle of legality ground Dyzenhaus's argument against the validity of the Security Council's listing measures - an argument which moves beyond institutional design and the formal doctrine of separation of powers. In rejecting the notion that deficits in international institutions limit international law, Dyzenhaus proposes that the rule of law is not about the maintenance of a formal separation of powers. Rather, all institutions of legal order, whether international or domestic, must serve the values of the rule of law:

⁷¹ Dyzenhaus *op cit* (n32) 28-9.

⁷² Dyzenhaus *op cit* (n32) 24-9.

⁷³ See below.

⁷⁴ Kingsbury, Krisch and Stewart *op cit* (n37) 16.

‘[V]iolations of the rule of law are to be determined by looking to the substantive values which the separation of powers is supposed to protect rather than to whether the particular arrangement of powers in a legal order has been disturbed. Moreover, once this point is appreciated, one can also come to appreciate that a failure of legality or of the rule of law takes place even when no institution exists which can provide a remedy.’⁷⁵

Because the underlying basis of the rule of law is the doctrine of legality – to which the legislature, judiciary and executive are equally subject – Dyzenhaus criticizes the ‘listing’ procedure not on the basis that the Security Council cannot legislate or exercise judicial powers, but on the basis that the principle of legality has been contravened:

‘The repugnance of the common law tradition to [any legislative provision for bills of attainder] is born of the idea that while the legislature can enact into law its understandings of subversion and other offences, the rule of law requires both that that offence be framed generally and that anyone accused of such an offence be tried in a court of law.’⁷⁶

In conclusion, then, the international human rights regime, the doctrine of separation of powers and the requirements of the rule of law all call into question not only the validity of any individual listing by the ‘1267’ Committee, but the validity of the listing procedure itself.

Judging the Security Council

The above analysis suggests that our Constitutional Court might invalidate ss 4 and 23 of the Protection of Constitutional Democracy against Terrorist and Related Activities Act to the extent that they implement the listing procedure of the United Nations Security Council. Moreover, should the Court find the provisions invalid, it is arguable that such a finding will conform to, rather than violate, international law. Nonetheless, by making such a finding, a South African court would be defying a mandatory measure of the Security Council.

Fifteen percent of the states reporting to the Counter-Terrorism Committee have faced legal challenges to their implementation of the Security Council’s listing system.⁷⁷ In many of these cases, however, a political solution was found to the conflict before a court could pronounce on the validity of the listing process and its implementation in the domestic system. So, for example, both the Security Council and the Canadian government managed to circumvent a pronouncement on the (erroneous) listing of a Canadian citizen by removing his name from their respective lists. Similarly, Sweden negotiated for the removal of the names

⁷⁵ Dyzenhaus op cit (n32) 23-4.

⁷⁶ Dyzenhaus op cit (n32) 22.

⁷⁷ Guthrie op cit (n37) 519.

of two of its citizens from the Security Council list. If a South African national were to be listed by the Security Council, and find himself or herself inadequately protected by South Africa's executive branch, could this person challenge the listing successfully in a South African court? What would be the implications of a refusal by the courts to give effect to the Security Council's mandatory measures?

In *Kaunda v President of the RSA (2)*,⁷⁸ the majority refused to find that the South African executive was under a duty to extend diplomatic protection to South African citizens in foreign countries in order to safeguard their human rights. Chaskalson CJ reached his conclusion partly because international law itself does not impose a duty of diplomatic protection on states and partly out of a concern that the sovereignty of other states would be infringed should South Africa engage with them on their human rights standards. In contrast, Justice O'Regan's minority judgment emphasised that the state's right of diplomatic protection under international law is facultative and that the other states involved in the Kaunda matter – Zimbabwe and Equatorial Guinea – had also ratified the human rights instruments on which the applicants were relying. South Africa would not, therefore, infringe the sovereignty of these states merely by exercising a right held under international law – that of diplomatic protection – nor would it do so by holding them to a standard which they had already accepted. There are two aspects of this case that are central to a debate about the correct response to the international anti-terrorism regime. First, the case showcases different readings of international law, and not just constitutional law. Secondly, the weak enforcement mechanisms of international human rights law was one of the factors which informed Justice O'Regan's interpretation of the South African Constitution – an interpretation which would have better enabled South Africa to fulfil her own human rights obligations while strengthening the international human rights regime generally.⁷⁹

The case law on POCA shows that our courts have already accepted the responsibility of countering global scourges, such as organised crime, and of helping South Africa to take her place in global efforts against them.⁸⁰ This attitude is also clear from the Protection of Constitutional Democracy against Terrorism and Related Activities Act, which lists in its preamble SCR 1373, ten international conventions to which South Africa is a party and another three which she intends to ratify. Eagerness to participate in an international endeavour is, of course, both laudable and understandable, particularly in the light of South Africa's still novel position in the international fold. However, such an attitude tends to assume, somewhat

⁷⁸ 2004 (10) BCLR 1009 (CC).

⁷⁹ *Kaunda v President of the RSA (2)* supra (n78) at paras 216-217; 220-223.

⁸⁰ See above.

blindly, that the international order is both monolithic and benign. This is not always the case.

Being part of the international community and giving effect to international law entails engaging with the complexity and contradictions of that law, and developing the law to find solutions when the anti-terrorism regime conflicts with human rights norms. As we grapple with such conflicts in both the domestic and international spheres, we should avoid fashioning the law after the remedy. As Dyzenhaus points out:

'If judges cannot carry out their constitutional duty, it does not ... follow that they have no such duty. Rather, what follows is that the legal reform is required in order for the legal order to maintain its claim to be such, to be an order governed by the rule of law.'⁸¹

In this vein, some scholars have suggested that national courts step into the 'remedy' breach,⁸² effectively providing a response to the Security Council process when the International Court of Justice cannot.⁸³

In its current form, the listing procedure is an example of triple executive dominance: it allows each state to put forward names for the list with no procedural controls to protect the entity in question; it restricts any discussion of the listing to an inter-executive exchange; and it is buttressed by the full might of the international 'executive' - the Security Council - throughout its operation. The listing procedure is one of the clearest indications that the anti-terrorism programme could move beyond law and become simply an exercise of unfettered executive discretion and, ultimately, an exercise of power. If domestic courts are prepared to engage critically with the dilemma which the listing system presents, they can help to prevent the anti-terrorism programme from degenerating into a contest of power with power, and creating the very type of lawless environment in which terrorism is said to thrive.

⁸¹ Dyzenhaus op cit (n32) 22.

⁸² See, in particular, De Wet and Nollkaemper op cit (n43) 184-5; Kingsbury, Krisch and Stewart op cit (n37) 18-20.

⁸³ See De Wet and Nollkaemper op cit (n43) 170-1, who point out how seldom the International Court of Justice will be able to review decisions of the Security Council.