

12^{ème} Commission

Le contrôle juridictionnel des décisions du Conseil
de Sécurité (ONU)
Judicial Control of Security Council Decisions
(*UNO*)

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I. Introduction

In the Declaration of the High-level Meeting of the General Assembly on the Rule of Law at the National and International Level (A/RES 67/1 of 30 November 2012), amongst other assertions, it was stated that:

“We recognize that the rule of law applies to all States equally, and to international organizations, including the United Nations and its principal organs and that respect for and promotion of the rule of law and justice should guide all of their activities. We also recognize that all persons, institutions and entities, public and private, including the State itself, are accountable to just, fair and equitable laws and are entitled without any discrimination to equal protection of the law.”

This Declaration confirms that decisions of the Security Council also must respect the rule of law.¹ The declaration does neither detail what is meant by the obligation to respect and promote the rule of law nor does it indicate how this obligation of the Security Council is to be implemented in respect of its decision making. It is telling, though, that Security Council resolution S/RES 2178 (2014) of 24 September 2014 on combatting terrorism emphasizes the obligations of Member States to respect obligations under international law and in particular human rights law rather than its own obligations.²

¹ See also the World Summit Outcome Document, GA/RES 60/1 of 16 September 2005 in which the heads of State already called “upon the Security Council with the support of the Secretary-General to ensure that fair and clear procedures exist for the placing of individuals and entities on sanctions lists and for removing them, as well as drafting humanitarian exceptions” (at para. 109). The UN Secretary-General described the content of the rule of law principle:

[A] principle of governance in which all persons, institutions and entities, public and private, including the State itself, are accountable to laws that are publicly promulgated, equally enforced and independently adjudicated, and which are consistent with international human rights norms and standards. It requires, as well, measures to ensure adherence to the principles of supremacy of law, equality before the law, accountability to the law, fairness in the application of the law, separation of powers, participation in decision-making, legal certainty avoidance of arbitrariness and procedural and legal transparency (UNSG 2004 Report on the Rule of Law, para. 6).

² The Resolution states in its seventh preambular paragraph amongst other things: “*Reaffirming* that Member States must ensure that any measure taken to counter terrorism comply with all their obligations under international law, in particular international human rights law, international refugee law, and international humanitarian law, *underscoring* that respect for human rights, fundamental freedoms and the rule of law are complementary and mutually reinforcing with effective counter-

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The report will concentrate on the judicial control of targeted sanctions and in particular on the system established through S/RES 1267 (1999)/1989 (2011) which have to be seen in the context of the system of sanctions under Chapter VII of the UN Charter as a whole.³ But there are also other situations where Security Council decisions are of such a nature that a judicial control is to be contemplated. These are acts or omissions undertaken in the context of peace keeping operations and the administration of territories under the auspices of the United Nations. Another area of interest in this context will be the Security Council decisions under Article 13 lit. (b) ICC Statute.⁴

The sanctions system 1267 (1999)/1989 (2011) has developed in nature and scope into a global counter-terrorism mechanism.⁵ In its current form this system requires all States to impose a range of measures, including asset freezes, international travel bans and arms embargos on individuals and entities designated by a procedure managed by a subsidiary body of the Security Council (sanctions committee). But this system is only one among others.⁶ Many of the sanctions systems since 1990 have been established with the explicit purpose, inter alia, to target particular individuals, groups or entities. These systems differ in their scope and application. Sometimes the names of the individuals, groups and entities targeted are set out in the decision of the Security Council sometimes the

terrorism measures ... and notes the importance of respect for the rule of law so as to effectively prevent and combat terrorism.”

³ In the period 1945-1990 only a total of two sanctions were issued S/RES 232 (1966) of 16 December 1966 against Southern Rhodesia and S/RES 418 (1977) of 4 November 1977 against South Africa.

⁴ See below under II.5.5.

⁵ For details concerning this development see below under II.5.64.

⁶ The following sanctions committees exist at the moment (June 2015): S/RES 751 (1992) of 24 April 1992 and 1907 (2009) of 23 December 2009 concerning Somalia and Eritrea; S/RES 1267 (1999) of 15 October 1999 and S/RES 1989 (2011) of 17 June 2011 concerning Al Qaida and associated individuals and entities; S/RES 1521 (2003) of 22 December 2012 concerning Liberia; S/RES 1518 (2003) of 24 November 2003 concerning the situation between Iraq and Kuwait; S/RES 1533 (2004) of 12 March 2004 concerning the Democratic Republic of the Congo; S/RES 1572 (2004) of 15 November 2004 concerning Côte d'Ivoire; S/RES 1591 (2005) of 29 March 2005 concerning Sudan; S/RES 1636 (2005) of 31 October 2005 concerning Lebanon; S/RES 1718 (2006) of 14 October 2006 concerning People's Republic of Korea; S/RES 1737 (2006) of 23 December 2006 concerning Iran; S/RES 1970 (2011) of 26 February 2011 concerning Libya; S/RES 1988 (2011) of 17 June 2011 concerning Taliban; S/RES 2048 (2012) of 18 May 2012 concerning Guinea-Bissau; S/RES 2127 (2013) of 5 December 2013 concerning the Central African Republic; S/RES 2140 (2014) of 26 February 2014 concerning Middle East; S/RES 2205 (2015), 20 February 2015 concerning South Sudan.

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Member States are called upon to nominate individuals or groups to be included into a list administered by a sanctions committee. As far as lists⁷ of targeted persons and entities are concerned, a procedure has been established for updating those lists, which means adding and deleting persons as well as groups and entities to and from such lists.

The measures against individual or entities taken in the context of targeted sanctions systems (including their implementation) have been criticised for violating internationally protected human rights such as the right to property, right to free movement and the right to privacy. Further it has been argued that this system of targeted sanctions is violating the right to a fair trial since the designated individuals or entities had no sufficient means to challenge the facts or assumptions on which their designation as being associated with terrorism was based.⁸

The fact that targeted sanctions have a direct effect on the legal position of individuals as well as entities and thus may directly infringe upon their human rights⁹ means that the Security Council exercises public authority

⁷ The lists are made available under:

http://www.un.org/sc/committees/1267/aq_sanctions_list.shtml

⁸ See in particular the report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, UN Doc. A/67/396 at p. 4 et seq.; *Bardo Fassbender*, Targeted sanctions: listing/de-listing and due process, study commissioned by the United Nations, Office of Legal Affairs, (2006); *David Cortright/Erika de Wet*, Human rights standards for targeted sanctions, 2009; *Ian Johnstone*, The United Nations Security Council counter-terrorism and human rights, in: *Counter-terrorism: Democracy's Challenges*, Andrea Bianchi and Alexis Keller, eds., 2008; *Josiane Auvret-Finck*, Le contrôle des décisions du Conseil de Sécurité par la Cour européenne des droits de l'homme, in: *Sanctions ciblées et protections juridictionnelles des droits fondamentaux dans l'Union européenne: Equilibres et déséquilibres de la balance*, Constance Grewe et al. eds, 2010; *Clemen A. Feinäugle*, Hoheitsgewalt im Völkerrecht, 2011, at p. 141 et seq.; *Vera Gowlland-Debbas*, The Security Council and Issues of Responsibility under International Law, RdC 345 (2011), 184-443.

⁹ On this aspect see in particular, *Bardo Fassbender*, Targeted Sanctions and Due Process: The Responsibility of the UN Security Council to ensure that fair and clear procedures are made available to individuals and entities targeted with sanctions under Chapter VII of the UN Charter, Study commissioned by the United Nations, Office of Legal Affairs – Office of the Legal Counsel – 2006; *Iain Cameron*, The ECHR, Due Process and the UN Security Council Counter-Terrorism Sanctions, Report prepared for the Council of Europe, 2006; *Vera Gowlland-Debbas* (ed.), *United Nations Sanctions and International Law*, 2001; *August Reinisch*, Developing Human Rights and Humanitarian Law Accountability of the Security Council for the Imposition of Economic Sanctions, *AJIL*, vol. 95 (2001), at 851-872; *Eric Rosand*, The Security Council's Efforts to Monitor the Implementation of Al Qaeda/Taliban Sanctions, *AJIL*, vol. 98 (2004), at 745-763; *Karel Wellens*, Remedies against international organisations, 2002; *Gran L. Willis*, Security Council Targeted Sanctions, Due Process and the 1267 Ombudsperson, *Georgetown Journal of International Law*, vol. 42 (2012), 675-745;

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directly *vis-à-vis* individuals or groups equivalent to the exercise of public authority by a State. Such a direct effect did not exist – albeit their effect on the population of the targeted State was criticized by human rights bodies – when sanctions under Chapter VII of the UN Charter were only directed against States.

Basically it is argued that the principle of the rule of law requires that the exercise of public authority by whosoever exercised must be open to some form of judicial or other review. The Declaration of the High-level meeting of the General Assembly referred to above seems to support this approach. A further element fuelling the demand for judicial control is the claim that the exercise of public authority, on the national and also the international level, is limited by human rights. Their protection requires a judicial control of the measures in question.¹⁰

As indicated already targeted sanctions are not the only measures which directly interfere with the exercise of human rights and fundamental freedoms. Individuals also claimed damages arising from actions or omissions of Security Council subsidiary bodies in the context of an international administration of territories or in the context of peace keeping missions which they alleged to have infringed upon their human rights. The legal issues which arise are similar but not identical with the ones connected with targeted sanctions.¹¹

This report will focus on judicial control although there are other means to implement the respect for international law, human rights and the rule of law. Mechanisms other than judicial control will be discussed in this report only if they have a bearing on judicial control on which this report has to focus on.

Abstractly defined, judicial control constitutes an *in rem ex post facto* control undertaken on the basis of law. As far as Security Council decisions are concerned this would theoretically mean that they would be controlled from the point of view of applicable international law, which would embrace the UN Charter as well as other norms of international law, after the decision in question has been taken and, probably, after it has been implemented.

Christopher Michaelsen, The Competence of the Security Council under the UN Charter to adopt sanctions targeting private individuals, *International Law in the New Age of Globalization*, A. Byrnes, M. Hayashi, C. Michaelsen, eds., 2013, 11-39; *August Reinisch*, Securing the Accountability of International Organizations, *Global Governance*, vol. 2 (2001), 131.

¹⁰ Advocated by the Special Rapporteur (note 8), p. 18.

¹¹ See below under II.5.62.

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Theoretically one may also envisage a pre-emptive judicial control as originally suggested by the delegation of Belgium at the San Francisco Conference. According to the two proposals submitted¹² – the first one dealing with Security Council competences under Chapter VI was withdrawn – any State would have had the possibility of requesting an advisory opinion from the International Court of Justice for the purpose of reviewing the legality of proposed Security Council decisions.¹³ The United States, the United Kingdom, the USSR and China spoke against these proposals.¹⁴ The Belgian amendment was finally not accepted by the Legal Committee.

In the context dealt with here two different forms of judicial control are relevant: a direct and an indirect one. A direct judicial control would assess the decision of the Security Council as such, whereas an indirect control would scrutinise the measures undertaken to implement such a decision.

A direct control of Security Council resolutions has been attempted, so far, only rarely. It has been rejected or avoided by the International Court of Justice early on¹⁵ and in the *Lockerbie* cases¹⁶ as well as in the case concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (*Bosnia-Herzegovina v. Serbia and Montenegro*).¹⁷ However the International Criminal Tribunal for the

¹² See *Ke Roberts*, Second Guessing the Security Council: The International Court of Justice and its Powers of Judicial Review, *Pace International Law Review* 7 (1995), 281 at 291.

¹³ The Belgian proposal read: “Any state party to a dispute brought before the Security Council shall have the right to ask the Permanent Court of International Law whether a recommendation or decision made by the Council or proposed if it infringes on its essential rights. If the Court considers that such rights have been disregarded or are threatened, it is for the Council either to reconsider the question or to refer the dispute to the Assembly for decision.” Doc. 2, G17(k)(1), UNICO, vol. 3, Docs 335, at 336.

¹⁴ See statement of the USSR, in United Nations Conference on International Organization, vol. 12 (1945), 49; United Kingdom, *ibid.*, at 49 and France, *ibid.*, at 50. The arguments voiced against the proposals advanced several reasons, namely that the adoption of the Belgian proposal would weaken the security structures or that it would give the aggressor additional time or that the inherent limits of the Charter were sufficient. United Nations Conference on International Organization, vol. 3 (1945), 336; see also vol. 13 (1945), 653/4. See on that: *Erika de Wet*, The Chapter VII Powers of the United Nations Security Council, 2004 at 75 et seq.; see also *Roberts*, (supra note 12), at 292.

¹⁵ Advisory Opinion in the Case *Concerning Certain Expenses of the United Nations*, ICJ Reports 1962, p. 151 (168).

¹⁶ See below under III.2.2.

¹⁷ ICJ Reports 1996, p. 595 (611)

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Former Yugoslavia was required to assess the Security Council decision that established the Tribunal.¹⁸

Most of the “judicial control” of Security Council decisions exercised until now have been of an indirect nature – considering the implementation rather than the decision itself – and undertaken by national courts, the European Court of Justice, regional international human rights courts and international criminal courts.¹⁹ As will be demonstrated, this control occasionally also includes an interpretation or even an assessment of the Security Council decision which is being implemented, although some national or regional courts avoid addressing the Security Council decision in question. Such interpretation and assessment of implementing measures unavoidably will shed some light on the interpretation of a Security Council decision.

It is a fact that the number of cases where some form of judicial control has been exercised over Security Council decisions is growing. Such cases are either triggered by individuals, groups or entities and are directed against the implementation of sanctions issued by the Security Council under Chapter VII of the UN Charter specifically targeting them. Apart from that – and to be distinguished from the former –, there are further cases where individuals brought actions against acts or omissions of subsidiary bodies of the Security Council.²⁰ Jurisprudence and academic writings have, as far as judicial control is concerned, not always clearly distinguished between those cases. There are, however, significant differences between the two.

The report will start by taking stock of and analyse any form of judicial control over Security Council decisions and their implementation which has been exercised so far by international, national and regional courts. It will be established that this judicial control lacks coherency. The report will further contemplate whether any form of judicial control of Security Council decisions – be it directly or indirectly – is appropriate. In doing so, the report will have to weigh several aspects namely that the Security Council was and its functions were designed by the drafter having in mind the failure of Article 16 of the Covenant of the League of Nations. It will have to be taken into account that the Security Council is designed as political body having discretionary powers. However account also will have to be taken of the fact that the powers and functions of the Security Council are based upon the UN Charter that they have developed over

¹⁸ *Prosecutor v. Tadic (Jurisdiction)*, ILM 35 (1996), 35 (at 39 et seq.); for further details see below, pp. 45 et seq..

¹⁹ As to this jurisprudence see below, pp. 40 et seq..

²⁰ See below under III.3.

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time and that the drafter of the UN Charter did not anticipate that the Security Council would direct its sanctions against individuals or private entities rather than States.²¹ Further it will have to be taken into consideration that it is necessary to balance the need for an effective functioning of the Security Council against the relevance of the rule of law and human rights in respect of the exercise of public authority.²² Finally the report must necessarily assess to what extent the Security Council has established an adequate procedure to scrutinise its decisions on targeted sanctions.²³ The practice of the Security Council in this respect has developed significantly. It is to be considered whether this practice renders judicial control unnecessary or limits its scope.

The report will proceed in several steps. At the outset, it is necessary to establish which “decisions” of the Security Council should be the focus of this report. The term “decision” embraces actions of the Security Council of a varying nature as far as content, addressees and their context is concerned.

II. Security Council decisions

1. Terminology

There are several options²⁴ for interpreting the term “decision”; it may mean single case related acts as opposed to norms of a general nature. Or one may perceive ‘decisions’ as binding acts (of a general or specific nature) as compared to recommendations, which are of a hortatory nature.

Acts of the Security Council in general are adopted in the form of resolutions without specifying whether the resolution in question is to be considered a decision or a recommendation. According to the generally held legal opinion, confirmed by the International Court of Justice in the *Namibia Advisory Opinion*, the meaning is to be decided on the basis of the text of the measure in question and whether it is meant to be binding.²⁵ The key to the understanding of the term “decision” lies in how

²¹ See on discretionary powers of the Security Council under 5.7.2.

²² See on this issue 5.7.4.

²³ See 5.6.4.

²⁴ *Anne Peters*, on Art. 25, MN 8, in: Bruno Simma et al. (eds.), *The Charter of the United Nations: A Commentary*, 3rd ed., 2012.

²⁵ The language of a resolution of the Security Council should be carefully analysed before a conclusion can be made as to its binding effect. In view of the nature of the powers under Article 25, the question whether they have in fact been exercised is to be determined in each case, having regard to the terms of the resolution to be interpreted, the discussion leading to it, the Charter provisions invoked and, in general, all circumstances that might assist in determining the legal consequences of the resolution of the Security Council (Legal consequences for States of the Continued Presence of

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the term “decision” and the complementary term “recommendation” are being used in the UN Charter. The term “recommendation” refers to non-binding pronouncements of the Security Council which means that the complementary term “decision” embraces all pronouncements of the Security Council which have a binding effect.²⁶ This is how the term will be used in this report. This means that the judicial control of recommendations will not be considered, unless these have been transformed into decisions.

From the mandate of the Security Council in respect of the preservation of international peace and security²⁷ it follows that there is a presumption in favour of the binding nature of decisions of the Security Council under Chapter VII. It is common view though that whether a Security Council decision is binding does not depend only as to whether such decision was taken under Chapter VII, but also on whether it was intended to be mandatory as indicated by mandatory language. Occasionally, the Security Council includes mandatory and non-mandatory elements in one and the same pronouncement adopted under Chapter VII of the UN Charter. In such a case, only the mandatory elements are binding and only those qualify as a decision, properly speaking.

According to the Advisory Opinion of the ICJ on *Namibia* invoking Article 25 of the UN Charter²⁸ decisions also may be taken by the Security Council under Chapter VI UN Charter as far as the settlement of disputes are concerned. It is difficult to think of any provision in Chapter VI which may serve as a basis for binding pronouncements (decisions).²⁹ Therefore the report will not deal with decisions of the Security Council under Chapter VI of the UN Charter.

South Africa in *Namibia* (South-West Africa) notwithstanding Security Council Resolution 276 (1970) Advisory Opinion ICJ Reports 1971, 16, at para. 114).

²⁶ *Peters* (supra note 24), at MN 8.

²⁷ According to Article 24(1) of the UN Charter, Member States have conferred on the Security Council the primary responsibility for the maintenance of international peace and security and have agreed that in carrying out its duties under this responsibility the Security Council acts on their behalf. Further, according to Article 25 of the UN Charter, Member States have agreed to accept and to carry out the decisions of the Security Council in accordance with the Charter. See on this, amongst others, *Jochen A. Frowein*, Implementation of Security Council Resolutions taken under Chapter VII in Germany, in Vera Gowlland-Debbas (ed.) *United Nations Sanctions and International Law*, 2001, 253-265 (253).

²⁸ The Court pointed out that Article 25 of the UN Charter is not confined to Chapter VII since the binding nature of decisions under that Chapter is already dealt with in Articles 48 and 49 of the UN Charter, but may also extend to decisions under Chapter VI (at p. 53, para. 113).

²⁹ Different *Peters* (supra note 24), at MN 11.

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According Article 94(2) of the UN Charter on the enforcement of ICJ judgments and Article 96(1) of the UN Charter on requests for Advisory Opinions the Security Council may address the ICJ. As to whether these Security Council decisions may be amenable to judicial control by the International Court of Justice will be dealt with below.³⁰

It is of particular relevance in the context of this report whether omissions of the Security Council may be controlled judicially. As a matter of logic omissions of the Security Council may only be treated equally as actions if there is an obligation on its part to act. This is in line with the approach taken in the ILC Draft Articles on the International Responsibility of States for Internationally Wrongful Acts, as adopted 2001.³¹ As an illustration it may be sufficient to point to the *Behrami case*, a case which will be analysed in some detail later.³² The European Court of Human Rights found in this case that an omission of UNMIK, a subsidiary organ of the United Nations, was as attributable to the latter.³³

Particularly since the establishment of sanctions committees, it is an open question whether subsidiary organs of the Security Council set up in accordance with Article 29 of the UN Charter or other entities established under Article 28 of the Provisional Rules of Procedure of the Security Council have the mandate to take binding decisions on behalf of the latter. The Security Council enjoys a general competence to establish subsidiary organs and other subsidiary entities and the UN Charter does not contain restrictions as far as entrusting such organs or entities with the Council's competence to take binding decisions. However, the power to delegate is not unlimited. Due to the fact that the Security Council itself derives its competencies and legitimacy from the Member States it cannot, by delegating its powers to make binding decisions to a subsidiary organ or to another entity, increase or alter its mandate, change the balance of its composition, or change the decision-making procedure which applies to it. Two considerations have to be taken into account in this context. The competencies of the Security Council evolve through practice which means the Security Council may acquire customary competencies in practice,³⁴ if the Member States do not object. States

³⁰ See below under III.2.2.

³¹ Article 2, Text in: A/RES 56/83 of 12 December 2001, Annex as corrected by A/56/49 vol. I/Corr.4.

³² *Behrami and Behrami v. France*, Appl. No. 71412/01; *Saramati v. France, Germany and Norway*, Appl. No. 78166/01, Grand Chamber Decision As to Admissibility (2 May 2007).

³³ The Court reached this conclusion by referring to the mandate of UNMIK under Security Council Resolution 1244. Kosovo (S/RES1244 (1999) of 10 June 1999).

³⁴ See ICJ Namibia Advisory Opinion (note 22), p. 52 (para. 110).

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have acquiesced in the delegation, just as they have acquiesced in the delegation of Chapter VII powers to the UN Secretary General for the purpose of territorial administration. Given the strong presumption of legality attached to decisions of the Security Council³⁵ Member States would need to object clearly if they regard a particular delegation of power as *ultra vires* and thus illegal. As far as the activities of such subsidiary bodies or entities are concerned the Security Council must keep the overall control over the subsidiary body or entity and the decisions in question taken by it.³⁶ This also means that the Security Council cannot delegate its powers and functions and powers altogether.

It seems to be beyond doubt, though, that in establishing its sanctions committees the Security Council has kept well within this framework. They have the power to take binding decisions, to the extent mandated.

To summarise, decisions of the Security Council are those pronouncements which are binding upon Member States, non-Member States and other entities as the case may be, and which are to be implemented.³⁷ In contrast thereto Security Council recommendations are not binding, which albeit their significant political relevance.³⁸

2. Potential scope of Security Council decisions

In particular when discussing a potential judicial control of Security Council decisions it has to be borne in mind that based upon the experience of the League of Nations, the drafters of the UN Charter opted for a strong Security Council with far reaching powers under Chapter VII of the UN Charter being subject to very few express limitations.³⁹ In respect of other decisions by the Security Council under Chapter VI and VIII of the UN Charter the position of the Security Council is less pronounced. It is to be noted that Article 1(1) UN Charter requires observance of international law by the Security Council concerning

³⁵ *de Wet* (supra note 14).

³⁶ See also, *Peters* (supra note 24), at MN 21 for more details.

³⁷ In the case *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa)* notwithstanding Security Council Resolution 276 (1970), vol. I; *Namibia case* (Advisory Opinion), ICJ Reports 1971, 16, para. 116 the ICJ concluded the UN Security Council Resolution 276 (30 January 1970) was binding upon South Africa and, accordingly, the latter was obliged to withdraw its administration from Namibia immediately and to put an end to its occupation of its territory.

³⁸ See *Frowein* (supra note 27), at 263.

³⁹ *Robert Kolb*, *An Introduction to the Law of the United Nations*, 2010, at 79.

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dispute settlement but not for measures of collective security under Chapter VII.⁴⁰

It has been argued that Security Council decisions, including the ones under Chapter VII of the UN Charter, are normative⁴¹ (i.e. setting standards) rather than operational.⁴² This does not, in this generality, embrace the Security Council practice fully as it has developed over the years. Security Council decisions mostly combine operational and normative aspects.⁴³ The Security Council may make legal determinations, such as what is necessary to restore international peace and security,⁴⁴ what constitutes a threat to international peace and security – decisions which are predominantly normative.⁴⁵ As far as targeted sanctions are concerned, operational aspects prevail. This is also true for decisions of the Security Council according to Article 13 lit. (b) of the ICC Statute.⁴⁶

Of particular interest in the context of this report on a potential judicial control is the delegation of discretionary authority to Member States to designate persons to be included in the list as provided for in S/RES 1373 (2001) and S/RES 2178⁴⁷ in comparison to the original regime established under S/RES 1267 (1999) /1989 (2011).⁴⁸

⁴⁰ *Rüdiger Wolfrum* on Art 1, at MN 21/2, in: Bruno Simma et al. (eds), *The Charter of the United Nations: A Commentary*, 3rd ed. 2012; *Gérard Cahin*, *La notion du pouvoir discrétionnaire appliquée aux organisations internationales*, RGDIP vol 107 (2003), at 567.

⁴¹ *Catherine Denis*, *La pouvoir normatif du Conseil de sécurité*, 2004, at pp. 53/4.

⁴² *Benedetto Conforti*, (1996) 43 RYDI 123 seq..

⁴³ On this see the comprehensive analysis of *Antonios Tzanakopoulos*, *Disobeying the Security Council: Countermeasures against wrongful sanctions*, 2011, at p. 22.

⁴⁴ See for example Security Council Resolution 687 (1991) of 3 April 1991.

⁴⁵ A situation of interest in this context is the decision of the Security Council to transfer Iraqi Oil for Food-Funds to the Coalition Provisional Authority (CPA) in the Iraq under Security Council Resolution 1483 (2003) (2003) of 22 May 2003, at para. 17. The Security Council provided for the transfer of these funds to the CPA without any conditions and without retaining certain rights for oversight or control. These funds were administered to up to that point by the UN itself. The funds in any case were the property of the Iraqi people if not of the Iraqi State.

⁴⁶ The basis for such a decision of the Security Council rests in Article 41 of the UN Charter.

⁴⁷ S/RES 1373 of 28 September 2001 which speaks in paragraph 2(a) of ‘entities or persons involved in terrorist acts’ while paragraph 7 of S/RES 2178 (2014) of 24 September 2014 refers to “individual, groups undertakings and entities associated with Al-Qaida who are financing, arming, planning or recruiting for them, or otherwise supporting their acts or activities including through information and communication technologies, such as the internet, social media or other means.” This is combined with a reference to S/RES 2161 (2014) of 17 June 2014.

⁴⁸ For details see under III.5.6.4.

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3. Decisions attributable to the Security Council

In literature⁴⁹ the question has been raised as to which decisions are, or may be, attributed to the Security Council. This is unproblematic in respect of all decisions by the Security Council taken. This is equally true for decisions subsidiary organs or bodies of the Security Council, such as UNMIK (although it may be disputed whether a particular action is to be attributed to UNMIK or the States having contributed contingents) or the sanctions committees.⁵⁰

However, it will be necessary for the report to consider whether measures taken by mandated States or entities implementing Security Council decisions are to be attributed to the latter. These are with respect to targeted sanctions States and the European Union.⁵¹ The essential question is whether the conduct of States implementing Security Council decisions is to be seen as the conduct of agents and is to be attributed to the Security Council as principal. It is a fact that the Security Council will, necessarily, act through States or State organs due to a lack of operational capacity of its own. This is where the jurisprudence of the national courts, the European Court of Human Rights and the one of the European Court of Justice does not seem to be coherent.

This issue will be dealt with below when assessing the already existing jurisprudence of national and regional courts.

4. Binding and self-executing effect of Security Council decisions

To have self-executing effect⁵² would mean in respect of Security Council decisions that such decisions would, at the national level, provide the direct legal basis for any national judicial or administrative action to be taken.⁵³

⁴⁹ *Peters* (supra note 24).

⁵⁰ See the guidelines of the Committee. Sanctions Committees are established in accordance with Rule 28 of the Provisional Rules of Procedure but not on the basis of Article 29 of the UN Charter which refers to subsidiary organs, see the uniform wording of all Security Council decisions (note 6) establishing sanctions committees. In consequence of their autonomous character, decisions taken by International Criminal Tribunal for Rwanda (ICTR) and of the International Criminal Tribunal for the former Yugoslavia (ICTY) are not attributable to the Security Council.

⁵¹ For details see under III.4.

⁵² See on this quite in detail *Peters* (supra note 24), at MN 45.

⁵³ This question of self-executing effect has been raised with respect to international treaties before national judicial and administrative fora; on that see *Thomas Buergenthal*, Self-Executing and Non-Self-Executing Treaties in National and International Law, RdC vol. 235 (1992), 307; *Pierre-Marie Dupuy*, Encyclopaedia of Public International Law, International Law and Domestic (Municipal) Law, MN 53 et. seq.; *André Nollkaemper*, EJIL vol. 20 (2009), 853, 864; *Vera Gowlland-Debbas*,

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The litmus test for the self-executing effect is whether supplementary national legislation or administrative decisions are necessary to provide for the applicability of the norm concerned by the judicial or administrative fora.

Whether Security Council decisions may be self-executing depends upon the powers and functions of the Security Council, on the wording of the decisions under consideration and on the national legal system of the States concerned.

As far as the powers and functions of the Security Council are concerned, it is necessary to distinguish between the self-executing provisions (if any) of the UN Charter and the possible self-executing nature of decisions of the Security Council.

Almost all provisions of the UN Charter are not self-executing;⁵⁴ this is clear from their wording. The Charter refers to the obligation of States *vis-à-vis* the United Nations or establishes competences of a United Nations organ.⁵⁵ This is particularly evident for the Security Council. Articles 39, 41, and 48 of the Charter, for example, deal with the competencies of this organ, thus referring to decisions which may be taken on this basis. Considering the language of provisions which mandate Security Council decisions, one can hardly argue that the UN Charter entrusts the Security Council with the function of issuing self-executing decisions on the national level.

As far as the wording of targeted sanctions is concerned, Security Council decisions addressing individuals or groups certainly meet this litmus test developed for the self-executing effect of international treaties. The targeted persons or entities are either named in a list or they are described with sufficient clarity in the decision itself. The measures to be taken are equally precisely defined as far as scope and content is concerned. But this is not decisive. Targeted sanctions explicitly rely on the implementation and enforcement power of the States they are addressing,⁵⁶ reflecting a multi-layered approach⁵⁷ according to which normative acts undertaken on the international level are to be

The Domestic Implementation of UN Sanctions, in: Erika de Wet and André Nollkaemper (eds.) *Review of the Security Council by Member States*, 2003, at 63, 70.

⁵⁴ An exception is for example Article 2(1) of the Charter prohibiting the discrimination among States.

⁵⁵ *Frowein* (supra note 27), at 256.

⁵⁶ *Alain Pellet/Alina Miron*, *Sanctions* in: Rüdiger Wolfrum (ed.), *MPEPIL* vol. IX, 2012 at MN 39 et seq..

⁵⁷ *Pellet/Miron* (supra note 56), at MN 9 and 15.

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implemented and enforced through national mechanisms.⁵⁸ Although targeted sanctions meet the criteria of self-execution, they lack enforceability. In that respect, the entire discussion as to the possible self-executing effect of Security Council resolutions is of more theoretical interest than practical relevance. It is telling that the judgments of national and regional courts to be considered in more detail below⁵⁹ have not contemplated whether the sanctions addressed to individuals were directly applicable.

There is also a further consideration to be taken into account. By entrusting implementation and enforcement to the national executive, the responsibility of States for the implementation of the UN Charter and decisions based thereupon is upheld.

Finally, it may be pointed out that the self-executing effect of Security Council decisions would necessarily have an impact on judicial control. National or regional courts would then have to attribute the taken measures to the United Nations, and on that basis they would be inclined to analyse the legality of Security Council decisions directly if they have such jurisdiction. To this extent the denial of self-executing effect for Security Council decisions constitutes as an additional protective shield against a direct national judicial review of Security Council decisions.

5. Systemising Security Council decisions with the view to potential judicial control

5.1 Security Council decisions of an internal nature

The Security Council is called upon to take decisions which are of an internal nature with respect to the United Nations organisation. These are decisions on – amongst others – the establishment of subsidiary organs (Article 29 of the UN Charter), the participation in the elections of judges of the ICJ (Article 4 ICJ Statute) or on access to the ICJ (Article 35 ICJ Statute).⁶⁰ Such decisions by their very nature cannot be challenged from the “outside”, and accordingly will not be considered further in this report.

On the other hand, decisions concerning the admission of new members (Article 4 of the UN Charter speaks of recommendations to the General Assembly), while also of an internal nature, are – as has become evident in the past – of a highly political nature. Considering the wording of Article 4 of the UN Charter and taking into account its legislative history

⁵⁸ See S/RES. 1267 (1999) of 15 October 1999 (on Afghanistan), paras. 3 et seq..

⁵⁹ See below at pp. 45 et seq..

⁶⁰ See also Article 93 (2) UN Charter.

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it is but logical to conclude that such decisions are not open for any form of judicial review.

5.2 Security Council decisions on the basis of Chapter VI UN Charter

It has been stated already that pronouncements of the Security Council under Chapter VI shall not be dealt with in this report since it is doubtful as to whether they have binding effect.^{61/62}

5.3 Security Council decisions on the basis of Chapter VIII

The authorisation of a regional organisation by the Security Council under Article 53(1) certainly qualifies as a decision within the meaning used in this report.⁶³ Authorizing a regional organization to take military enforcement measures is, from the point of law, indistinguishable from those where the Security Council calls upon particular States to take actions under Chapter VII of the UN Charter.⁶⁴ Accordingly, the question concerning a potential judicial control should be treated alike.⁶⁵

5.4 Security Council decisions on the basis of Chapter XIV UN Charter

According to Article 94(2) UN Charter, the Security Council may take measures it considers necessary to give effect to a judgment of the International Court of Justice. The wording of this provision clearly indicates the Security Council is not under an obligation to act and it has wide discretion as to how to act. Where the Security Council resolves to take mandatory measures, which it may, even if it does not invoke Chapter VII, the respective measures would constitute a decision in the meaning of this report.

The Security Council may, in accordance with Article 96(1) UN Charter, request an advisory opinion from the ICJ. It is a matter of dispute whether such a request by the Security Council qualifies as a procedural decision

⁶¹ See above under II.4.

⁶² Under Article 34 of the UN Charter, the Security Council “may investigate any dispute” in order to determine whether it is likely to endanger peace. It is a matter of discussion whether such a decision to investigate may be initiated against the will of one of the parties and whether such a party would be obliged to co-operate with the Security Council (Negative *Benedetto Conforti/Carlo Focarelli*, *The Law and Practice of the United Nations*, 4th ed., 2010, 187 et seq.; affirmative *Hans Kelsen*, *The Law of the United Nations: A Critical Analysis of its Fundamental Problems*, 1950, 445; *Theodor Schweissfurth*, on Art. 34, MN 42 et seq., in: Bruno Simma et al. (eds), *The Charter of the United Nations: A Commentary*, 3rd ed., 2012).

⁶³ *Christian Walter*, on Article 53, MN 15/16, in: Bruno Simma et al. (eds), *The Charter of the United Nations, A Commentary*, 3rd ed., 2012.

⁶⁴ See below under IV.

⁶⁵ See below under IV.

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or a decision of substance, which is of relevance for the voting procedure under Article 27(3) of the UN Charter, but not for this report.

According to Article 65(1) ICJ Statute, the ICJ may give advisory opinions as requested. Although the ICJ has underlined that it is not obliged to render an advisory opinion, it has, so far, not declined a request for that reason.⁶⁶ In delivering an advisory opinion, the International Court of Justice may engage in interpretation of the question and may answer only part thereof. However, this should not be considered as “judicial review”, since advisory opinions are not binding. Apart from that, the relationship between the Security Council and the International Court of Justice is of a particular nature which leaves no room for judicial control.

5.5 Security Council decisions on the basis of Article 13 lit. (b), 16, ICC Statute

According to Article 13 lit. (b) of the ICC Statute, the Security Council may submit to the International Criminal Court, acting under Chapter VII of the UN Charter, “a situation in which one or more of such crimes appear to have been committed ...”⁶⁷

It is a matter of dispute whether Article 13 lit. (b), ICC Statute establishes a competence for the Security Council or whether it only provides a means for the latter to make use of its competencies in accordance with Chapter VII (Article 41) of the UN Charter.⁶⁸ This issue is not of direct relevance here.

What are of relevance, though, are the legal consequences of such a decision. In taking such a decision in respect of Member States to the ICC Statute, the Security Council opens the possibility of the International Criminal Court to act in accordance with its jurisdiction. In

⁶⁶ Karin Oellers-Frahm, on Art. 96, MN, in: Bruno Simma et al. (eds.), *The Charter of the United Nations: A Commentary*, 3rd ed., (2012).

⁶⁷ As to the legislative history of this provision see *Jakob Pichon*, *Internationaler Strafgerichtshof und Sicherheitsrat der Vereinten Nationen*, 2011, p 8; *Mahnoush H. Arsanjani*, *The Rome Statute of the International criminal Court of Justice*, *AJIL* Vol. 93, No. 1 (Jan. 1999), p. 22; *Sharon A. Williams* and *William A. Schabas*, Article 13, in: Otto Triffterer (ed.), *Commentary on the Rome Statute of the International Criminal Court: Observers' Notes, Article by Article*, 2008, 563; *Luigi Condorelli/Santiago Villalpando*, *Referral and Deferral by the Security Council*, in: Antonio Cassese, Paola Gaeta, and John R.W.D. Jones (eds.), *The Rome Statute of the International Criminal Court: A Commentary*, vol. I, 2002, 627.

⁶⁸ On this controversy see *Hans Peter Kaul*, *Max Planck Encyclopaedia of Public International Law*, ICC, MN 57,59,74,102; *Sharon A. Williams/William A. Schabas*, in *Otto Triffterer, Commentary on the Rome Statute of the international Criminal Court*, 2008, Art. 13 MN 16.

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the case of non-Member States of the ICC Statute, such a decision of the Security Council establishes the jurisdiction of the International Criminal Court and allows the latter to act in accordance with this now established jurisdiction.⁶⁹ The counterpart to Article 13 lit. (b) ICC Statute is Article 16 ICC Statute. It provides that:

“[n]o investigation or prosecution may be commenced or proceeded with under this Statute for a period of twelve months after the Security Council, in a resolution adopted under Chapter VII of the Charter of the United Nations, has requested the Court to that effect; that request may be renewed by the Council under the same conditions.”

Such a decision of the Security Council is binding for the ICC.

Considering the consequences of decisions of the Security Council under Articles 13 lit. (b) and 16 of the ICC Statute it is a valid question whether the ICC has the right of judicial control concerning these Security Council decisions.⁷⁰ Both decisions the one under Article 13 lit. (b) ICC Statute and the one under Article 16 ICC Statute are to be treated separately.

As far as decisions under Article 13 lit. (b) of the ICC Statute are concerned, it is necessary to bear in mind that the International Criminal Court is independent from the Security Council and, further, that it is one of the principle functions and even obligation of an international court to establish whether it has jurisdiction (Kompetenz-Kompetenz). This principle is reflected in Article 19(1) of the ICC Statute.⁷¹ This raises the question whether this competence presents the possibility for judicial control by the International Criminal Court on decisions of the Security Council under Articles 16 of the ICC Statute and which grounds may be invoked.

To deny the International Criminal Court the right to decide on its jurisdiction when a situation has submitted to it according to Article 13 lit. (b) ICC Statute would make Article 19 ICC Statute inapplicable in part and would render the International Criminal Court into a subsidiary organ of the Security Council. This would not conform to the status of the International Criminal Court as envisaged by the ICC Statute. In deciding on its jurisdiction the International Criminal Court will have to decide whether it has jurisdiction *ratione materiae* in accordance with Article 5

⁶⁹ *Kaul* (supra note 68), MN 59.

⁷⁰ This issue was not discussed at the Rome Conference.

⁷¹ Article 19(1) ICC Statute reads: The Court shall satisfy itself that it has jurisdiction in any case brought before it. The Court, may, on its own motion, determine the admissibility of a case in accordance with Article 17.

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of the ICC Statute, *ratione temporis*, *ratione personae* and *ratione loci*.⁷² Further, the International Criminal Court may determine whether a case submitted is inadmissible.⁷³

Comparing the issues to be considered by the International Criminal Court with the ones the Security Council will have to assess it becomes evident that they overlap only in part. The Security Council has to consider a 'situation in which one or more of such crimes appears to have been committed' whereas the International Criminal Court deals with a 'case brought before it'. Which means the International Criminal Court decides on its jurisdiction on the basis of factually more concrete information. The Security Council has to establish that the situation is a threat to international peace. This decision is, according to Article 24 of the UN Charter, the 'primary' responsibility of the Security Council and therefore not open for judicial review. This primary responsibility has to be respected by the International Criminal Court as the Security Council has to respect the autonomy of the International Criminal Court. This means in essence that although the International Criminal Court may decline its jurisdiction in respect of a case embraced by a situation submitted to it under Article 13 lit. (b) ICC Statute this does not amount to a judicial control of the respective Security Council decision.

As far as decisions of the Security Council under Article 16 of the ICC Statute are concerned it is to be noted that the decision of the Security Council is taken on the basis of Chapter VII of the UN Charter which means that the suspension requested is in the interest of maintaining international peace and security. As to whether such a situation exists depends upon an assessment of the Security Council which only the latter is mandated to take.⁷⁴ Accordingly such a decision of the Security Council under Article 16 ICC Statute cannot be judicially controlled by the International Criminal Court.⁷⁵

5.6 Security Council sanctions based on Chapter VII UN Charter

5.6.1 In general

As already indicated, Security Council sanctions under Chapter VII of the UN Charter encompass in substance two decisions which are interlinked.

⁷² See on that in some detail *Pichon* (supra note 67), at p. 308 et seq.; *Luigi Condorelli/Santiago Villapando*, Referall and Deferral by the Security Council, in Antonio Cassese, Paola Gaeta and John R.W.D. Jones (eds) *The Rome Statute of the International Criminal Court: A Commentary*, vol. I, 2002, p. 627 (649).

⁷³ Article 19 ICC Statute.

⁷⁴ On that in more detail see under IV.

⁷⁵ *Pichon* (supra note 67), at p.315/316

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They first establish that a particular activity constitutes “a threat to the peace, a breach of the peace or act of aggression” in accordance with Article 39 of the UN Charter. This decision is of a normative character;⁷⁶ it becomes effective at the moment of its pronouncement. Second, they then decide what measures shall be taken in accordance with Articles 41 or 42 of the UN Charter which is dominantly operational. In general the objective of Security Council decisions is to maintain or restore international peace as defined by it.⁷⁷ Due to the Cold War, only a few such sanctions were adopted prior to 1990.⁷⁸ Thereafter the number of non-military sanctions increased and in this process the sanctions system has undergone significant changes and refinement, which finally led to targeted sanctions directed against particular individuals or groups.⁷⁹ This does not mean that sanctions against States will be set aside.

From the point of view of potential judicial control it is relevant to note that the powers of the Security Council under Chapter VII of the UN Charter are far reaching but they are, at the same time, subject to limitations whose scope is disputed.⁸⁰ Further it is to be noted that the Charter does not provide for any explicit mechanism of review, judicial or otherwise.⁸¹ It is commonly agreed that the Security Council is conceived as a strong “executive”.⁸² It is further relevant to note that the Council’s decision that a threat to the peace, breach of the peace or act of aggression exists, and the taking of non-military or military enforcement measures are tailored to particular factual situation⁸³ and are the outcome

⁷⁶ See on this *Nico Krisch*, Chapter VII Action with Respect to Threats to the Peace, Breaches of Peace, and Acts of Aggression, Introduction to Chapter VII: General Framework, The Charter of The United Nations: A Commentary, 3rd edition, (2012) (ed. by B. Simma, D.E. Khan, G. Nolte, A. Paulus), vol. II, p. 1251 et seq. with further references.

⁷⁷ *Pellet/Miron* (note 56), MN 9 and 15.

⁷⁸ Until then the Security Council had adopted 11 Resolutions with express reference to Chapter VII.

⁷⁹ *David Cortright*, Security: Challenges to UN Action, 2002; *David Cortright/George Lopez*, (eds.), Smart Sanctions. Towards Effective and Humane Sanctions Reform, 2002; *David Cortright*, Responses to the Global Terrorist Threat, 2007; *Gar C. Hufbauer, Jeffrey Schott, Kimberley Elliott, and Barbara Oegg*, Economic Sanctions Reconsidered, 3rd expanded edition, 2007; *Andrea Charon*, UN Sanctions and Conflict: Responding to Peace and Security threats, 2010.

⁸⁰ On that see below under II.572.

⁸¹ *Jerem M. Farral*, United Nations Sanctions and the Rule of Law, 2007, at 73 et seq..

⁸² *Nico Krisch*, on Art. 39, MN 12, in: Bruno Simma et al. (eds.), The Charter of the United Nations: A Commentary, 3rd ed., 2012; *Kolb* (supra note 39), at 79.

⁸³ *Simon Chesterman*, Rule of Law, in: Rüdiger Wolfrum (ed.), MPEPIL vol. VIII, 2012, MN 29 distinguishes between discretionary powers granted to the Security Council by the UN Charter and ‘arbitrary’ execution of the relevant decisions.

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of political deliberations within the Security Council. They are not based upon juridical considerations. The lack of a precise definition what constitutes a threat to peace is intentional and is meant to give the Security Council considerable flexibility in deciding whether it was necessary to respond to a particular situation.⁸⁴ In practice, the Security Council mostly resorted to “threat to peace” or “threat to international peace” as the relevant threshold to issue measures under Chapter VII of the UN Charter. It, however, referred to a “breach of peace” in the case of the invasion by Iraq into Kuwait.⁸⁵

Traditionally, non-military as well as military sanctions were directed against a State concerned. As already indicated targeted sanctions are directed against individual or groups alone or besides States. The Security Council sanctions are implemented by the State or States to whom they are addressed. These may be one State (as in the case of Southern Rhodesia⁸⁶), a group of States, Member States (only in the case of Southern Rhodesia and North Korea⁸⁷) or all States.

Sanctions issued by the Security Council are, according to Articles 25, 48 and 103 of the UN Charter, legally binding on all to whom they are addressed. In accordance with Article 2(6) of the UN Charter, this also includes non-Member States.⁸⁸ The Trial Chamber of the ICTY pointed out that the extension of sanctions to non-Member States did not constitute an *excès de pouvoir* if it was necessary for the maintenance of international peace and security.⁸⁹

5.6.2 *Military measures*

It is generally accepted that the Security Council, instead of acting directly, may authorise Member States to use military force.⁹⁰ This has

⁸⁴ Robert C Hildebrand, *Dumbarton Oaks: The Origins of the United Nations and the Search for Post-war Security*, 1990, 138; *Farral* (supra note 81), at 64.

⁸⁵ S/RES 660 (1990) of 2 August 1990.

⁸⁶ S/RES 232 (1966) of 16 December 1966, at paras. 2,7.

⁸⁷ S/RES 1708 (2006) of 14 October 2006, at paras. 8-10.

⁸⁸ Hans Kelsen, *The Law of the United Nations*, 1951, 85/86.

⁸⁹ *Prosecutor v Milan and others*, Case IT-99-37-PT, Trial Chamber on Jurisdiction (6 May 2003), paras. 51-57.

⁹⁰ *de Wet* (supra 14), at 260-263; *Linos-Alexander Sicilianos*, *Entre multilateralisme et unilaterisme: l'autorization par le Conseil de securité de recourir à la force*, RdC 339 (2008), 9 at 169-174; *Thomas M. Franck*, *Recourse to Force: State Action Against Threats and Armed Attacks*, CUP 2002, 24-29; *Simon Chesterman*, *Just War or Just Peace? Humanitarian Intervention and International Law*, 2001, 191, *Yoram Dinstein*, *War, Aggression, and Self-Defence*, 4th ed., 304, takes the position that the Security Council has never attempted to activate Article 42 of the UN Charter and see the operations such as the one against Iraq as based on Article 39 of the UN Charter.

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become an established practice⁹¹ in spite of the criticism that, through this practice, the Security Council loses control over the enforcement actions undertaken by the States concerned.

The first such authorisation took place in 1966 when the Security Council called upon the UK to prevent “by the use of force if necessary” the shipment of oil to Southern Rhodesia.⁹² In response to the invasion of Kuwait by Iraq, the Security Council called upon Member States to enforce the trade embargo, then to free Kuwait.^{93/94} The formula used in the Security Council resolutions later became the standard model for action. Thereafter the Security Council authorised the use of force in the cases of Somalia,⁹⁵ Rwanda,⁹⁶ Haiti,⁹⁷ and Libya;⁹⁸ further cases are Liberia⁹⁹ and Côte d’Ivoire.¹⁰⁰

It should have become evident from the foregoing that the authorisation of Member States or regional organisations to take forcible measures under Chapter VII can be divided into several decisions, namely, that there is a threat to international peace or security, a breach of peace or aggression, that measures under Article 41 of the UN Charter are not adequate and that a particular State, or groups of States or regional organisation should take action.

It is generally accepted that limits for the delegation of forcible actions exist. Such limits are not specified in the UN Charter; they evolve from

⁹¹ *Christine Gray*, *International Law and the Use of Force*, 3rd ed. 2008, 366; *Benedetto Conforti*, *The Law and Practice of the United Nations*, 3rd ed., 2005, 208; see also the World Summit Outcome Document, GA/Res. 60/1, 16 September 2005 which reaffirmed ‘the authority of the Security Council to mandate coercive action’ at para. 79.

⁹² S/RES 221 (1966), 9 April 1966.

⁹³ S/RES 665 (1990), 26 August 1990; S/RES 678 (1990), 29 November 1990. “... to use all necessary means to restore peace and security in the area ...”.

⁹⁴ It is, however, discussed controversially whether these resolutions concerning Iraq constituted an authorisation under Article 42 of the UN Charter or an endorsement of collective self-defence – in favor of the latter *Dinstein*, supra note 86, at 273-277; *Joe Verhoeven*, *Etats allies ou Nations Unies? L’O.N.U. face un conflit entre l’Irak et le Kuwait*, AFDI 36 (1990), 185-189; in favor of the former *Christopher Greenwood*, *New World Order or Old? The Invasion of Kuwait and the Rule of Law*, MLR, 55 (1992), 169; *de Wet* (supra note 14), at 281; *Dan Sarooshi*, *The United Nations and the Development of Collective Security*, 1999, 174 et seq..

⁹⁵ S/RES 733 (1992) of 23 January 1992.

⁹⁶ S/RES 918 (1994) of 17 May 1994; S/RES 925 (1994) of 22 June 1994.

⁹⁷ S/RES 875 (1993) of 16 October 1993; S/RES 917 (1994) of 6 May 1994; S/RES 940 (1994) of 31 July 1994.

⁹⁸ S/RES/748 (1992) of 31 March 1992.

⁹⁹ S/RES 1497 (2003) of 1 August 1993.

¹⁰⁰ S/RES 1572 (2004) of 15 November 2004.

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general considerations on the delegation of powers. Such limits include a precise definition of the scope of the delegated power and the effective supervision of the functions exercised by the mandated entity.¹⁰¹ To assess the practice of the Security Council in this respect it is necessary to distinguish between targeted sanctions, peace keeping missions, the administration of territories and mandating military enforcement measures. It has been argued that the practice of the Security Council is not coherent in this respect.¹⁰² The report will return to this issue in the context of discussing judicial control and its limits.¹⁰³

5.6.3 *Non-military measures addressing States only*

Non-military sanctions have been issued for a range of specific objectives such as compelling an occupying State to withdraw its troops,¹⁰⁴ preventing a State from developing weapons of mass destruction,¹⁰⁵ countering international terrorism,¹⁰⁶ protecting against human rights violations¹⁰⁷ and implementing the program for a peace process.¹⁰⁸ In all these cases the Security Council has decreed that there was a threat to international peace and security.

Non-military sanctions mostly consist of, apart from diplomatic measures, embargoes against the import and export of weapons as well as other goods, and the limitation of cross-border travel.¹⁰⁹ In 1966 sanctions

¹⁰¹ Nico Krisch, on Art. 42, MN 14, in: Bruno Simma et al (eds.), *The Charter of the United Nations: A Commentary*, 3rd ed., 2012; Giorgio Gaja, *Use of Force Made or Authorized by the United Nations*, in: Christian Tomuschat (ed.), *The United Nations at Age Fifty*, 1995; 46; Sicilianos (supra note 90), at 70/1.

¹⁰² Critical in this respect, *de Wet* (supra note 14), at 280-283.

¹⁰³ See below under IV.

¹⁰⁴ Iraq/Kuwait (S/RES 661 (1990) of 6 August 1990).

¹⁰⁵ South Africa (S/RES 418(1977) of 4 November 1977); North Korea (S/RES 1718 (2006) of 14 October 2006); Iran (S/RES 1737 (2006) of 23 December 2006).

¹⁰⁶ Afghanistan (S/RES 1267 (1999) of 15 October 1999).

¹⁰⁷ South Africa (S/RES 418 (1977) of 4 November 1977); Haiti (S/RES 841 (1993) of 16 June 1993); Sudan (S/RES 1556 (2004) of 30 July 2004).

¹⁰⁸ Liberia (S/RES 788 (1992) of 19 November 1992); Liberia (S/RES 1521 (2003) of 22 December 2003); Angola (S/RES 864 (1993) of 15 September 1993); Rwanda (S/RES 918 (1994) of 17 May 1994); Sierra Leone (S/RES 1132 (1997) of 8 October 1997); Democratic Republic of the Congo (S/RES 1493 (2003) of 28 July 2003); Ivory Coast (S/RES 1572 (2004) of 15 November 2004).

¹⁰⁹ There exists an extensive literature on non-military sanctions; see for example: *Tono Eitel*, *Reform of the United Nations sanctions regime*, *Praxishandbuch UNO*, S. von Schorlemer (Hrsg.) 2003, who is critical about the procedure as applied *de facto* for deciding on sanctions; *Johan Galtung*, *The Effects of International Economic Sanctions: With Examples from the Case of Haiti*, *World Politics*, vol. 19 (1967), 378-416 who takes a critical view; equally so *Arne Torsten/Beate Bull*, *Are Smart Sanctions*

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were imposed against Southern Rhodesia¹¹⁰ and in 1977 against South Africa.¹¹¹ By S/RES 232 (1966) all Member States were obliged to implement an export and import ban on certain products or commodities to or from Southern Rhodesia, equally they had to impose a traffic ban. S/RES 418 (1977) of 4 November 1977 against South Africa followed in principle the same pattern although concentrating on an arms embargo. In both cases a sanctions committee was established which possessed different functions from the ones established after 1991. They were merely to gather information and to monitor the situation.¹¹²

After 1991 the restrictions on import and export imposed by non-military sanctions were broadened¹¹³ and tightened at the same time over the years.

Also in one further respect the sanctions system underwent gradual changes over the years. Originally sanctions of the Security Council were directed against particular States while addressing States or only a group thereof to implement the sanctions. Due to the growing involvement of non-state groups in non-international conflicts to which the Security Council increasingly turned its attention to after 1990 it modified its practice without, however, developing a clear pattern.¹¹⁴ It increasingly directed its sanctions against non-state actors alone or together with particular States. For example, S/RES 2139 (2014) of 22 February 2014 on Syria condemns violations of human rights and international humanitarian law committed by the Syrian government and groups such as Al-Qaida. S/RES 1653 (2006) of 27 January 2006 was equally as specific naming particular groups having violated human rights and international humanitarian law; the same is true for S/RES 2071 (2012) of 12 October 2012 on Mali and 2088 (2013) of 24 January 2013 on the Central African Republic. Although these resolutions – none of them was issued under Chapter VII of the UN Charter – seem to have some similarity with targeted sanctions there is one significant difference. They are meant to establish or to restate substantive obligations for particular groups whereas targeted sanctions require the addressed States to

Feasible?, *World Politics*, vol. 54 (2002), 373-403; *David A. Baldwin*, *Economic Statecraft*, 1985, 35-36.

¹¹⁰ S/RES 232 (1966) of 16 December 1966.

¹¹¹ S/RES 418 (1977) of 4 November 1977.

¹¹² See S/RES 253 (1968) of 29 May 1968 and S/RES 421 (1977) of 9 December 1977, para. 1.

¹¹³ See the sanctions imposed upon Haiti (1993-1994), Yugoslavia (1992-1995) and, in particular, on Iraq.

¹¹⁴ ICRC, *Interpretative Guidance on the Notion of direct participation in hostilities under international humanitarian law*, 2009, p. 31/32.

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implement sanctions against particular individuals or groups. Nevertheless, these former Security Council resolutions may be regarded as the forerunners of targeted sanctions emphasizing that also non-state entities may have obligations under public international law. From there to take enforcement measures against such groups is just an additional step.

5.6.4 *Non-military measures addressing States to implement sanctions against identified or identifiable individuals, groups and entities (targeted sanctions)*

5.6.4.1 In general

The first resolution to explicitly introduce targeted sanctions focussing on particular individuals and groups¹¹⁵ was S/RES 1267 (1999) of 19 October 1999.¹¹⁶ In previous resolutions – not issued under Chapter VII – the Security Council had already called upon the Taliban to end the fighting.¹¹⁷ Although the S/RES 1267 sanctions system has by now become the one mostly referred to when targeted sanctions are

¹¹⁵ The relevant part in the Resolution reads:

“**Determining** that the failure of the Taliban authorities to respond to the demands in paragraph 13 of Resolution 1214 (1998) constitutes a threat to international peace and security,

Stressing its determination to ensure respect for its Resolutions, **Acting** under Chapter VII of the Charter of the United Nations,

1. **Insists** that the Afghan faction known as the Taliban, which also calls itself the Islamic Emirate of Afghanistan, comply promptly with its previous resolutions and in particular it cease the provision of sanctuary and training for international terrorists and their organizations, take appropriate effective measures to ensure that the territory under its control is not used for terrorist installations and camps, or for the preparation or organization of terrorist acts against other states on their citizens, and cooperate with efforts to bring indicted terrorists to justice;

2. **Demands** that the Taliban turn over Usama bin Laden without further delay to appropriate authorities in a country where he has been indicted, or to appropriate authorities in a country where he will be returned to such a country, or to appropriate authorities in a country where he will be arrested and effectively brought to justice;...”

Others consider S/RES 1127 (2006) of 14 October 2000 as the first targeted sanction since it provided for the imposing of a travel ban against senior officials of UNITA and members of their immediate families, see *Stephan J. Hollenberg*, *Challenges and Opportunities for Judicial Protection of Human Rights against Decisions of the United Nations Security Council*, 2013 (imprint) at p 29.

¹¹⁶ See on the legal regime established by this Resolution *Feinäugle* (supra note 8), at 141 et seq.; *Rosemar Foot*, *The United Nations, Counter Terrorism and Human Rights: International Adaption and Embedded Ideas*, *Human Rights Quarterly* 29 (2007), 489, 504 et seq.; *Willis* (supra note 9) points out that already in 1966 (S/RES 232(1966) of 16 December 1966) addressed the white minority government of Southern Rhodesia rather than the State itself.

¹¹⁷ S/RES 1193 (1998) of 28 August 1998; S/RES 1214 (1998) of 8 December 1998.

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discussed, the policy shift from comprehensive to targeted sanctions was in effect only manifested in S/RES 1483 (2003) of 22 May 2003. This resolution changed the sanctions system providing for a freezing of assets of a group of individuals to be defined by the Sanctions Committee. It has become the model of subsequent targeted sanctions. The S/RES 1267 sanctions system which originally targeted the Taliban and Al-Qaida as well as individuals and entities associated with them was ultimately separated into a Taliban sanctions system (S/RES 1988 (2011) of 17 June 2011 and an Al-Qaida sanctions system (S/RES 1989 (2011) of 17 June 2011). The procedure for the two differs.

The sanctions system based upon S/RES 1373 (2001) of 28 September 2001 which had for objective to eradicate the funding of international terrorism was amalgamated with the S/RES 1267 sanctions system.

Although all non-military sanctions ultimately aim at influencing the behaviour of individuals, albeit by addressing States, targeted sanctions modify this approach. They specifically target named individuals or entities involved in armed conflict, terrorism, systematic and widespread violations of human rights as well as international crimes, all qualified as threats to peace and security, with the objective to make them comply with international law in general or adopted Security Council resolutions. The addressed States are obliged to implement such non-military sanctions. The situation for them is different in respect of military sanctions where the Security Council has to seek the co-operation of States willing to engage militarily.

Since targeted sanctions¹¹⁸ inevitably lead to an infringement of the rights of individuals or entities, they raise the question whether and to what extent such individual rights are protected and whether the Security Council or the implementing State or both have to honour such protection and to what extent. Here the issue of attributability comes into play. It is necessary to establish against whom the measure was taken against and it is equally decisive to whom such measure is attributable.¹¹⁹

¹¹⁸ Other types of Security Council pronouncements must be distinguished from targeted sanctions, namely those which have directed recommendations to the public and non-State actors. For example, in Sierra Leone the Council asked the diamond industry to collaborate with the official government. With regard to Liberia, the Council called upon the Liberian parties to cease hostilities. However, these pronouncements are recommendations, not decisions, and they do impose obligations upon neither the civil society nor upon any other group named in this context.

¹¹⁹ See below under IV.

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It is evident that the measures to be taken under a targeted sanction and the rights of targeted individuals or entities may be in conflict. This leads to the further question of who is to decide in such a conflict, whether judicial control is appropriate and whether the latter fits into the overarching system of the preservation of international peace. The policy of targeted sanctions was justified as being more specific than the traditional economic sanctions directed against States since they are meant to address only against those who were responsible for the activities which allegedly constituted a threat to the peace. The development of targeted sanctions was in response to the criticism voiced against economic sanctions, in particular the ones against Iraq.¹²⁰ However, the decision making process concerning targeted sanctions have come under criticism for not complying with internationally accepted standards of due process.¹²¹

As already indicated targeted sanctions are not the only ones which may affect the rights of individuals. On several occasions subsidiary organs of the Security Council took binding measures in the context of the international administration of territories (Kosovo, Bosnia and Herzegovina, East Timor).¹²² As far as the situation of individuals is concerned, measures enacted in the context of territorial administration may create similar restrictions for individuals as those implementing targeted sanctions.¹²³

5.6.4.2 Threat to international peace and security in the context of targeted sanctions

As indicated earlier all sanctions – apart from the one on Iraq – establish that a “threat to international peace and security”¹²⁴ justified the

¹²⁰ See, for example, *Erika de Wet*, Human rights limitations to economic enforcement measures under Article 41 of the UN Charter and the Iraq sanctions regime, *Leiden Journal of international law* 14 (1988), 277-304.

¹²¹ See the literature in *supra* notes 8 and 9 as well as the 2005 World Summit Outcome Document (A/RES 60/1, 24 October 2005). In 2006 the UN Secretary-General called on the Security Council to establish “fair and clear procedures” for the 1267 sanctions regime concerning listing and delisting individuals and entities (UN SCOR 61st session, 547th mtg., at 5, UN Doc. S/PV5474 (22 June 2006). *August Reinisch*, Value Conflicts Within the United Nations Security Council, *Austrian Review of International and European Law*, vol. 14 (2009), 41-60, considers it ironic that targeted sanctions being meant to be more human rights friendly are equally criticized from the point of view of human rights.

¹²² See *de Wet* (*supra* note 14), at 291, 315.

¹²³ On that see below.

¹²⁴ The wording may –as far as targeted sanctions are concerned – vary somewhat. None of them refers to Article 39 of the UN Charter explicitly. They all, however, explicitly

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sanction's decisions taken by the Security Council. Filling this term with substance, in respect of targeted sanctions, underwent considerable development. The S/RES 1267 (1999) sanctions system, at the beginning having targeted Al-Qaida and Osama bin Laden, in particular, may serve as an illustrative example since it was supplemented by further Security Council resolutions.¹²⁵

At the outset, Security Council resolution 1267 (1999) of 15 October 1999 on Afghanistan established that the failure of the Taliban authorities to respond to the demands of resolution 1214 (1998) of 8 December 1998 constituted a threat to international peace and security. Resolution 1214 (not adopted under Chapter VII) had requested that the Taliban stop providing sanctuary and training for international terrorists and their organisations and that all Afghan factions co-operate with efforts to bring indicted terrorists to justice. The Taliban

state that the Security Council is acting under Chapter VII of the UN Charter. Only few refer to Article 41 of the UN Charter.

¹²⁵ S/RES 1333 (2000) of 19 December 2000 (on Afghanistan); S/RES 1363 (2001) of 30 July 2001 (on Afghanistan); S/RES 1390 (2002) of 16 January 2002 (on Afghanistan); S/RES 1452 (2002) of 20 December 2002 (on threats to international peace and security caused by terrorist acts); S/RES 1455 (2003) of 17 January 2003 (on threats to international peace and security caused by terrorist acts); S/RES 1526 (2004) of 30 January 2004 (on threats to international peace and security caused by terrorist acts); S/RES 1566 (2004) of 8 October 2004 (on threats to international peace and security caused by terrorist acts); S/RES 1617 (2005) of 29 July 2005 (on threats to international peace and security caused by terrorist acts); S/RES 1624 (2005) of 14 September 2005 (Security Council Summit) (on threats to international peace and security caused by terrorist acts); S/RES 1730 (2006) of 19 December 2006 (on General issues relating to sanctions); S/RES 1732 (2006) of 21 December 2006 (on General issues relating to sanctions); S/RES 1735 (2006) of 22 December 2006 (on threats to international peace and security caused by terrorist acts); S/RES 1822 (2008) of 30 June 2006 (on threats to international peace and security caused by terrorist acts); S/RES 1904 (2009) of 17 December 2009 (on threats to international peace and security caused by terrorist acts); S/RES 1988 (2011) of 17 June 2011 (on threats to international peace and security caused by terrorist acts); S/RES 1989 (2011) of 17 June 2011 (on threats to international peace and security caused by terrorist acts); S/RES 2082 (2012) of 17 December 2012 (on threats to international peace and security caused by terrorist acts); S/RES 2083 (2012) of 17 December 2012 (on threats to international peace and security caused by terrorist acts). These resolutions have been analyzed by *Feinäugle*, supra note 8, at 141 et seq.; S/RES 2129 (2013) of 17 December 2013 (on threats to international peace and security caused by terrorist acts); 2170 (2014) of 15 August 2014 (on threats to international peace and security caused by terrorist acts); S/RES 2178 (2014) of 24 September 2014 (on threats to international peace and security caused by terrorist acts) and S/RES 2199 (2015) of 12 February 2015 (on threats to international peace and security caused by terrorist activities) are equally as relevant. Equally of relevance are S/RES 2160 and 2161 of 17 June 2014 – the latter, together with S/RES 2199 (2015), extended the scope of targeted individuals and entities to cover ISIL (Islamic State in Iraq and the Levant) and ANF (Al-Nusrah Front).

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organisation was further requested to stop human rights violations. Later, the finding of the Security Council that there was a threat to international peace and security was based upon the ongoing terrorist attacks, the terrorist network, etc. Such terrorism was considered to exist worldwide; the previous territorial connection was abandoned. In the course of this development the objective of the sanctions regime was altered. Whereas S/RES 1267 (1999) referred to Afghanistan, the agenda item for S/RES 1566 (2004) of 8 October 2004, although taking S/RES 1267 (1999) as a starting point, refers to “threats to international peace and security caused by terrorism”. The first Security Council resolution to qualify terrorism as a threat to international peace in this context was S/RES 1390 (2002), which thus adopted the approach of S/RES 1373 (2001) while generalising it. S/RES 1566 (2004) amalgamated the sanctions directed against Al-Qaida and the Taliban with the decisions of the Security Council against the financing of terrorism and terrorist attacks as referred to in S/RES 1373 (2001) of 28 September 2001. With S/RES 1390 (2002), the territorial nexus to Afghanistan was given up, transforming the S/RES 1267 sanctions regime into a general one against terrorism worldwide.

This development also has an influence on the scope of the sanctions as far as the targeted persons and entities are concerned.

5.6.4.3 Targeted individuals, groups and entities

S/RES 1267 (1999) was directed against all members and supporters of the Taliban and Osama bin Laden.

With resolution 1333 (2000), the Security Council extended the application of the sanctions provided for under resolution 1267 (1999). The principle shift in this sanctions regime rests in the fact that, as far as financial sanctions were concerned, the territorial nexus was given up and the financial sanctions became individualised; they targeted Osama bin Laden and all individuals and entities associated with him.¹²⁶ The identification of these persons and entities rested with the Sanctions Committee concerned which was entrusted with the establishment and administration of a list which named the targeted individuals and entities.¹²⁷ Whereas Security Council resolution 1267 (1999) speaks of the “Afghan faction known as the Taliban”, Security Council resolution 1373 (2001) of 28 September 2001 embraces a wider group, namely “persons who commit or attempt to commit terrorist acts or participate in or facilitate the commission of terrorist acts”. This changed

¹²⁶ S/RES 1333 (2000) of 19 December 2000, at para. 8.

¹²⁷ Ibid. para. 16; on that see below under 5.6.4.6.

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the mandate of the Sanctions Committee considerably as well as the nature of the sanctions as such. From now on it was possible to target individuals worldwide. The most important aspect of this change is that individuals and entities may be listed which are or only may be engaged in the preparation of terrorist acts.¹²⁸ This modifies the objective of the sanctions from being predominantly repressive into ones of a preventive nature.

Security Council resolution 1390 (2002), adopted in 16 January 2002, constituted a further step. Whereas so far the financial sanctions targeted Osama bin Laden and his followers, the sanctions on travel and transit only addressed high-ranking officials. All sanctions had the same target, namely Osama bin Laden, members of the Al-Qaida organisation and the Taliban and other individuals, groups, undertakings and entities associated with them, as referred to in the list created pursuant to resolutions 1267 (1999) and 1333 (2000) to be updated regularly by the Committee. This constituted a consequential shift in the sanctions policy already anticipated in the loosening of the territorial nexus inherent in S/RES 1267 (1999). It further described the measures to be taken in greater precision. Through this, the sanctions system against terrorism also became quasi-permanent. The reason for this development was the collapse of the Taliban regime in Afghanistan in 2001, which made it obsolete to address this group in its territorial nexus with Afghanistan. Since the Security Council considered international terrorism a threat to peace¹²⁹ the policy shift as evidenced in this resolution was a matter of consequence.

Five years after having established that targeted sanctions should be directed against Osama bin Laden, the Taliban and other individuals, groups or undertakings and entities associated with them, S/RES 1617 (2005) made an attempt to identify what was meant by

¹²⁸ The individuals targeted vary: They may be persons in decision-making positions of States, in rebel groups or in terrorist groups, arms dealers. In particular the scope of the S/RES 1267/1989 sanctions system is broad including also individual or entities associated with Al-Qaida or supporting Al-Qaida. Even the possibility of such support is sufficient. There is a trend to increase the use of designating criteria related to human rights and the protection of civilians in armed conflict. For example, S/RES 1542 of 15 November 2004 imposed sanctions on those 'responsible for serious violations of human rights and international humanitarian law'.

¹²⁹ The UN Secretary-General addressed this point when he stated: "... with the collapse of the Taliban most sanctions measures appear to have no focus...". Report of the Secretary-General on the humanitarian implications of the measures imposed by Security Council Resolution 1267 (1999) and 1333 (2000) on the territory of Afghanistan under Taliban control, S/ 2001/ 1215, 18 December 2001, paragraph 3. See also *Feinägule* (supra note 8), at 151/2.

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“associated with”.¹³⁰ This resulted in a further widening of the scope of potential targeted persons or entities, since any supporting act or activity was considered sufficient. Apart from that, the resolution established a link to principles developed by the Financial Action Task Force, an entity created by the G7 in 1989. Under S/RES 2083 (2012) of 17 December 2012, all States are obliged to “take measures ... with respect to Al-Qaida and other individuals, groups, undertakings and entities associated with them.”¹³¹ The scope was further extended by S/RES 2161 (2014) of 17 June 2014 and S/RES 2199 (2015) of 12 February 2015 so as to cover ISIL and ANF.¹³²

One may summarize that the particularity of targeted sanctions as far as the scope of such sanctions is concerned is not that Security Council decisions are directed against individuals or entities – this was occasionally the practice of the Security Council before¹³³ – but that enforcement measures are to be implemented by the addressed States which have no or only limited discretionary power with respect to the identification of the target and the nature of the measures to be undertaken. Although these individuals or groups have direct obligations under public international law they are mediated by States, or in Europe by the EU, when it comes to the implementation of the targeted sanctions.¹³⁴ This changes the role of the States or the EU as the case may be. In implementing targeted sanctions of the Security Council, States and the EU act like an executive of the former.

5.6.4.4 Measures to be taken on the basis of targeted sanctions¹³⁵

One of the most common measures of targeted sanctions is the freezing of financial assets. The freezing of financial assets was adopted the first time in S/RES 841 (1993) of 16 June 1993.¹³⁶ Since then, the freezing of financial assets has become common, in particular, as a measure to fight terrorism.¹³⁷ There is a substantive connection between targeted sanctions

¹³⁰ See S/RES 1617 (2005) 29 July 2005 at para. 2.

¹³¹ S/RES 2083 (2012) of 17 December 2012, at para. 1; para. 2 contains a definition on what is meant by “associated with Al-Qaida”.

¹³² See supra note 125.

¹³³ See above under II.5.64.

¹³⁴ *Peters* (supra note 24), at MN 36.

¹³⁵ The measures to be taken are comprehensively set out in S/RES 2161 (2014) 17 June 2014.

¹³⁶ S/RES 841 (1993) of 16 June 1999, at para. 8.

¹³⁷ See S/RES 1390 (2002) (note 119) para. 2(a) and the subsequent Security Council Resolutions until S/RES 2082 (2012) (note 119), para 1(a) while the wording is stereotype. For details see *Thomas Biersteker/Sue Eckert*, *Countering the Financing of Terrorism*, 2008. With S/RES 2170 (2014) (note 118) the wording becomes more

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against terrorism and the International Convention for the Suppression of the Financing of Terrorism, 1999.¹³⁸ The freezing of targeted assets is decreed and implemented with a view to denying or depriving particular entities (individuals, groups, companies or institutions) of their assets or property so as to render their activities impossible or at least more difficult or ineffective. This freezing of assets in the fight against terrorism does not distinguish between assets held privately or in an official capacity.¹³⁹

S/RES 1452 (2002) of 20 December 2002 was the first decision to concentrate on exemptions from financial sanctions, thus ameliorating some of the economic consequences of the targeted sanctions. It thus acknowledged that the implementation of these sanctions resulted in the infringement of the rights of individuals and such sanctions, although justified, must not have a totally disproportionate effect. This approach prevailed.

Travel bans are equally a common measure for targeted sanctions. Travel bans or restrictions have been decreed, for example, by UN sanctions against the military junta in Haiti¹⁴⁰ and specifically listed Iranian individuals involved in the nuclear activities of Iran.¹⁴¹ Travel bans are applied to individuals who are either part of a regime (for example Syria) or they are applied more independently. They mean to restrict the efficiency of terrorist networking.

In S/RES 2170 (2014) the Security Council noted with concern that terrorist groups generate income from oilfields and condemns any direct or indirect trade with such groups. It stated that such trade would constitute financial support for 'entities designated by the Sanctions Committee pursuant to S/RES 1267 and S/RES 1989 and may lead to further listings by the Sanctions Committee. This announcement has been implemented by S/RES 2199 (2015) of 12 February 2015, by associating ISIL and ANF with Al-Qaida.¹⁴²

comprehensive. This is due to the fact that terrorist gained access to natural resources using these resources for their funding.

¹³⁸ A/RES 54/109 of 9 December 1999.

¹³⁹ See for example S/RES/1373 (2001) of 28 September 2001. In other cases such as in the case of sanctions against the Iraq only assets held in an official capacity or governmental assets were frozen.

¹⁴⁰ S/RES 914 (1994) of 27 April 1994.

¹⁴¹ S/RES 1737 (2006) of 23 December 2006.

¹⁴² See supra note 125.

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Another example for targeting particular goods is the arms embargoes adopted in most targeted sanctions.¹⁴³ Occasionally a ban on the import of luxury goods has been issued.¹⁴⁴ Such a ban is meant to target the political elite in particular.

5.6.4.5 Management of the sanctions regimes

As already indicated the Security Council has delegated several of its responsibilities concerning the implementation of sanctions to sanctions committees.¹⁴⁵

Generally speaking, sanctions committees oversee the implementation of sanctions by States and eventually their effect on third States.¹⁴⁶ Each sanctions committee is tailored to a particular sanctions regime.¹⁴⁷ This practice was established with the first sanctions regime,¹⁴⁸ concerning Southern Rhodesia and maintained, with one exception,¹⁴⁹ to date. Other sanctions committees were established to undertake responsibilities concerning sanctions regimes which were already in existence.¹⁵⁰

In spite of the proliferation of sanctions committees, they have several elements in common. They are composed of representatives of the Member States of the Security Council, they meet in closed session and they take decisions by consensus. Apart from that significant differences exist,¹⁵¹ but they all exercise their power on behalf of the Security Council.¹⁵² States are obliged to implement the decisions of sanctions committees taken on behalf of the Security Council.

¹⁴³ See the report United Nations Arms Embargoes: Their Impact on Arms Flows and Target Behaviour, ed. by Damien Fruchart et al., 2007.

¹⁴⁴ Democratic People's Republic of Korea S/RES 1718 (2006) of 14 October 2006, para. 8(a)(iii).

¹⁴⁵ See the detailed list on the established sanctions committees at note 6. On sanctions committees in general see *Andreas Paulus*, on Art. 29, MN 35, in: Bruno Simma et al. (eds.), *The Charter of the United Nations: A Commentary*, 3rd ed., 2012, at pp. 1000-1003. Frequently Sanctions Committees are referred to as 'subsidiary organs' of the Security Council. It should be noted, though, that the relevant resolutions refer to Rule 28 of the Provisional Rules of Procedure of the Security Council rather than Article 29 of the UN Charter. Only the latter speaks of subsidiary organs. Sanctions Committees instead are subsidiary bodies.

¹⁴⁶ See *Paulus* (note 145), MN 35.

¹⁴⁷ On the existing sanctions committees see footnote 6 above.

¹⁴⁸ S/RES 253 of 29 May 1968 (Southern Rhodesia).

¹⁴⁹ The exception is the Sudan, see S/RES 1070 (1996) of 16 August 1996.

¹⁵⁰ The activities of the Sanctions Committees vary considerably. The Sanctions Committee S/RES 1267/1989 on Al-Qaida and the S/RES 1970 Sanctions Committee on Libya belonged to the most active ones in the past.

¹⁵¹ See below under IV.

¹⁵² See *Paulus* (supra note 145), at pp. 1000-1003.

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Most sanctions committees are required to examine the reports of the Secretary General on the implementation of the sanctions, they seek information from Member States and they examine how to render sanctions more effectively. Some committees have the responsibility of considering applications for exemptions from a sanctions regime and requests for special assistance under Article 50 of the Charter. The most important task of sanctions committees is to administer the list of targeted individuals and entities.¹⁵³ In particular this latter responsibility has undergone a significant evolution under S/RES 1267/1989 (1999/2011) and supplementing Security Council resolutions.

The mandate of the Sanctions Committee under S/RES 1267 (1999)¹⁵⁴ was, at the outset, rather limited. The Committee had to examine reports or information submitted to it by the UN Secretary General and member States and to make periodic reports on the information received as well as on the implementation of the sanctions regime. It could also identify funds (or other financial resources) and aircraft 'in order to facilitate the implementation of the measures imposed ...'¹⁵⁵

The targeted individuals or entities were, after targeting was taken up, listed in the Security Council resolution itself. In this respect a decisive change was introduced with S/RES 1333 (2000) which empowered the Sanctions Committee to list targeted persons and entities thus identifying them for sanctioning.¹⁵⁶

In S/RES 1363 (2001), adopted on 30 July 2001, the Security Council decided to set up a mechanism to monitor the measures imposed by resolutions 1267 (1999) and 1333 (2000); the monitoring group consisted of up to five experts selected on the basis of equitable geographical distribution. This resolution did not yet attempt to render the sanctions system more transparent, but meant to better control the implementation of the sanctions imposed by the States.

- *Listing*

Paragraph 16 of S/RES 1333 (2000) decrees as follows:

¹⁵³ To assist sanctions committees' panels or groups of experts have been established for most of the sanctions committees.

¹⁵⁴ S/RES 1267 (1999) of 15 October 1999, at para. 6.

¹⁵⁵ S/RES 1267 (1999) (note 154), at para. 4 (e).

¹⁵⁶ There are still two approaches concerning the listing of individuals or entities. The listing may take place within a resolution or the relevant sanctions committee may create the list while using the appropriate designation criteria set out in the governing Security Council resolution.

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“Requests the Committee to fulfil its mandate by undertaking the following tasks in addition to those set out in Resolution 1267 (1999);

(a) ...

(b) To establish and maintain updated lists, based on information provided by States and regional organizations, of individuals and entities designated as being associated with Usama bin Laden, in accordance with paragraph 8(c) above;

(c) – (g) ...”

The Sanctions Committee was further mandated ‘to make the relevant information regarding the implementation of these measures publically available.’¹⁵⁷ The Security Council resolution neither established whether additional material had to be tabled by the Member State concerned in support of the information for listing (designating State) nor did it set out any procedural or other requirements to be followed by the designating State nor any procedure for the delisting of persons or entities.¹⁵⁸ In reaction to criticism concerning the lack of transparency of targeted sanctions the Security Council adopted detailed resolutions to develop a procedure concerning the sanctioning of individuals and entities. S/RES 1456 (2003)¹⁵⁹ and 1526 (2004)¹⁶⁰ tried to make the system more transparent and effective by providing that the States concerned should be informed about the listing and calling upon them, when seeking to list a person or entity, to provide as much information as possible. S/RES 1456 (2003) emphasised that States were obliged to ensure that

“any measure taken to combat terrorism comply with all their obligations under international law, in particular international human rights.”¹⁶¹

The listing procedure was amended by para. 17 of S/RES 1526 (2004) which requested designating States when submitting new names to the Committee’s list to ‘include identifying information and background information, to the greatest extent possible, that demonstrates the individuals’ and or entity(ies)’ association with Usama bin Laden or with

¹⁵⁷ In some sanctions systems information may also be provided by the UN Secretary-General, the High Commissioner for Human Rights or some panels or expert groups.

¹⁵⁸ This listing procedure was confirmed in S/RES 1390 (2002). However, in this context it has to be noted that the Security Council Resolution now referred to Usama bin Laden, the members of the Al-Qaida organization and the Taliban and other groups, undertakings, entities associated with them.

¹⁵⁹ Of 20 January 2003 adopted at a Meeting of Ministers for Foreign Affairs.

¹⁶⁰ Adopted 30 January 2004, see *Feinäugle* (supra note 8), at pp. 155 et seq..

¹⁶¹ S/RES 1456 (2003) of 20 January 2003, at para. 6.

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members of the Al-Qaida organization and/or the Taliban.’ This information was meant to allow the Sanctions Committee to scrutinize the information concerned and thus was a means of controlling designations. This listing procedure was further refined by S/RES 1617 (2005)¹⁶² requiring the designating States to provide the Sanctions Committee with ‘a statement of the case describing the basis of the proposal’. These procedural elements were confirmed in S/RES 1735 (2006),¹⁶³ but it was added that Member States were encouraged to identify those parts of the statement of case which may be publically released. Apart from that the listing procedure remained essentially the same¹⁶⁴ with the exception that the listing focused on the aspect of financing and support. With S/RES 1822 (2008) of 30 June 2008 the designating States were called upon to summarize the reasons for listing in a way that it could be put on the website of the Sanctions Committee. These summaries are prepared with the assistance of the Monitoring Team¹⁶⁵ but they may be edited to remove information the designating State considers sensitive.¹⁶⁶ The listing procedure was further amended for the Al-Qaida list by S/RES 2161 (2014), of 17 June 2014.¹⁶⁷ The listing procedure became more formalized and the listing has to be made public. Apart from that States are obliged , “... to notify or inform in a timely manner the listed individual or entity of the listing and to include with this notification the narrative summary of reasons for listing, a description of the effects of listing as provided in the relevant resolutions, the Committee’s procedure for delisting requests, including the possibility of submitting such a request to the Ombudsman in accordance with paragraph 43 of resolution 2083 (2012) and Annex II of this resolution, and the provisions of resolution 1452 (2002) regarding

¹⁶² Para. 4.

¹⁶³ Para. 5; see also S/RES 1732 (2006) which welcomed the report of an informal working group on sanctions and adopted its Recommendations (Report of the Informal Working Group of the Security Council on General Issues of Sanctions S/2006/997 of 22 December 2006). This working group had recommended that the Security Council should clearly define the scope of the sanctions as well as the criteria for their moderation and abolition.

¹⁶⁴ See S/RES 1904 (2009), para. 11 which, however, decrees that the statement of the case should be releasable unless to be considered confidential; see also S/RES 1988 (2011), paras 11/12; 1989 (2011), paras 12/13; 2082 (2012) paras 12 et seq., 2083 (2012), paras 10 et seq.

¹⁶⁵ S/RES 1989 (2011), annex I, para. k.

¹⁶⁶ By its Resolution 1904 (2009), of 17 December 2009 the Security Council introduced a presumption that the full statement of the case would be published except for those parts that the designing State identified as confidential. The Special Rapporteur (note 8) remained critical on the procedure.

¹⁶⁷ Paragraphs 30-40.

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available exemptions, including the possibility of submitting such requests through the Focal Point mechanism.”¹⁶⁸

These detailed rules addressed to the States concerned demonstrate two things. It is clear that the implementation of the listing rests with the States concerned and that in doing so States have to respect procedural rights and standards of the targeted individuals or entities. In implementing this obligation States are guided by the Security Council but they act under their own responsibility.

The listing as far as the Taliban list is concerned is regulated in S/RES 216. Its particularity – apart from not providing for an Ombudsperson – is that the listing of individuals and entities should be undertaken only after consultations with the Afghan government.¹⁶⁹

Proposals for listing are adopted by consensus by members of the Committee. The designating State is expected to have reviewed the underlying evidence whereas the Committee as a whole in reality lacks this possibility. This raised concern that the procedure might be used for purposes unrelated to the fight against terrorism.¹⁷⁰

- *Obligation of States concerning the procedure of listing*

There is one important element to be noted. Since S/RES 1506 (2004) the Security Council emphasizes that States ‘must ensure that any measures taken to combat terrorism comply with all their obligations under international law, in particular human rights, refugee and humanitarian law.’¹⁷¹ It is important to note that the Security Council realized that the implementation of targeted sanctions could infringe upon the human rights of the persons and entities concerned. However, it obviously considers the observance of human rights as an obligation States when designating persons or entities or when implementing targeted sanctions.

5.6.4.6 Internal control/delisting

The decision to use targeted sanctions raised questions and criticism in judicial pronouncements¹⁷² as well as in the academic literature.¹⁷³

¹⁶⁸ Paragraph 40.

¹⁶⁹ Paragraph 23.

¹⁷⁰ *Her Majesty's Treasury (Respondent) v. Mohammed Jabar Ahmed and others (FC) (Applicants)* (2010) UKSC 2 AC 534, para. 181.

¹⁷¹ See also S/RES 1624 (2005) of 14 September 2005 (not adopted under Chapter VII of the UN Charter); S/RES 1822 (2008) of 30 June 2008; S/RES 1989 (2011); S/RES 2083 (2012); S/RES 2178 (2014) of 24 September 2014 in its preambular part.

¹⁷² See below under III.3.

¹⁷³ *Norrin M Ripsman*, *The Challenge of Targeting Economic Sanctions*, *The [reviews] International Journal*, Vol. 57, Issue 4 (Autumn 2002), pp. 647-651; *Eric Rosand*, *Security Council's Efforts to Monitor the Implementation of Al Qaeda/Taliban*

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Targeted sanctions have been criticised for the manner in which individuals are listed and have their assets frozen without either transparency or the possibility of formal review. This has prompted the Security Council to establish a system which provides for a review of the listing of individuals and entities. This system has been refined over the years.^{174/175} Petitions for delisting (removal from the list of targeted individuals and entities) may be addressed to the committee by member States of the committee, to the committee via the state of nationality or residency of the petitioner or to the Focal Point by the petitioner directly. S/RES 1730 (2006) of 16 December 2006 established a procedure for delisting¹⁷⁶ and in this context set up a “Focal Point” as a contact possibility for listed individuals. The Focal Point is responsible for receiving requests for delisting from a petitioner. The request is forwarded to the designating government and the governments of citizenship and residence. The governments concerned are encouraged to consult with the designating government. If recommended by one of those governments, the delisting request is to be placed on the agenda of the sanctions committee, which would take a decision by consensus. Further procedural developments are enshrined in S/RES 1732 (2006) of 21 December 2006, and 1735 (2006) of 22 December 2006, all attempting to improve the transparency and the efficiency of the listing and the delisting procedure. This delisting procedure does not only apply to the Sanctions Committee established by S/RES 1267 (1999), but also

Sanctions, *The American Journal of International Law*, Vol. 98, pp. 745-763; see also the literature quoted in *supra* notes 8 and 9.

¹⁷⁴ There have been several initiatives of States not belonging to the Permanent members of the Security Council to improve the design of targeted sanctions. These initiatives have led to several reports such as *Design and Implementation of Arms Embargoes and Travel and Aviation Related sanctions* (2001) which resulted from the Bonn-Berlin Process, the report *Targeted Financial Sanctions: A Manual for Design and Implementation* (2001) as the result of the Interlaken Process. The Stockholm Process produced a *Report on Making Targeted sanctions Effective: Guidelines for the Implementation of UN Policy Options* (2003). These reports had an influence on the report of the Informal Working Group on *General Issues of Sanctions* (2006) (S/2006/997).

¹⁷⁵ In response to the criticism of the sanctions regime, the Sanctions Committee on 8 November 2002 published procedural rules which, amongst others, established a procedure for the delisting of individuals and entities (Security Council Committee pursuant to Resolution 1267 (1999) and 1989 Concerning Al-Qaida and Associated Individuals and Entities, *Guidelines of the Committee for the Conduct of its work* http://www.un.org/sc/committees/1267pdf/1267_guidelines.pdf; on that procedure see *Feinäugle* (note 8 at notes 13-16).

¹⁷⁶ Contained in an annex to the Resolution; see also the Presidential statement S/PRST/2006/28 of 22 June 2006. This Presidential Statement followed a meeting of the Security Council on Strengthening international law, rule of law and maintenance of international peace and security.

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to those sanctions committees set up by S/RES 1718 (2006), 1636 (2005), 1591 (2005), 1572 (2004), 1533 (2004), 1521 (2005), 1518 (2003), 1132 (1997), 918 (1994) and 751 (1992). Security Council resolution 1735 (2006) of 22 December 2006 reiterated the sanctions previously imposed and the requirements for the listing of individuals and entities, and provided for a procedure for notifying the individuals or entities concerned.¹⁷⁷

The procedure was subsequently reinforced with the adoption of Security Council resolutions 1822 (2008) and 1904 (2009) of 17 December 2009.¹⁷⁸ In the latter, the Security Council decided to create an office of the ombudsperson to assist the S/RES 1267 Sanctions Committee in respect of delisting requests for the Al-Qaida regime only. Before the Al-Qaida S/RES 1267/1989 and the Taliban (S/RES 1988) system were split.

It is the task of the Ombudsperson to receive requests from individuals targeted by the Security Council sanctions in the fight against terrorism.¹⁷⁹ Individuals and entities on the sanctions list are entitled to obtain information on the reasons for the measures taken against them and to file delisting petitions with the ombudsperson. It is the Ombudsperson's function to examine each case impartially and independently and then to submit a report to the sanctions committee explaining the reasons for or against delisting.¹⁸⁰

With S/RES 1989 the powers of the Ombudsperson were expanded significantly. Recommendations to the Al-Qaida 1257/1989 Sanctions Committee for removal from listing become final and binding within 60 days unless overturned by consensus or referred to the Security Council by a committee member.¹⁸¹ This reversal of the procedure from consensus required for delisting to consensus required for continued listing does not necessarily result in an automatic delisting if the Ombudsperson so recommends. Any member of the Committee may bring the matter within 60 days to the Security Council which has to

¹⁷⁷ S/RES 1735 (2006) of 22 December 2006 paras. 10 and 11.

¹⁷⁸ See paras 20 et seq.; the ombudsperson was originally established for 18 months only; its mandate was extended.

¹⁷⁹ On both resolutions see *Feinäugle* (supra note 8), at 169 et seq..

¹⁸⁰ This procedure was reviewed critically and it was pointed out that it did not constitute an equivalent to judicial control (see, in particular, the Supreme Court of in England in: *Her Majesty's Treasury (Respondent) v. Mohammed Jabar and others (FC)* (supra note 170), paras 78, 80-81 and 239.

¹⁸¹ See the criticism even on this enhanced procedure by the Special Rapporteur (supra note 8), at p 14/5 (paras 32-35).

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decide within 60 days about delisting. Such decision can be vetoed. The mandate of the Ombudsperson was extended in S/RES 2161 (2014).¹⁸²

The delisting procedure for the Taliban list differs – apart from lacking an Ombudsperson –. According to S/RES 2160 (2014)¹⁸³ the delisting requires prior consultations with the Afghan government. This opens the possibility for a political process in Afghanistan setting aside anti-terrorist considerations.

A group of likeminded States recommended to the Security Council that the mandate of the Ombudsperson should be extended to all sanctions system.¹⁸⁴

5.6.4.7 Exemptions

The Al-Qaida system provides for the possibility of exemptions.¹⁸⁵ The request for delisting on that basis has first to be submitted for the consideration of the State of residence. A similar procedure applies to the Taliban list on the basis of S/RES 1452 (2002), 1735 (2006).¹⁸⁶

5.7 Legal limitations to Security Council decisions, in particular targeted sanctions

5.7.1 Targeted sanctions to be understood as a unit or as a composed measure

Before dealing with the following issue as to whether there exist limitations, especially for human rights reasons, for the Security Council in deciding on targeted sanctions it is recommendable to briefly give an assessment of the characteristics of targeted sanctions. These are frequently seen as a unit although they consist of various layers which are dominated by the Security Council, a sanctions committee acting on behalf of the Security Council or by Member States. Certainly the targeted person or entity experiences only the final result but it has to be taken into consideration that at least two layer of a targeted sanction are under the responsibility of individual Member States.

The first layer consists of the decision of the Security Council under Article 39 UN Charter that international terrorism constitutes a threat to

¹⁸² Paragraphs 41-61.

¹⁸³ Paragraph 25.

¹⁸⁴ Austria, Belgium, Costa Rica, Denmark, Finland, Germany, Liechtenstein, The Netherlands, Norway, Sweden and Switzerland (S/PV/6964 10 May 2012) whereas others emphasized the political nature of UN sanctions and held that it would be premature to extend the authority of the Security Council (Security Council Report: Special research Report, UN Sanctions 8 November 2013), at p. 14.

¹⁸⁵ S/RES 2161 (2014), paragraphs 62-64.

¹⁸⁶ S/RES 2160 (2014), paragraph 12.

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international peace and security. Although S/RES 1267 (1999) had a different starting point this general decision on international terrorism has been integrated into the S/RES 1267 system. On the next layer the Security Council decides which sanctions are to be taken (financial sanctions and travel bans). Both such decisions have a predominantly normative character since in the context of targeted sanctions they are not directly implementable as long as the list of individuals or entities does not specify against whom they are to be addressed. It then falls upon the Member States – and this constitutes the third layer – to design persons and entities to be listed with the view that the sanctions decided upon by the Security Council on the second layer be applied against them. Member States are obliged under the S/RES 1267 system to make such nominations but it is for them to decide whom to designate and what to produce as the basis for such designation. Member States have quite some discretionary power in that respect. The Security Council emphasized that Member States in designating persons and entities have to respect international law obligations, in particular human rights and international humanitarian law. If and when persons or entities have been listed by the Sanctions Committee (acting on behalf of the Security Council) – which constitutes the fourth layer – the Member States or the EU is under an obligation to implement the sanctions as decreed (fifth layer). Finally, Member States play a role in the delisting process.

5.7.2 *UN Charter*

To what extent the Security Council's competence to issue binding decisions on sanctions is limited is discussed controversially in academic writing as well as in national or regional jurisprudence. It has to be borne in mind that even accepting legal restraints for the Security Council in exercising its functions is not tantamount to judicial control.

Some writers conclude that the Security Council's function is to maintain international peace and security and that places it above the law.¹⁸⁷ Others insist, however, that the actions of the Security Council are subject to

¹⁸⁷ *Clyde Eagleton*, *International Government*, 1952; *Gabriël H. Oosthuizen*, *Playing the Devil's Advocate: The Security Council is Unbound by Law*, *LJIL* 12 (1999), p. 549 et seq.; *Hans Kelsen*, *The Law of the United Nations: A critical Analysis of its Fundamental Problems*, 1951, p. 294; Judge *Schwebel*, *Dissenting Opinion, Case Concerning Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. US)*, *Merits*, *ICJ Reports* 1986, p. 14 (290); *Hanspeter Neuhold*, *Die Grundregeln der zwischenstaatlichen Beziehungen*, in: *Hanspeter Neuhold/Waldemar Hummer/Christoph Schreuer* (eds.), *Österreichisches Handbuch des Völkerrechts*, 1997, 319, 326.

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legal limitations which have their basis in the UN Charter as well as in international law.¹⁸⁸

It has been argued by some that the UN Charter indicates in Articles 24 and 25 that the power of the Security Council to issue sanctions is not unlimited. According to Article 25 of the UN Charter, Member States agree to carry out the decisions of the Security Council in accordance with the UN Charter, although it has been equally argued by others that the words “in accordance with the present Charter” may apply to the actions of Member States or the decision of the Security Council, or both.¹⁸⁹

Those who accept that the powers of the Security Council are limited, instead refer to the broad wording of Article 49 of the UN Charter and the discretionary powers of the Security Council which are beyond judicial control,¹⁹⁰ or distinguish between the various elements of a Security Council decision under Chapter VII of the UN Charter. Others¹⁹¹ point to the law-making function of the Security Council.

Finally, it has also been argued that according to Article 24(2) UN Charter, the Security Council is required to act in accordance with the purposes and principles of the United Nations. This constitutes a reference to Articles 1 and 2 of the UN Charter. Although Article 24(2) of the UN Charter clearly establishes that the Security Council is under legal restrictions when exercising its functions under Chapter VII of the UN Charter, these provisions are considered as being vague and too

¹⁸⁸ *Mohammed Bedjaoui*, *The New World Order and the Security Council: Testing the Legality of its Acts*, 1994, p. 14; *Georg Nolte*, *The Limits of the Security Council's Powers and its Functions in the International Legal System: Some Reflections*, in: Michael Byers (ed.), *The Role of Law in International Politics*, 2000, 315-326; *James Crawford*, *Brownlie's Principles of International Law*, 8th ed., 2012, p. 184; *Gowlland-Debbas* (supra note 8), 13; *Michaelsen* (supra note 9), 14.

¹⁸⁹ *Bernd Martenczuk*, *The Security Council, the International Court of Justice and Judicial Review*, 535.

¹⁹⁰ *Michae Reisman*, *The Constitutional Crisis in the United Nations*, AJIL 87 (1993), p. 83 (93); *Krisch* (supra note 101), at MN 5,6, but see also Sir Robert Jennings in the Lockerbie case stating in his dissenting opinion: “The first principle of the applicable law is this: that all discretionary powers of lawful decision-making are necessarily derived from the law, and are therefore governed and qualified by the law. This must be so if only because the sole authority of such decision flows itself from the law. It is not logically possible to claim to represent the power and authority of the law and at the same time claim to be above the law” (Case concerning Questions of Interpretation and Application of the 1971 Montreal Convention Arising from the Aerial Incident of Lockerbie (*Libyan Arab Jamahiriya v. United Kingdom*)(Preliminary Objections) [1998], ICJ Reports, 110.

¹⁹¹ *Alain Pellet*, *Conclusions*, in: Brigitte Stern (ed.): *Les aspects juridiques de la crise et de la guerre du Golfe*, 1991, p. 487, 490: “Ce qu[e le Conseil de sécurité] dit est le droit”.

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general to provide a meaningful limitation of the powers of the Security Council.¹⁹²

It has further pointed out that even if the Security Council is not bound by international human rights Member States are when implementing targeted sanctions. The implementing measures undertaken by the Member States (or the European Union) have been challenged before national and regional courts. This has curtailed the efficiency of the sanctions systems in question.¹⁹³

5.7.3 *Jus cogens*

In the literature, peremptory rules of international law have been referred to as possible limits for Security Council sanctions. The proponents of this view argue that these norms are so important for the international community that Security Council decisions violating them are *ab initio* null and void.¹⁹⁴ The problem with this approach is that the peremptory norms have not been exhaustively defined, although the prohibition of the use of force, the right to self-determination, the prohibition of genocide, fundamental human rights and international humanitarian law are referred to in this context.¹⁹⁵ The Court of First Instance of the European Union has in the *Kadi* case supported this approach.¹⁹⁶

5.7.4 *Human rights*

Three approaches have been advocated in academic writings, as well as, in part, in the jurisprudence, to instrumentalise human rights as a limit for Security Council decisions under Chapter VII of the UN Charter. Each of these approaches involves attributing to human rights a hierarchy in the international legal system comparable to the UN Charter by “transcribing” human rights into the UN Charter, either via Articles 1(1), 1(3), 55, 56 of the UN Charter,¹⁹⁷ or referring to Article 2(2) of the UN Charter and the promotion of human rights by the United Nations by arguing that the United Nations is bound by the existing human rights instruments under the principle of good faith,¹⁹⁸ or finally by considering

¹⁹² *Martenczuk*, (supra note 189), at 542.

¹⁹³ Report of the Special Rapporteur (note 8), p. 8 (at para. 20).

¹⁹⁴ *Alexander Orakhelashvili*, *The Impact of Peremptory Norms on the Interpretation and Application of United Nations Security Council Resolutions*, at 62-63.

¹⁹⁵ *Orakhelashvili* (supra note 194), at 63-67.

¹⁹⁶ *Yassin Abdullah Kadi v. Council and Commission*, Court of First Instance, Case T-315/01, 21 September 2005, ILM vol. 45, 81.

¹⁹⁷ *Wolfrum* (supra note 40), at 84/5.

¹⁹⁸ *de Wet* (supra note 14), at p. 195; *Erika de Wet/André Nollkaemper*, *Review of Security Council Decisions by National Courts*, GYIL 45 (2002), 166, 173;

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international human rights to be part of customary international law which is binding upon the United Nations.¹⁹⁹ It has also been argued that human rights are binding upon the United Nations due to the fact that its members are committed.²⁰⁰

Some scholars have argued that almost every first-generation human right has attained the status of *ius cogens*.²⁰¹ Such an approach faces the argument that several of these rights are derogable in times of emergency and it is to be assumed that the Security Council acts under Chapter VII in such times.²⁰²

5.7.5 *Inherent limitations*

It has been stated that the Security Council must not abuse its powers,²⁰³ which would embrace using its powers for purposes not endorsed by the UN Charter, or to use them in an arbitrary manner or in a manner contrary to the principles and purposes of the UN Charter. In this respect reference is made to the Preamble of the UN Charter which declares that it is a function of the United Nations to "...reaffirm faith in fundamental human rights, in the dignity and worth of the human person..." A somewhat similar approach is that the Security Council exercises public power and such an exercise must – as a matter of principle – adhere to the principles of the rule of law, including due process.²⁰⁴

Alexander Orakhelashvili, The Acts of the Security Council Meaning and Standards of Review, Max Planck UNYB 11 (2007), p. 143.

¹⁹⁹ *Michael Bothe*, Security Council's Targeted Sanctions against Presumed Terrorists, The Need to Comply with Human Rights Standards, JICJ 6 (2008), 541 et seq.; *Reinisch* (supra note 9), at 858; *Bardo Fassbender*, Targeted Sanctions Imposed by the UN Security Council and Due Process Rights, IOLR 3 (2006), 437, *Orakhelashvili*, supra note 184, at 149; *Rain Liivoja*, The Scope of the Supremacy Clause of the United Nations Charter, ICLQ 57 (2008), 583, 598; *Reinisch* (supra note 9), 137/8; 141-143; *Henry G. Schermers/Niels M. Blocker*, International Institutional Law, 1885, 983; *Michaelsen*, (supra note 9), 27.

²⁰⁰ *Bedjaoui* (supra note 188), at 7; *Reinisch* (supra note 9), at 858.

²⁰¹ *Alexander Orakhelashvili*, Peremptory Norms in International Law, 2006, pp. 53-60.

²⁰² *Koji Teraya*, Emerging Hierarchy in International Human Rights and Beyond: From the Perspective of Non-derogable Rights, EJIL 12 (2001), 917; *Antonios Tzanakopoulos*, Collective Security and Human Rights, in: *Hierarchy in International Law: The Place of Human Rights*, Erika de Wet and Jure Vidmar (eds.), 2012, 42 at 49.

²⁰³ *Peters* (supra note 24), at MN 107; *Vera Gowlland-Debbas*, The Relationship between the International Court of Justice and the Security Council in the light of the Lockerbie Case, AJIL 88 (1994), 643-677, at 663.

²⁰⁴ *Franck* (supra note 90), at 244; *Simon Chesterman*, The UN Security Council and the Rule of Law, Final Report and Recommendations from the Austrian Initiative, 2004-2008; in detail *Feinäugle* (supra note 8), at 101 et seq.; *Willis* (supra note 9), 716 et seq.

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The focus of this report is on the possibility and the extent of judicial control of the relevant²⁰⁵ Security Council decisions. This issue is to be distinguished from substantive limitations on the power of the Security Council to take such measures in question. Therefore the Report refrains from taking positions on the foundation of limits the Security Council may face in deciding on targeted sanctions. However, this Report is based upon the assumption that the Security Council acts within the international legal system, in particular within the UN Charter.

5.8 *National implementation of Security Council decisions under Article 41 UN Charter in particular targeted sanctions*

As already indicated national decisions are to be taken at beginning of a targeted sanction, namely to identify persons or entities to be targeted *vis-à-vis* the sanctions committee concerned and then in respect of the implementation of a targeted sanction.

In respect of the national designation process States have discretionary power under the respective national legal systems concerned how to organize the process which leads to the designation of a particular person or entity. In doing so States are obliged to observe apart from their national law – as the Security Council pointed out – international law, including human rights law, refugee law and international humanitarian law. It depends upon national law how States live up to this obligation. The Security Council bears no direct responsibility in respect of this national process of identifying individuals or entities to be targeted although the Sanctions Committee is in a position to scrutinize the information received from the designating State. Whether this creates a responsibility of the Sanctions Committee which is open for judicial control is still to be discussed.²⁰⁶

Equally States play a dominant role in the process of delisting. Here again they are to act in conformity with international law and national law. The possibility of judicial review of any national action (or non-action) will depend on the relevant national legal system.

The national systems for implementing Security Council resolutions adopted under Article 41 of the UN Charter vary significantly. Whereas, for example, the United States and the United Kingdom rely on a particular law concerning the implementation of UN sanctions, other States such as France, Germany, Japan and Switzerland use laws dealing with different subject matters such as foreign exchange control and foreign trade as the basis for taking the necessary national measures to

²⁰⁵ See above at p. 3.

²⁰⁶ See below under IV.

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implement the Security Council in question. But they all have in common to use national legislation as the basis for the required implementation measures. Such national legislation constitutes the necessary link between the international level on which the sanctions are being adopted and the national level necessary for implementation.

A typical example for such a link between Security Council decisions and national law is to be found in the United Nations Act, 1946 of the United Kingdom which provides:

“if under Article 41 of the Charter of the United Nations signed at San Francisco on 26 June 1945 (being the article which relates to measures not involving the use of armed force) the Security Council of the United Nations call upon His Majesty's government in the United Kingdom to apply any measures and to give effect to any decision of the Council, His Majesty may by Order in Council make such provision as appears to Him necessary or expedient for enabling those measures to be effectively applied, including (without prejudice to the generality of the preceding words) provision for the apprehension, trial and punishment of persons of offending against the order.”

The empowerment of the President of the United States of America is of a more general nature. It rests on the United Nations Participation Act,²⁰⁷ which authorises the US President to implement UN Security Council resolutions, and the International Emergency Economic Powers Act,²⁰⁸ which contains a wider mandate.²⁰⁹

In implementing Security Council resolutions adopted under Article 41 of the UN Charter, whether directed against other States or individuals, the members of the European Union must take into account the competences of the European Union (EU). As for the implementation under national law, a normative act of the EU is required to authorise the implementation. The Council of the European Union based on Articles 75, 215, 352 Treaty on the Functioning of the European Union (TFEU) decided on Common Position 1996/746 (SSP) which was amended subsequently. These Common Positions are the basis for Regulation 337/2000 and subsequent ones which implemented the sanctions as required. Through this S/RES 1267/1989 sanctions are

²⁰⁷ United Nations Participation Act, SEC 5 (a).

²⁰⁸ International Emergency Economic Powers Act, § 1701.

²⁰⁹ *Natalie Reid, Sue E Eckert, Jarat Chopra, and Thomas J. Biersteker, Targeted Financial Sanctions: Harmonizing National Legislation and Regulatory Practices*, in: *Smart Sanctions: Targeting Economic Statecraft*, at p. 65 et seq..

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directly applicable in all Member States as are similar targeted sanctions.²¹⁰

III. Judicial control

1. Introduction

In the following section, the most relevant judgments having dealt with the legality/illegality of Security Council resolutions adopted under Chapter VII of the UN Charter or their implementation respectively will be reported. Those dealing with targeted sanctions mostly come to the conclusion that the procedure of listing and delisting lacks transparency and that the targeted individuals or entities did not have recourse to a fair trial. The judgments differ, though, whether they refer to the Security Council decision or only to the implementing national or European law, as the case may be. The judicial techniques of the judgments by which human rights standards are given preference over sanctions seem to have been after a period of development consolidated.²¹¹ It is of interest, too, whether and to what extent the courts took into consideration the procedure set up by the Security Council on listing and delisting.

2. Judicial control by the International Court of Justice and the ICTY

2.1 *In general*

The question whether the International Court of Justice should exercise judicial review over Security Council measures has been discussed controversially²¹² since the Conference of San Francisco. When deliberating on the Chapter relating to the peaceful settlement of disputes, the Belgian delegation submitted two proposals that would have granted individual States the possibility of requesting an advisory opinion from the International Court of Justice for the purpose of reviewing the legality of a proposed Security Council resolution.²¹³ However, these proposals were not accepted.

²¹⁰ *Frowein* (supra note 27), at 260; *Andrea Gattini*, Effects of Decisions of the UN Security Council in the EU Legal Order, in: *International Law as law of the European Union*, Enzo Cannizzaro, Paolo Palchetti, and Ramses A. Wessel (eds.), 2012, at p. 215 et seq.

²¹¹ *Erika de Wet*, From Kadi to Nada: Judicial Techniques Favoring Human Rights over United Nations Security Council Sanctions, *Chines Journal of International Law* vol. 12 (2013), 787-807.

²¹² On the various positions taken, see *de Wet* (supra note 14), at 74 et seq..

²¹³ United Nation Conference on International Organization vol. 3, 336 and vol. 13 at 653/4; on this see *de Wet*, supra note 14, at 75.

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Both the opponents and the proponents of a judicial review function for the International Court of Justice refer equally to the legislative history of the UN Charter as endorsing their positions.

The opponents of judicial review in general argue that judicial control of Security Council measures would neither be commensurate with the status of the Security Council in the organisation of the United Nations nor the functions entrusted to it.²¹⁴ The arguments against the judicial control of decisions of the Security Council are summarised by Judge Schwebel in his dissenting opinion in the Lockerbie cases:²¹⁵

“The texts of the Charter of the United Nations and of the Statute of the Court furnish no shred of support for a conclusion that the Court possesses a power of judicial review in general, or a power to supervene the decisions of the Security Council in particular. On the contrary, by the absence of any such provision, and by according the Security Council “primary responsibility for the maintenance of international peace and security”, the Charter and the Statute import the contrary. So extraordinary a power as that of judicial review is not ordinarily to be implied and never has been on the international plane. If the Court were to generate such a power, the Security Council would no longer be primary in its assigned responsibilities, because if the Court could overrule, negate, modify – or, as in this case, hold as proposed that decisions of the Security Council are not “opposable” to the principal object State of those decisions and to the object of its sanctions – it would be the Court and not the Council that would exercise, or purport to exercise, the dispositive and hence primary authority.”²¹⁶

The supporters of judicial review of Security Council decisions by the International Court of Justice put forward several arguments. They argue that the International Court of Justice is perfectly capable of ensuring that its procedure is not misused for political reasons.²¹⁷ It is even stated that

²¹⁴ *Michael Reisman*, The Constitutional Crisis in the United Nations, AJIL vol. 87 (1993), 88.

²¹⁵ Dissenting Opinion of President Schwebel, in the case *Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v. United Kingdom) Libya v. United Kingdom* Preliminary Objections, at 162 et seq.; *Scott S. Evans*, The Lockerbie Incident Cases: Libyan-Sponsored terrorism, Judicial Review and the Political Question Doctrine, Maryland Journal of International Law and Trade, vol. 18 (1994).

²¹⁶ See also the Separate Opinion of Judge *at hoc* Jennings, *Libya v. United Kingdom* (Preliminary Objections); see also *Marcella David*, Passport to Justice Internationalizing the Political Question Doctrine for Application in the World Court, Harvard International Law Journal, vol. 40 (1999), 121.

²¹⁷ *Martenczuk* (supra note 189), at 533; *Bernd Malanczuk*, Reconsidering the Relationship between the ICJ and the Security Council, in: *International Law and The Hague's*

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judicial review of Security Council decisions might strengthen rather than weaken the powers of the Security Council. In particular, it is said, it would make sure that more powerful States would not have excessive influence on the Security Council decision concerned.²¹⁸

When discussing this issue one has to take into account that the role of the Security Council under Chapter VII, as envisaged at the San Francisco Conference, was different from the one today. At the beginning it was not anticipated that Security Council decisions would have a direct impact upon the enjoyment of human rights of particular individuals or groups. Even the discussions surrounding the Libyan cases could not, and do not, cover this element. Apart from that it was not anticipated that the principle of the rule of law would play a role as envisaged by the General Assembly in its declaration (A/RES 67/1 of 30 November 2012).

Therefore the issue of a judicial review of Security Council decisions should be re-considered in the light of the recent developments as far as the sanctions system under Chapter VII of the UN Charter is concerned, taking into account the role human rights are meant to play for the United Nations, including the Security Council.

2.2 *Pronouncements of the ICJ*

As indicated earlier the ICJ has had several occasions to pronounce it on Security Council decisions but it, at the very end, has declined to do so. The ICJ, in its Advisory Opinion in the case Concerning Certain Expenses of the United Nations²¹⁹ emphasised:

“In the legal system of States, there is often some procedure for determining the validity of even a legislative or governmental act, but no analogous procedure is to be found in the structure of the United Nations. Proposals made during the drafting of the Charter to place the ultimate authority to interpret the Charter in the International Court of Justice were not accepted.”²²⁰

This dictum was reiterated in the Advisory Opinion of the ICJ on Legal Consequences for States of the Continued Presence of South Africa in

750th Anniversary (Wybo P. Heere, ed.), 190, 90; *Edward MacWhinney*, *The Judicial Wisdom, and the World Court as Special Constitutional Court*, *Festschrift für Rudolf Bernhard*, 1995, 709.

²¹⁸ *de Wet* (supra note 14), at 77/8 with further references; *John Dugard*, *Judicial Review of Sanctions*, in: Vera Gowlland-Debbas (ed.), *United Nations Sanctions and International Law*, 2001, 85.

²¹⁹ Art. 17, para. 2, of the Charter.

²²⁰ ICJ Reports 1962, 168.

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Namibia (South West Africa) notwithstanding Security Council resolution 276 (1970).²²¹

One further pronouncement arises from the much discussed *Lockerbie cases*. After the incident the United States and the United Kingdom jointly demanded the extradition of two Libyan citizens, an action complemented by the non-binding Security Council resolution 731 (1992) requesting Libya to comply. Libya on the basis of the compromisary clause, filed a claim with the ICJ arguing that the United States and the United Kingdom had violated their obligations under the Montreal Convention by requesting the extradition. Libya also submitted a request for provisional measures. Briefly after the hearing on this request, the Security Council adopted resolution 748 (1992) under Chapter VII of the UN Charter by which it was stated that Libya had not effectively implemented resolution 731 (1992), which constituted a threat to international peace and security. It also decided that Libya was required to extradite the two Libyan citizens. The ICJ decided that under the prevailing circumstances it was not necessary to prescribe provisional measures. It did so while avoiding the legal issues raised by Security Council resolution 748 (1992).^{222/223}

The preliminary objections were mostly dismissed for procedural reasons of no relevance in the context here. The Court, however, countered the objection advanced by the United States and the United Kingdom that Security Council resolution 748 (1992) superseded the potential rights of Libya under the Montreal Convention (on which it had based its claim) by stating that the Security Council resolution was adopted only after the case had been submitted. The ICJ held that it had jurisdiction upon the filing date and that the coming into existence of Security Council resolutions could not affect jurisdiction once established. This was criticised in particular in the dissenting opinion of Judge Schwebel.²²⁴

²²¹ ICJ Reports 1971, 45.

²²² Case Concerning Questions of Interpretation and Application of the 1971 Montreal Convention Arising from the Aerial Incident at Lockerbie (*Libyan Arab Jamahiriya v United Kingdom*) Preliminary Objections, ICJ Reports 1998, 9; Case Concerning Questions of Interpretation and Application of the 1971 Montreal Convention Arising from the Aerial Incident at Lockerbie (*Libyan Arab Jamahiriya v United States*) Preliminary Objections, ICJ Reports 1998, 115.

²²³ *Libya v United States* (supra note 222), at 127; *Libya v United Kingdom* (note 222) at para. 38; Judge *Bedjaoui* in his dissenting opinion stated that the Security Council should comply with the purposes and principles of the UN Charter and avoid undermining the ICJ's position as the principal judicial organ (ICJ Reports 1992 at 155-159); Judge *Weeramantry* argued that Chapter I of the Charter limits the Security Council's power because it has to "regard ... principles of international justice and international law (ICJ Reports 1992 at 175).

²²⁴ ICJ Reports 1998, 73-74; as to the details of the dissenting opinion see above.

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In the case concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (*Bosnia-Herzegovina v Yugoslavia (Serbia and Montenegro)*),²²⁵ apart from pursuing its case concerning the responsibility for acts of genocide, Bosnia-Herzegovina wanted the ICJ also to consider the legal status and effects of the arms embargo imposed by Security Council resolution 712 of 25 September 1991. The ICJ however declined to deal with this issue in its Order on Provisional Measures for procedural reasons.²²⁶

2.3 Pronouncements of the ICTY

The ICTY in its decision on the Defence Motion for Interlocutory Appeal on Jurisprudence of 2 October 1995²²⁷ dealt intensively with the question as to whether the Tribunal had been established by the Security Council in accordance with the UN Charter, whereas both the Trial Chamber and the Prosecutor were of the opinion that the Tribunal lacked the authority to review its establishment. The Appeals Chamber dealt with several specific arguments in this respect: namely that the issue was a political one and thus beyond judicial control; that the Tribunal was not a constitutional court; and the issue of whether the establishment of the Tribunal was covered by Chapter VII of the UN Charter.

The Tribunal stated in respect of the first argument that the political question doctrine had gained no basis in international law and that, basically, all cases before international courts had a political background.²²⁸ Also the ICTY discarded the argument that it was not a constitutional court by indicating that it was merely exercising its incidental jurisdiction to establish its own jurisdiction over the case before it.

Thereafter the ICTY assessed in some detail whether the establishment of the Tribunal was covered by the powers and functions entrusted to the Security Council by Chapter VII of the UN Charter. It ultimately came to the conclusion that the Tribunal

“has been established in accordance with the appropriate procedures under the United Nations Charter and provides all the necessary safeguards of a fair trial.”

²²⁵ Provisional measures ICJ Reports 1993, 3.

²²⁶ Provisional measures ICJ Reports 1993, 3. Para. 2 (m), (o).

²²⁷ ILM vol. 35 (1996), 35.

²²⁸ See also *Certain Expenses of the United Nations*, Advisory Opinion of 20 July 1962, ICJ Reports 1962, 151 at 153.

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3. Indirect judicial control by national or regional courts

National and regional courts adopted various approaches concerning a judicial control of Security Council decisions. They either declined jurisdiction concerning domestic implementation of targeted sanctions or other decisions of the Security Council infringing human rights or they reviewed implementation measures without having recourse to the relevant Security Council decisions or they had recourse to the relevant Security Council decision as well as to the procedure applied by the Sanctions Committee.

3.1 *Courts declining judicial review of the consequences of activities under the authority of the Security Council or of the domestic implementation of Security Council decisions*

On some occasions regional courts declined to undertake a judicial review. Two different types of arguments have been used to decline review. The first holds that the implementation measure in question was attributable to the Security Council rather than to the implementing State concerned – accordingly the court in question denied jurisdiction over the matter. According to the second approach the national measures in question are attributable to the implementing State, but Article 103 UN Charter excluded any judicial review on the basis of international law or national law.

The first type of argument was advanced by the European Court on Human Rights in the *Behrami*²²⁹ and the *Saramati case*.^{230/231} The complaints were ultimately directed against France and Norway as Member States of the European Convention for the Protection of Human Rights and Fundamental Freedoms. The Court considered as a crucial issue whether acts or omissions of KFOR were attributable to the two States concerned, or to the United Nations. It considered whether the Security Council had lawfully delegated its powers to KFOR – not relying on general international law on the responsibility of international organisations but on the rules of delegation as part of the institutional law of international organisations.²³² In that context the Court considered “whether the Security Council retained ultimate authority and control so

²²⁹ Mr Behrami invoked a violation of the right to life, which had been so he claimed violated by KFOR by not having de-mined an area.

²³⁰ Mr Saramati complained about his arrest and detention by UNMIK by Order of the Commander of KFOR.

²³¹ *Behrami v. France/Saramati v. France, Germany and Norway* (Admissibility) (2007) (71412/01 and 78166/01).

²³² *Ibid.* paras. 132-141; The Grand Chamber ruled as follows: “In such circumstances, the Court observes that KFOR was exercising lawfully delegated Chapter VII powers of the UNSC so that the impugned action was, in principle, “attributable” to the UN...”.

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that operational command only was delegated". The Court found that the Security Council retained ultimate authority and control and that, consequently, the impugned action was attributable to the United Nations.²³³ Accordingly the Court held that it lacked jurisdiction *ratione personae*.²³⁴

As far as UNMIK was concerned it was qualified as a subsidiary organ of the UN and, accordingly any action or omission was attributed to the UN.²³⁵

This jurisprudence was confirmed in the cases *Berić and Others*²³⁶ as well as in *Kalinic Bilbija v. Bosnia and Herzegovina*.²³⁷ The applicants complained with respect to decisions of the High Representative. His competences were confirmed by S/RES 1144 (1997) of 19 December 1997. Following the approach in the *Behrami case*, the Court declared the complaints inadmissible. The Court equally did not admit the application of *Galic and Blagojevic v. The Netherlands*,²³⁸ who were both sentenced by the ICTY and claimed a violation of their procedural rights.

The House of Lords in its judgment in the *Al-Jedda case*²³⁹ followed a different approach, however, leading to the same result. Al-Jedda was interned in Iraq by UK forces acting as a Multi-National Force on the basis of S/RES 1546 of 8 June 2004. The majority of the House of Lords held that the Security Council had, in contrast to the situation pertaining to KFOR, not delegated its powers, but rather had authorised the United Kingdom to carry out functions it could not perform itself.²⁴⁰ Applying the standard of the ILC Draft Articles on the International Responsibility

²³³ Ibid. para. 141.

²³⁴ Ibid. para. 153.

²³⁵ Ibid. paras 142/3.

²³⁶ *Berić and Others against Bosnia and Herzegovina*, Decision as to Admissibility, 16 October 2007.

²³⁷ Admissibility [2008] 45541/04 and 16587/07.

²³⁸ *Galic v. The Netherlands* [2009] 22617/07; *Blagojevic v. The Netherlands* [2009] 49032/07.

²³⁹ *R (on the applications of Al-Jedda v. Secretary of State for Defence* [2007] UKHL 58, ILDC 832 (UK 2007) (Al-Jedda). In an earlier case concerning the individual accountability arising from the actions of UK forces operating within KFOR the UK government had not argued that the actions in question were attributable to the UN. In consequence a British court considered itself to have jurisdiction and to review the case on the merits (*Bici v. Ministry of Defence* [2004] EWHC 786 (QB), ILDC, 100; see also on this case *Hollenberg*, supra note 111, at 87; The House of Lords referred to this change of arguments and indicated that it was prompted by the judgment of the European Court of Human Rights in the *Behrami case* (see paras. 3 and 18).

²⁴⁰ Paras. 23-24.

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of International Organizations,²⁴¹ the House of Lords concluded that the UK forces were not under the “effective command and control” of the Security Council and thus the House of Lords had jurisdiction. The House of Lords, however, decided that the Security Council resolution, due to Article 103 of the UN Charter, prevailed over the European Convention for the Protection of Human Rights and Fundamental Freedoms and, therefore, dismissed the complaint.²⁴²

Also in the *Ahmed* case²⁴³ the Supreme Court of the United Kingdom had proceeded on the basis that international obligations prevail over human rights treaties. The Court, however, added that this did not affect domestic law and in consequence of this reviewed the implementing measures of the UK government from the point of view of national law only.²⁴⁴ Nevertheless, the Court also dealt with the procedure of listing and de-listing as to whether this was equivalent to judicial review.²⁴⁵

When the *Al-Jedda* case was brought before the European Court of Human Rights,²⁴⁶ the Court modified its previous position somewhat by declaring the case admissible. It applied its standard of “ultimate authority and control” parallel to the standard of “effective control”, ultimately concluding that the Security Council had neither. It ruled that despite the Security Council’s authorization in S/RES 1511 (2003) of 16 October 2003²⁴⁷ the conduct of the Multinational Force in Iraq had not ceased to be attributable to the State contributing the troops.²⁴⁸ The Court on this basis reached the conclusion that it had jurisdiction.²⁴⁹ This already indicated the possibility of dual attributability.

This approach was firmly taken in the case *Netherlands v. Nuhanovic*, Judgment of 6 September 2013 by the Supreme Court of the Netherlands.²⁵⁰ The Court held the government of the Netherlands responsible for the deaths of three men killed by Bosnian Serb forces after the Dutch battalion (Dutchbat) of the peacekeeping mission expelled them from the UN compound. The Court adopted a dual attribution

²⁴¹ Article 6.

²⁴² Paras. 34-36.

²⁴³ *HM Treasury v. Mohammed Jahar Ahmed and others* (2010) UKSC2 & UKSC5; ILDC 1535 (UK 2010).

²⁴⁴ *Ibid.* at para. 75.

²⁴⁵ On that see below p. 51.

²⁴⁶ *Al-Jedda v. The United Kingdom* (2011), ECHR 1092.

²⁴⁷ Para. 13.

²⁴⁸ Note 231, at para. 80; the standard applied is not fully clear since the Court referred to the test of ‘ultimate authority and control’ as well as to ‘effective control’.

²⁴⁹ Note 231, at para. 86.

²⁵⁰ <http://www.rechtspraak.nl/organisatie/Hoge-Raad/OverDeHogeRaad/publicaties/Documents/12%2003324.pdf>.

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approach relying on Article 7 of the ILC Draft Articles on Responsibility of International Organizations.^{251/252} The ILC has recognized the possibility of a dual or multiple attributions²⁵³ without establishing its formal basis. In this respect it seems a matter of consequence to refer to the ILC Draft Articles on Responsibility of States for Internationally Wrongful Acts for the responsibility of the seconding State.

3.2 Control of the implementing measures without having recourse to the relevant Security Council decision

In its judgment in the case *Ahmed and others v. HM Treasury*, the Supreme Court of the United Kingdom held that the government in freezing of the assets of the applicant, and thus implementing Security Council resolutions 1267 (1999) and 1373 (2001), had acted *ultra vires* the powers conferred upon it by section 1 of the United Nations Act of 1946. The main reason to come to such a conclusion was that the appellants had been deprived of an effective remedy against being listed. The judgment deals with the implementing Order alone; the Order was annulled insofar as it did not provide for an effective remedy.

3.3 Control of implementing measures while having recourse to the relevant Security Council decision

When assessing the national or European implementing measures, the courts concerned frequently interpreted the relevant Security Council resolutions. By way of generalisation – and thus simplification – one may say that two different approaches were applied. The courts in question either interpreted the relevant Security Council resolution from the point of view of its wording and its objective, or they presumed that the Security Council had no intention to limit international law conflicting with its resolution. Both approaches led to the same result, namely they limited the scope of the Security Council resolution in question. Reaching the conclusion that the scope of the Security Council resolution was more limited than the implementing measure, or that the implementing executive had not used its discretionary powers appropriately, the courts in question held that the national or European authorities had acted *ultra vires*.²⁵⁴

²⁵¹ Text with commentaries in: GAOR, 66th session, Supp. No. 10, UN Doc. A/66/10, Add. 1.

²⁵² In its commentaries to the draft articles the ILC explains that article 6 applies when an organ of a State or an organization is fully seconded to another organization. Article 7 instead applies when the seconded organ still acts to a certain extent as organ of the seconding State.

²⁵³ Commentary (note 236) at p. 83.

²⁵⁴ On that in some detail *Hollenberg* (supra note 115), at 172 et seq..

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Other courts did not shy away from reviewing the relevant Security Council resolution with the view to establish whether it had violated international law, which was – in their view – limiting Security Council decisions. Not using its discretionary power appropriately was the relevant issue in the case *A and Others v. Netherlands*, decided by a district court, the Court of Appeal and the Supreme Court.²⁵⁵ The Dutch Government, in implementing S/RES 1737 (2006) of 23 December 2006, had enacted a regulation prohibiting Iranian nationals access to certain security sensitive locations and databases; it also prohibited the provision of certain specialised education to Iranian nationals. Several Iranians claimed that the prohibition of discrimination had been violated. The provision upon which the Dutch regulation was based required all States to:

“exercise extra vigilance and prevent specialized teaching or training of Iranian nationals, within their territories or by their nationals, of disciplines which would contribute to Iran’s proliferation sensitive nuclear activities and development of nuclear weapon delivery systems.”

The District Court and the Appeal Court held that this provision left the implementing States some discretion and that the Dutch authorities had not sufficiently established that discrimination on the basis of nationality was the only means to achieve the objective of the Security Council resolution.²⁵⁶ The Supreme Court confirmed this finding and added that it was the obligation of the implementing authorities to harmonise diverging international obligations, i.e. those imposed by the Security Council and others such as the prohibition of discrimination under the European Convention on Human Rights and Fundamental Freedoms.

The Canadian Federal Court in the *Abdelrazik* case, in principle, followed the same approach. The case *Abdelrazik v. Canada (Minister of Foreign Affairs)* concerned a ban on the return of the applicant, being of Canadian and Sudanese citizenship, to Canada. The Federal of Court of Canada in its judgment of 4 June 2009 took the view that the listing procedure of the Al-Qaida and Taliban Sanctions Committee was incompatible with the right to

²⁵⁵ (2010) LJM: BL 1862/334949; ILDC 1463 (NL 2010) 3 February 2010; [2011] LJM: BQ 4781 (Iranian Nationals).

²⁵⁶ Although the Court of Appeal did not review the Security Council resolution, but rather interpreted it narrowly, it stated by way of an obiter dictum that even if the Security Council resolution had obliged the States concerned to distinguish between Iranians and non-Iranians, this would not have prohibited the Court from reviewing whether the domestic implementation of that resolution was in conformity with human rights as enshrined in the European Convention on Human Rights and Fundamental Freedoms (*Netherlands v. A and Others* (2011) LJM BQ 4781 (Iranian Nationals)[5.5.].

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an effective remedy.²⁵⁷ Justice Zinn, who pronounced the judgment, criticised – in what technically constituted an *obiter dictum* – the sanctions system under S/RES 1267:

“I add my name to those who view the 1267 Committee regime as a denial of basic legal remedies and as untenable under the principles of international human rights. There is nothing in the listing or de-listing procedure that recognizes the principles of natural justice or that provides for the basic procedural fairness. The judge concluded that the applicant’s right to enter Canada had been breached.”²⁵⁸

Thereafter he interpreted the relevant resolution, coming to the conclusion that Mr Abdelrazik’s return would not constitute a violation of the resolution. On that basis the Federal Court overruled the measures taken by the Canadian Government.

In the case *(R)M v. HM Treasury*,²⁵⁹ the UK Court of Justice used the same technique. The case concerned measures against spouses of individuals targeted by the 1267 sanctions regime. The concrete issue was whether social benefits paid to them were covered by the prohibition to financially support terrorism. Emphasising the objectives of the sanctions regime and the objective of social benefits, the Court held that the benefits, being fixed at a level intended to meet only the strictly vital needs of the persons concerned, could not be diverted in order to support terrorist activities. Hence, the Court held that the 1267 sanctions regime did not prohibit the payment of social benefits to spouses of individuals listed as being associated with terrorism.

Another form of interpreting the relevant Security Council resolution is the presumption that obligations created by a Security Council resolution are not intended to be in conflict with other international law obligations, in particular fundamental principles of human rights.²⁶⁰ This approach was used by the Grand Chamber of the European Court of Human Rights in the *Al-Jedda* case.²⁶¹ The relevant paragraph 102 reads:

“[T]he Court must have regard to the purposes for which the United Nations was created. As well as the purpose of maintaining international peace and security, set out in the first subparagraph of Article 1 of the United Nations Charter, the third subparagraph provides that the United Nations was established to “achieve international cooperation in ... promoting and encouraging respect

²⁵⁷ [2010] 1 F.C.R. 267, paras. 157 et seq..

²⁵⁸ *Ibid.* at para. 51.

²⁵⁹ [2008] UKHL 26, [2008] 2 All ER 1097.

²⁶⁰ Detailed on this, *Hollenberg* (supra note 115), at 181.

²⁶¹ *Al-Jedda v. The United Kingdom*, Appl.No. 27021/08.

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for human rights and fundamental freedoms”. Article 24(2) of the Charter requires the Security Council, in discharging its duties with respect to its primary responsibility for the maintenance of international peace and security, to “act in accordance with the Purposes and Principles of the United Nations”. Against this background, the Court considers that, in interpreting its resolutions, there must be a presumption that the Security Council does not intend to impose any obligation on Member States to breach fundamental principles of human rights. In the event of any ambiguity in the terms of a Security Council resolution, the Court must therefore choose the interpretation which is most in harmony with the requirements of the Convention and which avoids any conflict of obligations. In the light of the United Nations’ important role in promoting and encouraging respect for human rights, it is to be expected that clear and explicit language would be used were the Security Council to intend States to take particular measures which would conflict with their obligations under international human rights law.”

The European Court of Human Rights indicated that the presumption of compliance could be rebutted, which was accepted in the *Nada* case.²⁶²

In this context it is worth mentioning that the jurisprudence of the European Court of Human Rights on national measures implementing Security Council decisions differs from the jurisprudence pertaining to national implementation measures of decisions promulgated by an international organisation. Although the Court has no jurisdiction in respect of international organisations, it applies an “equivalent protection test”.²⁶³ This means that, when asked to review national conduct required by its membership in the organisation, the Court presumes that the State did not act contrary to its obligations under the European Convention for the Protection of Human Rights and Fundamental Freedoms if the international organisation in question protects human rights in a manner equivalent to the protection of the European Convention.²⁶⁴ So far the

²⁶² ECtHR, 195-196.

²⁶³ See *Hollenberg* (supra note 115) Challenges and Opportunities for Judicial Protection of Human Rights against Decisions of the United Nations Security Council, at p. 102 et seq.; *Cedric Ryngaert*, The European Court of Human Rights’ Approach to the Responsibility of Member States in Connection with Acts of International Organization, *International and Comparative Law Quarterly*, vol. 60 (2011), 997, 1012.

²⁶⁴ *Bosphorus Hava Yolları Turizm ve Ticaret Anonim Şirketi v. Ireland*, EHTT 42 (2005) I [155]; *M & Co. v Germany* (App. 13258/87) (1990) DR 64, 18. The *Bosphorus* case concerned the impoundment by Irish authorities of an aircraft owned by a Yugoslav company on the basis of EU Regulation 990/1993 implementing the Security

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Court has not established such a violation.²⁶⁵ Nevertheless, from the point of view of human rights protection this approach has the advantage that the Court assumes its jurisdiction and offers some judicial review.

The cases discussed so far in this report either interpreted the relevant Security Council resolution or, by presuming its conformity, tried to overcome possible contradictions between international human rights regimes and the targeted sanctions by the Security Council. In the following cases the courts in question took, or at least attempted to take, a different position.

The approach taken by the judgment of the Bosnian Constitutional Court in the *Bilbija* case²⁶⁶ reflects the particularities of the Constitution of Bosnia Herzegovina. The central issue of this case was whether decisions of the High Representative of Bosnia Herzegovina could be challenged. This was denied in view of Security Council resolution 1144 (1997) of 19 December 1997. However, the Court, by referring to the Constitution of Bosnia Herzegovina, which incorporates the European Convention on Human Rights and Fundamental Freedoms, came to the conclusion that the measures in question violated the Convention as part of the Constitution. Due to the particularities of the Constitution of Bosnia and Herzegovina, this judgment cannot be generalised.

The case of *Yassin Abdullah Kadi and Al Barakaat International Foundation v. Council of the European Union*²⁶⁷ and *Commission of the European Communities*,²⁶⁸ (later joined) (*Kadi I*), decided by the Court of First Instance and the European Court of Justice (*Kadi II*) was, and is still, controversial. Both courts took opposite views as to whether and how to review a Security Council resolution and thus demonstrated the uncertainties prevailing among courts and scholars on the review of targeted sanctions.²⁶⁹ The case concerned the freezing of the applicant's assets pursuant to European Community regulations adopted in connection with the implementation of Security Council resolutions 1267 (1999), 1333 (2000) and 1390 (2002). The applicants had argued, amongst others, that the regulations had been adopted *ultra*

Council sanctions against the former Yugoslavia. At that time the EU had not yet acceded to the European Convention for the Protection of Human Rights and Fundamental Freedoms.

²⁶⁵ *Hollenberg* (supra note 115), at 102.

²⁶⁶ *Bilbija et al v. Bosnia Herzegovina* (2006) AP-953/05.

²⁶⁷ C-402/05 P.

²⁶⁸ C-415/05 P.

²⁶⁹ Earlier cases emanating from Security Council targeted sanctions: Case T-362/04, *Minin v. Commission*, 2007 E.C.R. II-2003; Case T-253/02, *Ayadi v. Council* 2006 E.C.R. II-2139; Case T-49/04, *Hassan v. Council*, 2004 E.C.R. II-52.

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vires. On 21 September 2005, the then Court of First Instance (General Court since 1 December 2009) rejected the arguments advanced by the applicants. It confirmed the lawfulness of the regulations. The General Court took the position – and this is of relevance here – that it was not entitled to exercise judicial review, that “the resolutions of the Security Council at issue fall, in principle, outside the ambit of the Court’s judicial review and that the Court has no authority to call in question, even indirectly, their lawfulness in the light of community law”.²⁷⁰ The leading argument to this conclusion was that judicial review, in the light of European Union law, would be contrary to Article 103 of the UN Charter, which places the UN Charter and Security Council resolutions above all other international obligations.²⁷¹ However, the Court established one exception to this general rule. It stated that it was empowered to check, indirectly, the lawfulness of the resolutions of the Security Council in question as to whether they violated *ius cogens*.²⁷² The latter was

²⁷⁰ Court of First Instance, Case T-315/01, *Yassin Abdullah Kadi v. Council and Commission* (2005) ECR II-3649 (hereinafter Kadi I); T-306/01 *Yusuf v Council* (2005) ECR II-3533.

²⁷¹ This dictum was discussed controversially. See *Christian Tomuschat*, Case law – Court of Justice Case T-306/01, *Ahmed Ali Yusuf and Al Barakaat International Foundation v. Council and Commission*, in: *Common Market Law Review*, 2006, 537-551 (positively); *Nikos Lavranos*, UN Sanctions and Judicial Review, in: *Nordic Journal of International Law*, 2007, 1-17; *Alessandra Gianelli*, Il rapporto tra diritto internazionale e diritto comunitario secondo il Tribunale di primo grado delle Comunità europee, in *Rivista di diritto internazionale*, 2006, 131-138 (negative).

²⁷² The Court stated: “The freezing of funds provided for by Regulation No 881/2002 imposing certain specific restrictive measures directed against certain persons and entities associated with Usama bin Laden, the Al-Qaeda network and the Taliban, as amended by Regulation No 561/2003, and, indirectly, by the resolutions of the Security Council put into effect by those regulations, does not infringe the fundamental rights of the person concerned, measured by the standard of universal protection of the fundamental rights of the human person covered by *jus cogens*.

In that regard, the express provision of possible exemptions and derogations attaching to the freezing of the funds of the persons in the Sanctions Committee’s list clearly shows that it is neither the purpose nor the effect of that measure to submit those persons to inhuman or degrading treatment.

In addition, in so far as respect for the right to property must be regarded as forming part of the mandatory rules of general international law, it is only an arbitrary deprivation of that right that might, in any case, be regarded as contrary to *jus cogens*. Such is not the case here.

In the first place, the freezing of their funds constitutes an aspect of the sanctions decided by the Security Council against Usama bin Laden, members of the Al-Qaeda network and the Taliban and other associated individuals, groups, undertakings and entities, having regard to the importance of the fight against international terrorism and the legitimacy of the protection of the United Nations against the actions of terrorist organisations. In the second place, freezing of funds is a precautionary measure which, unlike confiscation, does not affect the very substance of the right of the persons concerned to property in their financial assets but only the use thereof. In the third place,

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understood as a body of higher rules of public international law binding on all subjects of international law, including the bodies of the United Nations, and from which no derogation was possible.²⁷³

On appeal the Court of Justice of the European Union took a different position. It stated that it had the jurisdiction to review the lawfulness of a regulation of the Community adopted within the European legal framework even where the objective of the regulation was to implement a Security Council resolution adopted under Chapter VII of the UN Charter.

The Court came to this conclusion on the basis of the consideration that “the Community judicature must, in accordance with the powers conferred on it by the European Community Treaty, ensure the review, in principle the full review, of the lawfulness of all Community acts in the light of the fundamental rights forming an integral part of the general principles of Community law, including the review of Community measures which, like the contested Regulation, are designed to give effect to the resolutions adopted by the Security Council under Chapter VII of the Charter of the United Nations.”²⁷⁴

the resolutions of the Security Council provide for a means of reviewing, after certain periods, the overall system of sanctions. Finally, the legislation at issue settles a procedure enabling the persons concerned to present their case at any time to the Sanctions Committee for review, through the Member State of their nationality or that of their residence.

Having regard to those facts, the freezing of the funds of persons and entities suspected, on the basis of information communicated by the Member States of the United Nations and checked by the Security Council, of being linked to Usama bin Laden, the Al-Qaeda network or the Taliban and of having participated in the financing, planning, preparation or perpetration of terrorist acts cannot be held to constitute an arbitrary, inappropriate or disproportionate interference with the fundamental rights of the persons concerned. (para. 6)

²⁷³ Court of First Instance (supra note 270), at para. 5.

²⁷⁴ European Court of Justice, Joined Cases C-402/05P and C-415/05, *P. Yassin Abdullah Kadi and Al Barakaat International Foundation v Council of the European Union and Commission of the European Communities* (2008) ECR I-6351, para. 326. There is a vast literature on the judgment. See amongst others *Takis Tridimas/Jose A. Gutierrez-Fons*, EU Law, International Law and Economic Sanctions against Terrorism: The Judiciary in Distress? *Fordham International Law Journal* 32 (2009), 660; *Grainne de Burca*, The European Court of Justice and the International Legal Order after Kadi, *Harvard International Law Journal* 51 (2010), 1; *Katja S. Ziegler*, Strengthening the Rule of Law, but Fragmenting International Law: The Kadi Decision of the ECJ from the Perspective of Human Rights, *Human Rights Law Review* 9 (2009), 288; *Pasquale De Sena/Maria C. Vitucci*, The European Courts and the Security Council: Between Dédoublment Fonctionnel and Balancing of Values, *EJIL* 20 (2009), 193; *Daniel Halberstam/Eric Stein*, The United Nations, the European Union, and the King of Sweden: Economic Sanctions and Individual Rights in a Plural World Order, *Common Market Law Review* 46 (2009), 13.

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As far as a review of the Security Council resolution in question is concerned, the European Court of Justice took a diametrically opposite position to that taken by the Court of First Instance. It held that it was not “for the Community judicature, under the exclusive jurisdiction provided by Article 220 TEC, to review the lawfulness of such a resolution adopted by an international body, even if that review were to be limited to examination of the compatibility of that resolution with *jus cogens*”.²⁷⁵

Although the European Court of Justice held that it was not for the “European judicature” to examine the lawfulness of Security Council resolutions, it was entitled to review Community acts or acts of Member States designed to implement such resolutions. It was stated that this “would not entail any challenge to the primacy of that resolution in international law.”²⁷⁶ This reasoning became the jurisprudence in the following years in similar cases.²⁷⁷

The Court concluded that the contested regulations, which did not provide for any remedy in respect of the freezing of assets, were in breach of fundamental rights standards of the EU and were to be annulled.^{278/279} The Commission issued a new implementing regulation that listed both applicants again which resulted in the *Kadi III* case²⁸⁰ in which the Court of First Instance nullified the regulation as far as Mr Kadi was concerned. It stated that its task was to ensure ‘in principle the full review’ of the lawfulness of the contested regulation in the light

²⁷⁵ Ibid. at para. 304.

²⁷⁶ Ibid. at para. 288.

²⁷⁷ T-318/01 *Omar Mohammed Othman v. Council and Commission* (2009) ECR II-1627, para. 19; Joined Cases C-399/06 P *Faraj Hassan, Chafiq Ayadi v. Council and Commission* (2009) ECR I-11939, paras 1-2;

²⁷⁸ Joined Cases C-402/05 P and C-415/05 P *Kadi and Al Barakaat International Foundation v. Council of the European Union and Commission of the European Communities* (2008) ECR I-6351 (hereinafter *Kadi II*) paras 372, 374-5.

²⁷⁹ See *Giacinto della Cananea*, *Global Security and Procedural Due Process of Law Between the United Nations and the European Union*, 519; *Gráinne De Búrca*, *The European Court of Justice and the International Legal Order After Kadi* (2010), 51 *Harvard International Law Journal* 1, 29; *Pasquale de Sena/Maria Chiara Vitucci*, *The European Courts and the Security Council: Between Dédoulement Fonctionnel and Balancing of Values* (2009) 20 *European Journal of International Law* 193, 222; *Lando Kirchmair*, *The ‘Janus Face’ of the Court of Justice of the European Union: A Theoretical Appraisal of the EU Legal Order’s Relationship with International and Member State Law* (2012) 4 *Göttingen Journal of International Law* 677, 683; *Julianne Kokott/Christoph Sobotta*, *The Kadi Case – Constitutional Core Values and International Law – Finding the Balance*, *EJIL* vol. 23 (2012), 1015 et seq.

²⁸⁰ C-584/10P *Commission and Others v. Kadi*, Judgment of the Court (Grand Chamber) of 18 July 2013.

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of the fundamental rights guaranteed by the European Union.²⁸¹ The judgment of the Court followed only a few months after the decision of the European Court of Human Rights in *Nada v. Switzerland*.²⁸²

In the judgment of 14 November 2007 (which later was considered in the case *Nada v. Switzerland* before the European Court of Human Rights²⁸³) of the Federal Court of Switzerland deduced from Articles 25 and 103 of the UN Charter that obligations arising from the UN Charter prevailed over domestic law as well as over obligations under other international agreements, whether of a bilateral or multilateral nature. The Federal Court further observed that while referring to Articles 24(2) and 1(3) of the UN Charter, the Security Council in exercising its functions was not absolutely free, but was required to act in accordance with the purposes and principles of the UN Charter, including the obligation to respect human rights and fundamental freedoms. Having stated that, the Federal Court pointed out that Member States were not permitted to avoid an imposed obligation on the grounds that a decision of the Security Council was substantively inconsistent with the Charter.²⁸⁴ As far as the Swiss Federation was concerned, the Federal Court pointed to Article 190 of the Swiss Constitution, which obliges the Swiss Federation to abide by international treaties ratified by the Swiss Federation, customary international law, and general principles of law and decisions of international organisations which are binding upon Switzerland. The Court further pointed out that the Swiss legal system provided no rules on the settlement of possible conflicts between different norms of international law and – to this extent – referred to the relevant rules of international law. It emphasised that rules of *ius cogens* had to be respected and that it had jurisdiction to scrutinise implementing measures for a possible violation of *ius cogens*. In the case at hand, the Federal Court denied that *ius cogens* norms had been violated.

The Federal Court obviously considered the possibility of scrutinising UN sanctions on the ground that they might have violated *ius cogens* as an exception from the general rule that national or regional courts had no jurisdiction in this respect, arguing the uniform application of UN sanctions would be endangered if the courts of States Parties to the European Convention on Human Rights or the International Covenant on

²⁸¹ *Kadi v. Commission* (2010) O-C90, 49-62) in which the Court of First Instance nullified the regulation as far as Mr Kadi was concerned (para. 126).

²⁸² *Nada v. Switzerland*, Appl. No. 10583/08 ECtHR (Judgment) [Grand Chamber](12 December 2013) – on that judgment see below.

²⁸³ See below.

²⁸⁴ *Nada v. Switzerland* (supra note 282), at para. 170.

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Civil and Political Rights were able to disregard those sanctions in order to protect fundamental rights of certain individuals or organisations.²⁸⁵

Also the UN Human Rights Committee in the case of *Sayadi and Vinck v. Belgium* may be noted in this context. The Human Rights Committee found that a travel ban on the applicants had been initiated before they had been heard and held Belgium responsible for the presence of their names on the lists and for the resulting travel ban. The Committee held that the applicants' right to freedom of movement under Article 12 of the Covenant on Civil and Political Rights had been violated as well as their honour and reputation (Article 17 of the Covenant).

In the case *Nada v. Switzerland*, the European Court of Human Rights (Grand Chamber) held in its judgment of 12 September 2012²⁸⁶ that sanctions (restrictions of movement) imposed upon the applicant constituted a violation of the applicant's human rights as enshrined in the European Convention on Human Rights. In doing so it rejected the argument submitted by the responding government,²⁸⁷ the intervening Governments of France²⁸⁸ and of the United Kingdom²⁸⁹ that the measures taken emanated from Security Council resolutions and thus fell outside the scope of the jurisdiction of the Court. The Court distinguished between the activities undertaken by KFOR²⁹⁰ and UNMIK, which were directly attributable to the United Nations and therefore fell outside the scope of the jurisdiction of the Court, and activities undertaken by Member States implementing the Security Council resolutions 1267 (1999), 1333 (2000), 1373 (2001) and 1390 (2002).²⁹¹ The national implementing measures were attributable to the implementing State, in this case Switzerland. As a matter of consequence the Court only scrutinised the implementation measures taken by the Swiss government and came to the conclusion that Articles 8 and 13 of the European Convention on Human Rights had been violated. In the A, K, M, Q and G case, a Court of Appeal held that it had jurisdiction to

²⁸⁵ Ibid. at para. 45.

²⁸⁶ Ibid. at para. 130.

²⁸⁷ Ibid. at para. 103.

²⁸⁸ Ibid. at para. 107.

²⁸⁹ Ibid. at para. 111.

²⁹⁰ See judgment of the European Court on Human Rights in the case *Behrami and Behrami v. France*, supra note 29.

²⁹¹ Case of *Nada v. Switzerland* (Application no. 10593/08) of 12 December 2012, at para. 120/1; see on this case, in particular, L'application de sanctions individuelles du Conseil de Sécurité des Nations unies devant la Cour européenne des droit de l'homme, *Revue Trimestrielle de Droits de l'homme* 24 (2013), 457-476; *de Wet* (supra note 211) at 803; *Romaine Tinière*, Les "black lists" du Conseil de Sécurité devant la Cour européenne des droits de l'homme, *Revue Trimestrielle de Droit Européen*, 2013, 515-530.

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undertake a judicial review of measures taken by the executive in pursuance of obligations established in the context of the S/RES. 1267 regime. It relied in that respect on the House of Lords *Al-Jedda* judgment. This case was later joined in appeal with the *HAY* case before the Supreme Court,²⁹² which held that obligations under the UN Charter prevail over obligations under other international agreements. In essence, the same approach was taken by the Dutch Supreme Court in the *Mothers of Srebrenica* case²⁹³ as well as by the US District Court in the *Sacks* case.²⁹⁴ This judgment was confirmed by the Supreme Court which, however, did not undertake a detailed review of the international law issue.²⁹⁵

3.4. Relevance and assessment of the Security Council procedure on listing and de-listing

In the *Ahmed* case²⁹⁶ decided by the Supreme Court of the United Kingdom, which may serve as an illustration how the procedure is perceived by a domestic court, Lord Hope for the Supreme Court stated:

“78. Some further details can be obtained from the Guidelines of the Security Council Committee established pursuant to Resolution 1267(1999) concerning Al-Qaida and the Taliban and Associated Individuals and Entities of 9 December 2008. They state that the committee is comprised of all the members of the Security Council from time to time, that decisions of the committee are taken by consensus of its members and that a criminal charge or conviction is not necessary for a person’s inclusion in the consolidated list that the committee maintains, as the sanctions are intended to be preventative in nature. It would appear that listing may be made on the basis of a reasonable suspicion only. It is also clear that, as the committee works by consensus, the effect of the guidelines is that the United Kingdom is not able unilaterally to procure listing, but it is not able unilaterally to procure de-listing either under the “Focal Point” procedure established under SCR 1730(2006). Although the Security Council has implemented a number of procedural reforms

²⁹² *HAY v. HM Treasury and Secretary of State for Foreign and Commonwealth Affairs* (2009) EWHC 1677 (Admin.); ILDC 1367 (UK 2009).

²⁹³ *Mothers of Srebrenica v. the State of the Netherlands and the United Nations*, Final appeal judgment (2012) LJN: BW 1999; ILDC 1760 (NL 2012).

²⁹⁴ *Bertram Sacks v. Office of Foreign Assets Control, US Department of Treasury* (2004) No. C04-108C, 4.

²⁹⁵ *Bertram Sacks v. Office of Foreign Assets Control, Department of the Treasury, et al.* (2007), US Supreme Court No. 06-948, 13.

²⁹⁶ *HM Treasury v. Mohammed Jahar Ahmed and others* (2010) UKSC2 & UKSC5; ILDC 1535 (UK 2010).

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in recent years and has sought improvement in the quality of information provided to the 1267 Committee for the making of listing decisions, the Treasury accepted in its response of 6 October 2009 (Cm 7718) to the House of Lords European Union Committee's Report into Money Laundering and the Financing of Terrorism (19th Report, Session 2008-2009, HL Paper 132) that there is scope to further improve the transparency of decisions made by the 1267 Committee and the effectiveness of the de-listing process. On 17 December 2009 the Security Council adopted SCR 1904(2009) which provides in paras 20 and 21 that, when considering de-listing requests, the Committee shall be assisted by an Ombudsperson appointed by the Secretary-General, being an eminent individual of integrity, impartiality and experience, and that the Office of the Ombudsman is to deal with requests for de-listing from individuals and entities in accordance with procedures outlined in an annex to the resolution. While these improvements are to be welcomed, the fact remains that there was not when the designations were made, and still is not, any effective judicial remedy."

The same position was formulated previously by Advocate General Maduro in his opinion on the *Kadi* case.²⁹⁷ He held that there was no "genuine and effective mechanism of judicial control" at the UN level. He added if that was the case, the European courts might have been released from the obligation to judicially review the implementation of the relevant Security Council resolution.²⁹⁸ The European Court of Justice found that the S/RES 1267 procedure did not offer sufficient guarantees of judicial protection of fundamental rights.²⁹⁹ It qualified the delisting procedure as being essentially diplomatic and intergovernmental.³⁰⁰

This approach was followed by the General Court (which thereby changed its original position). It considered the Ombudsperson neither to be an impartial body nor capable of guaranteeing the individuals concerned a fair hearing.³⁰¹ Apart from that, the Court criticised that the individuals were not provided with sufficient information in order to defend themselves effectively and that the sanctions committee decided by consensus on the delisting.³⁰²

²⁹⁷ Case C-402/05 P Opinion of Advocate General Poiares Maduro (2008) ECR I-06351, 54.

²⁹⁸ Ibid. at para. 54.

²⁹⁹ Case C-402/05 P and C-415/05 P *Yassin Abdullah Kadi and A Barakaat International Foundation v Council and Commission* (Kadi) (2008) ECR I-0635, 321/322.

³⁰⁰ Ibid. at 323 /324.

³⁰¹ Case T/85/09 *Kadi v European Commission* (Kadi II) (2010) ECR II-05177, 149-150.

³⁰² Ibid. paras. 130, 132.

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4. Assessment of the jurisprudence

In assessing the existing jurisprudence of regional and national courts it becomes evident that it mostly focuses on different issues than the prevailing literature on the protection of individuals and entities against Security Council decisions having a direct effect on the rights of the former. Whereas the jurisprudence concentrates on to whom the activities (or omissions) are attributable the literature focuses predominantly on the possible violation of individual rights, including procedural rights, by the implementation of the targeted sanction in question or the procedure in which the relevant was adopted. In particular the criticism on the procedure is harsh being based on the claim that a judicial review system was to be included into the sanctions system.

These pronouncements, however, fail to consider whether such a judicial review system could have a proper place in a sanctions system designed to be of political nature. At least the earlier judgments do not sufficiently take into account that individual States have their own responsibility if they decide to submit names of individuals and entities for listing and concerning the implementation of the sanctions.

In assessing the existing jurisprudence it is advisable to distinguish between the acts or omissions in the context of peacekeeping operations and in the international administration of territories on the one and targeted sanctions on the other.

After the jurisprudence of the European Court of Human Rights in the *Behrami case*³⁰³ was effectively rejected in the judgment in the case *Al-Jedda* (House of Lords)³⁰⁴ the jurisprudence concerning attributability consolidated.

A further development was introduced by the Dutch Supreme Court in the case *Nuhanovic* (2013).³⁰⁵ It ruled that the expulsion of the relatives of Nuhanovic from the UN Compound was attributable to the Netherlands and not UNPROFOR. This provided for the possibility of

³⁰³ *Behrami and Behrami v. France*, Appl. No. 71412/01; *Saramati v. France, Germany and Norway*, Appl. No. 78166/01, Grand Chamber Decision As to Admissibility (2 May 2007); this approach has been followed in general by the European Court of Human Rights in several subsequent cases such as Nos. 31446/02; 363507; 6974/05; critical *Marko Milanović/Tatjana Papić*, As bad as it gets: The European Court of Human Rights's *Behrami* and *Saramati* decision and general international law, ICLQ vol. 58 (2009), 267 et seq. For details see below (pp. 23, 46). Similarly the Hague District Court attributed the conduct of Dutchbat (UNPROFOR) in Srebrenica to the United Nation alone.

³⁰⁴ *R (on the application of Al-Jedda)(FC) (Appellant v. Sec. Of State for Defence (Resp))* (2007) UK HL58, 12 December 2007.

³⁰⁵ The Netherlands (Ministry of Defence and Ministry of Foreign Affairs) *Hasan Nuhanovic*, Judgment 6 September 2013.

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dual attribution under specific circumstances. In this context, amongst others, the statement of the Appeals Chamber in the *Tadic case*³⁰⁶ has to be taken into consideration.

In particular the Dutch Supreme Court in the case *Nuhanovic* based its reasoning on Article 7 of the ILC Draft Articles on the Responsibility of International Organizations³⁰⁷ dealing with the attributability of the conduct of State organs placed at the disposal of an international organisation thus opening the possibility for a dual attributability.^{308/309}

In respect of targeted sanctions the existing jurisprudence did not use the issue of attributability although it attempted more or less convincingly to distinguish between the targeted sanction as such and its implementation.

IV. Conclusions and recommendations (still tentative)

1. When dealing with the question whether decisions of the Security Council may be judicially controlled it is mandatory to distinguish between the various types of the relevant decisions.

2. Decisions of a predominately internal character such as the establishment of subsidiary organs (Article 29 of the UN Charter) or subsidiary bodies (Article 28 of the Provisional Rules of Procedure of the Security Council) are – due to their very nature – not open for judicial control.

3. Decisions of a predominantly normative character such as the decision that a particular situation constitutes a threat to peace, breach of peace or an act of aggression are not open for any form of judicial control since the taking of such decisions is the function of the Security Council vested in it by the Article 24(2) of the UN Charter. This, however, does not mean that the Security Council in this respect faces not limitations. Established by the UN Charter it has to act within the legal framework set by the latter.

4. Decisions of the Security Council on non-military sanctions under Chapter VII of the UN Charter are not open for judicial control. These measures, although being of an operative nature, belong to the core

³⁰⁶ The Appeals Chamber characterizes the action by Member States on behalf of the Organisation as a 'poor substitute faute de mieux, or a "second best" for want of the first'.

³⁰⁷ See the analysis of *Antonio Tzanakopoulos, Disobeying the Security Council: Countermeasures against Wrongful Sanctions*, 2011, 33 et seq.

³⁰⁸ See above.

³⁰⁹ A legal opinion of the Secretariat states that: "The responsibility for carrying out embargoes imposed by the Security Council rests was the Member States, which are accordingly responsible for meeting the costs of any particular action they deem necessary for ensuring compliance with the embargo."

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functions of the Security Council entrusted to it alone by Chapter VII of the UN Charter.

5. Decisions of the Security Council mandating regional arrangements under Chapter VIII of the UN Charter or mandating States under Chapter VII of the UN Charter to take military measures are not open for judicial control for the reason that such decisions belong to the core functions of the Security Council entrusted to it alone and – additionally – such measures are being taken after consultations with the States or regional arrangements concerned.

6. Decisions of the Security Council taken in accordance with Articles 13 lit. (b) and 16 of the ICC Statute respectively are not open judicial control of the ICC. The issue whether the preservation of peace requires such a decision falls within the sole authority of the Security Council vested into it by the UN Charter.

It is to be noted that the ICC decides separately upon its jurisdiction *ratione materiae*, *ratione personae*, and *ratione temporis* as well as upon the admissibility (Article 17 ICC Statute). In that respect the ICC is not prejudiced by the decision of the Security Council under Article 13 lit. (b) ICC Statute.

7. As far as Security Council decisions are concerned which have a direct impact upon individual human rights or which directly address individuals or entities (targeted sanctions) there is a need to establish first to whom the relevant actions or decisions are being attributable.

(a) Actions or omissions of subsidiary organs of the Security Council, such as peace keeping missions, are attributable to the Security Council in accordance with Article 6 of the ILC Draft Articles on the Responsibility of International Organizations to the extent that the Security Council exercises ‘effective control’ over the seconded entities (troops). If, however, the seconding State still exercises some control over the activities in question such activities (or omissions) may equally be attributed to the latter on the basis of Article 7 of the ILC Draft Articles on the Responsibility of International Organizations in connection with Article 4 and 8 of the ILC Draft Articles on Responsibility of States for Internationally Wrongful Acts. This means a dual attributability with the consequence that the acts or omissions of the State concerned may be judicially reviewed by regional or national courts. The basis for such review may be national, regional or international public law. However, such judicial review does not encompass the activities or omissions of the subsidiary organ of the Security Council.

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(b) Targeted sanctions, too, raise the issue of attributability although this issue is not yet much discussed. There is one decisive distinction between targeted sanctions and measures undertaken by subsidiary organs of the Security Council. The interference of the latter with the rights of individuals is the direct result of an action attributable to the subsidiary organ of the UN in question, whereas the effect of decisions on targeted sanctions on individual or entities is mediated by the implementation action undertaken by the State (EU) concerned. It is necessary to distinguish between the different phases leading to the decision for a targeted sanction against a concrete individual or entity:

(aa) The designation of individuals or entities for listing under the system S/RES 1267 (1999)/ 1989 (2011) rests entirely within the responsibility of the designating States. Such designation should – considering the human rights consequences of the listing – be done respecting human rights standards as well as other relevant international and national standards and under judicial review of the State concerned as indicated by the Security Council in S/RES 2178 (2014). The same should apply to the refusal of the designating State, the national State or the State of residence, as the case may be, to decline initiating or supporting a delisting.

(bb) The decision of the Sanctions Committee to list (or not to delist) an individual or an entity is attributable to that sanctions committee and consequently to the Security Council. Such decision is due to Article 103 of the UN Charter not open for judicial control of regional or national courts. This does not mean, though, that such decisions are not limited. They have to remain within the legal framework established by the UN Charter. The interpretation of this framework is not static but open for progressive interpretation by – amongst others – collective pronouncement of Member States. The attempts of the Security Council to render listing and delisting under the sanctions system of S/RES 1267 (1999)/1989 (2011) more transparent reflects the growing emphasis of international human rights standards and of the rule of law. There is room for improvement namely by applying the system to other sanctions systems but the one under S/RES 1267 (1999)/1989 (2011) and by further strengthening function and status of the ombudsperson. To introduce a judicial review system, properly speaking as advocated occasionally is considered to be contrary to the design of the sanctions system under Chapter VII of the UN Charter.

(cc) As far as the implementation of targeted sanctions are concerned by States (or the EU) is concerned it is to be noted that implementing States or entities are acting agents of the Security Council.

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However, it has to be taken into consideration that the decisions on listing and delisting are composite decisions involving States as well as the sanctions committee concerned. In particular the designation of an individual for listing rests with the States alone. Without its designation an individual or an entity cannot be listed under the system under discussion. Accordingly targeted sanctions are to be attributed to the Sanctions Committee as well as to the States (including the EU) having initiated the listing. In consequence thereof implementation measures may be judicially reviewed from the point of view of regional and national human rights standards by regional and national courts. This does not include reviewing the decision of the sanctions committee directly.

The situation for the other States being under an obligation to implement the sanctions decided upon is more complex. The jurisprudence referred to above separated the implementation from the sanction as such and reviewed the implementation on the basis of the relevant regional law. By involving attributability this approach is justifiable. In implementing sanction decisions the State concerned (or the EU) must interpret such decisions. Such interpretation has a bearing upon the format and scope of the implementation and justifies attributing the implementation measures to the State concerned (or EU).

This approach was followed by several regional or national courts. When deciding an implementation measure the regional or national courts, in question, should presume that the relevant decision of the Sanctions Committee was not meant to infringe upon human rights standards more than reasonably necessary to ensure the achievement of the legitimate objective of the sanction.

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II. DELIBERATIONS DE L'INSTITUT

Deuxième séance plénière Lundi 24 août 2015 (après-midi)

La séance est ouverte à 14 h 20 sous la présidence de M. *Rao*, premier Vice-Président.

The *President* announced that the afternoon would be devoted to the discussion of the Report of Mr Wolfrum on “Judicial Control of Security Council Decisions”. He welcomed newly elected Associate Members Mr Elias and Mr Soons and wished them a productive contribution to the *Institut*.

Mr *Dugard* wished to raise a point of order. He recalled that several sessions previously Sir Hersch Lauterpacht had proposed to bring to discussion at plenary sessions topical issues where international law could appear to have failed. Those discussions were not meant to result in the adoption of a declaration or a resolution, but solely to exchange points of view between international lawyers. The issue of migrants would be, in Mr Dugard’s opinion, a good example of such a topic. He proposed to the Bureau to organize a plenary session for a general discussion on issues of that kind.

The *President* thanked Mr Dugard for his suggestion and indicated that the Bureau would take it into consideration. That being said, he recalled the provisional schedule and the fact that a special session allocated to sanctions in general had already been planned. He then noted that the feasibility of Mr Dugard’s proposition would depend on the general timing and that priority should be given to the discussion of the reports. He nevertheless reassured Mr Dugard that he would personally look into the matter and he invited any other Member who would like to suggest other topics to let the Bureau know. He then invited Mr Wolfrum to present his Report.

The *Rapporteur* expressed his great pleasure and honour to present a comprehensive version of his Report for the first time, since only brief presentations had been made on previous occasions. He indicated that he would briefly lead the plenary through the Report in order to leave time for the discussion and comments of the Members, especially concerning the tentative conclusions and recommendations which will hopefully lead to a resolution. He believed that the impact of the plenary would be of great importance, allowing the Commission to consolidate the Report and

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conclusions and present an amended version later on during the Tallinn session.

Turning to the presentation of the Report, the Rapporteur began by indicating that the title with which some had taken issue was not decided by the Commission. He noted that the term “judicial control” could indeed have a broader or more limited meaning and that, depending on the outcome of the discussions, the title might be changed in the process. He recalled that the Report focused mainly on the judicial control of targeted sanctions. The Rapporteur also raised the question of the interpretation of the term “decision” and defined it as a “binding act”. He recognised that there could be room for some criticism since it was not always clear whether an act was binding or not, but he believed that, from a pragmatic point of view, the acts covered by the Report were easily identified.

The Rapporteur indicated that pages 440 to 455 of the Report presented the object and purpose of the mechanism of targeted sanctions, as well as a detailed explanation of the procedure, but did not take a position as to its legitimacy since that was not part of the Commission’s mandate. Pages 455 to 460 focused on the inherent limitations to Security Council decisions, in particular those on targeted sanctions. The Rapporteur emphasised that the fact that Security Council decisions were subject to legal limitations did not mean that any kind of review or control system was automatically implemented. He noted that whereas academic writings concentrated on the issues of *jus cogens* and human rights as possible limits for Security Council sanctions, the purpose of his Report was to shed light on the debate of judicial control of its decisions.

The Rapporteur turned to the presentation of the third and most important part of his Report, which offered a systematic analysis of the most relevant international, regional and national judgments having dealt with the legality/illegality of Security Council resolutions on targeted sanctions. The Rapporteur observed that the different judgments could be divided into three categories depending on the approach taken by the different courts: those which avoided criticising the targeted sanctions mechanism and the Security Council resolutions; those which indirectly and lightly criticised it; and those that did so explicitly and harshly. He argued that a cross-fertilization amongst the judgments had been realised and that there had been an undeniable development towards judicial control. He stated that this development was highlighted in the tentative conclusions.

Turning to the conclusions, the Rapporteur emphasised that, as a matter of fact, targeted sanctions were only implemented if initiated by a State

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(or the European Union) since the designation of an individual for listing rested with the States (or the European Union) alone. He explained that, as a consequence, targeted sanctions were composed of: firstly, a decision at the national level; secondly, a decision taken by the Sanctions Committee; and, thirdly, the implementation of measures adopted at the national or European Union level. He also observed that the procedures of the sanctions committees were not identical since each sanctions committee was tailored to a particular sanction regime, but that they had several elements in common.

The Rapporteur recalled that the whole discussion about control of the Security Council decisions dated back to the creation of the United Nations Charter and had been a pending issue ever since, but had been brought back into focus with the targeted sanctions and the judgments of the national and regional courts, which had had very different starting points. The Rapporteur hoped that the tentative conclusions of the Report constituted the “embryo” for a future resolution. Amongst the conclusions, he wished to emphasise that States should bear responsibility for the designation of individuals or entities for listing. The national decision should be controlled by a system implemented by each State. The Rapporteur believed that, although one might argue that such control was not necessary, those national decisions already bore a risk for the human rights of the individual concerned, which were to be put in balance with the objective of countering terrorism.

The Rapporteur also noted that most of the decisions of the Security Council were “immune” from judicial control. Whether such immunity was justified under Article 103 of the Charter or by the political nature of this organ, as he personally believed, remained open to discussion. He raised a further point concerning the implementation of the decisions and the dilemma with which the national administrative authorities were faced: having to either implement the resolution and potentially violate their national laws and Constitutions protecting human rights or ignore the resolution and breach their international obligations. The Rapporteur admitted that there was no magic formula in that regard, but observed that since targeted sanctions were composite and not only international measures, some control could and should be exercised at the national level.

The Rapporteur concluded by observing that, for technical reasons, the format of the Report was different for the Members of the Commission who had received the text with comments to that received by the other Members of the plenary.

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The *President* thanked the Rapporteur and opened the floor to comments and discussion.

M. *Sicilianos* félicite le Rapporteur pour son excellent travail sur un sujet complexe. Il estime que le rapport reflète de manière fidèle les différentes approches juridictionnelles, y compris celles de la Cour de Justice de l'Union européenne (CJUE) et de la Cour européenne des droits de l'homme (CEDH). Il apprécie le fait que le rapport adopte une approche large incluant la question des listes noires mais également d'autres questions telles la responsabilité dans le contexte des opérations de maintien de la paix de l'ONU ou les missions de paix simplement autorisées par le Conseil de Sécurité. A cet égard, il suggère d'ajouter une nouvelle sous-division au point 7 des conclusions afin de refléter le cas intermédiaire des opérations autorisées par le Conseil de Sécurité mais menées par une organisation régionale, telle l'OTAN. Il partage dans les grandes lignes les points de vue et la philosophie générale du Rapporteur et est favorable à ce que ses conclusions ouvrent la voie vers l'adoption d'une résolution les contenant. Il propose de mettre davantage en lumière la distinction entre un contrôle des décisions du Conseil de Sécurité « en tant que telles » ou « as such » et un contrôle de leur mise en œuvre par d'autres mesures ou de leurs effets.

M. *Torres Bernárdez* souhaite donner son opinion générale sur le travail du Rapporteur, qu'il trouve épistémologiquement excellent, et souligne qu'il apprécie la clarté de son exposé et qu'il partage sa philosophie. Il se déclare prêt à appuyer les conclusions du Rapporteur et à apporter toute sa collaboration afin qu'une résolution allant dans leur sens soit adoptée, si possible pendant la session de Tallinn.

M. *Ranjeva* s'associe aux compliments tout à fait justifiés adressés au Rapporteur pour son remarquable travail, fruit d'une réflexion intense sur un sujet délicat. Il souscrit à ce qui est présenté dans le rapport et conclusions mais souhaite mettre l'accent sur le besoin d'en convaincre ceux qui n'ont foi ni au droit international, ni au Conseil de Sécurité, ni au contrôle juridictionnel. Il considère que le rapport décrit très fidèlement le droit positif mais estime que le sujet se prête parfaitement à dépasser une approche purement technique afin d'insister davantage sur la nécessité de considérer le droit international comme un bien culturel et de prendre acte du fait que son domaine s'étend au point que plus rien n'échappe à son emprise. Le thème examiné est par ailleurs un sujet permettant de souligner la spécificité de la fonction judiciaire et juridictionnelle, les difficultés soulevées par toute tentative de contrôle d'actes politiques et le besoin de ré-calibrer la relation entre eux.

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Mr *Abi-Saab* congratulated the Rapporteur on his comprehensive and cogent Report. He nevertheless indicated that the title was problematic, since it generalized the subject matter to the control of any Security Council decision whereas, in his opinion, only the judicial control of targeted sanctions should be addressed. His other reservation concerned the emphasis that needed to be added in the Report as regards the limits of judicial control. Indeed, he argued that judicial control of the respect of the legal limits set by the UN Charter and *jus cogens* should not be excluded whenever a question arose allowing the International Court of Justice to go into the problem of the constitutionality of the sanctions. He admitted that no tribunal had primary jurisdiction to control the constitutionality of Security Council acts but wished for the Report to shed greater light on the fact that such control could be exercised at a preliminary stage and incidental jurisdiction over Security Council resolutions could not be excluded.

Mr *Benvenisti* added his congratulations to the Rapporteur for a thorough and clear Report. Concerning its global philosophy, he stated that he would rather it focus less on the judicial nature of the control and more on its legal nature, to the extent that legal constraints did exist even when there was no formal judicial control. He turned to tentative conclusion N° 7(bb), calling for more transparency concerning listing and delisting mechanisms under the sanction system, and suggested noting that such improvements were not a matter of good will and discretion but of law, since the UN Charter and other legal norms required it. The *Institut* could thus provide guidelines on the legal obligations of the Security Council.

Mr *Cançado Trindade* thanked the Rapporteur for the careful and substantial Report that he had prepared and presented. The Rapporteur had duly taken into account the impact of international human rights (either under the United Nations Charter itself or in general international law) and of *jus cogens* (with particular attention to non-derogable rights) on the judicial control of Security Council decisions. Accordingly, judicial control was not to be limited to the operation of regional courts, which applied norms devised in the conceptual framework of the universality of human rights. Contemporary international tribunals – the International Court of Justice (ICJ) as well as regional courts (CJEU and ECHR) – had the function of saying what the law was (*juris dictio, jus dicere*).

Mr *Cançado Trindade* added that it was high time to move beyond the ICJ's *obiter dicta* in the *Lockerbie* cases (1998); judicial review of implementation measures, in his understanding, was not the monopoly of

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regional courts; it was to be undertaken by the ICJ as well, particularly in the face of universal human rights and *jus cogens*. That was so in the present era of the primacy of the *rule of law* at both national and international levels. After all, States as well as the political organs of the United Nations were bound by the fundamental principles of international law (as enshrined in the UN Charter), by universal human rights and by *jus cogens*.

Mr *Oxman* thanked the Rapporteur for his work and flexibility and noted that the compliments addressed to him were well deserved. He wished to raise two points which could be considered mostly drafting matters. The first concerned the use of the English term “control” in parallel with the French term “contrôle”. Mr Oxman observed that these two terms were “faux amis” and suggested that the experts in French and English legal terminology should look into the matter. They could for instance maintain “contrôle” in French, but change “judicial control” into “judicial review” in the English text. Mr Oxman turned to his second point, concerning the fact that the Report and future resolution would draw the attention of several national and regional judges. He emphasised that in consequence it should be carefully drafted in a comprehensive way in order to capture their interest, especially given the fact that some of them did not have such an extensive background in public international law. He highlighted the necessity to make clear that a judgment by a national or regional court that limited the scope of a Security Council decision did not liberate States from their obligations under international law.

Mr *Frowein* paid his compliments to the Rapporteur for his thorough and well-documented Report. He made two points. Firstly, the scope of the Report was limited to binding decisions of the Security Council. Mr Frowein agreed that that was a proper approach but pointed out that some Security Council decisions had a double-edged nature. Notably, authorizations were not generally binding on Member States but were binding for the targeted State. The Report should focus more on that important element concerning the nature of such kind of resolutions. A second concern related to the role of the International Court of Justice. Mr Frowein believed that one should not take an overly pessimistic view on this point. The ICJ was the principal judicial organ of the United Nations; when it had jurisdiction – and it was well known that this was not always the case – the Court enjoyed full jurisdiction. Mr Frowein wondered whether or not it should be accepted that, where jurisdiction existed, the International Court of Justice could look into the lawfulness of UN Security Council actions. This position was widely accepted. One

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example illustrating the problem could be drawn from the *Kosovo* advisory opinion, which included a very detailed examination of the interim procedure for Kosovo set out in a Security Council resolution. On the basis of several elements, the Court concluded that the resolution was meant to set up a *régime* for an interim period. But had the ICJ reached the opposite conclusion, would the ICJ have avoided any assessment on the legality of such a finding and on whether a final settlement of the status of the territory fell within the Security Council's mandate? Admittedly, it was very difficult to think that a real clash would arise in the future, but Mr Frowein felt that the *Institut* should see to it that control by the ICJ as regards respect for the legal limits to the action of political organs be advanced.

Le *Secrétaire général*, s'exprimant à titre personnel, demande une précision sur la distinction entre « control » et « review », suggérée par M. Oxman. Il partage l'idée qu'un tribunal national ne peut pas annuler ou modifier une résolution, mais il peut bien refuser d'appliquer ce qu'il tient pour dépourvu de validité. Les deux questions sont différentes et il reste plus fécond de se concentrer sur la deuxième hypothèse, d'après laquelle les tribunaux nationaux peuvent refuser d'appliquer des mesures qu'ils estiment être invalides.

M. *Kohen* partage l'opinion qui vient d'être exprimée par le Secrétaire général. L'absence de contrôle constitutionnel des actes du Conseil de sécurité est une chose, autre chose est de constater qu'une certaine décision est incompatible avec la Charte ou des règles impératives de droit international général – ou même avec les règles de procédure du Conseil de sécurité. Si la Cour internationale de Justice est investie d'une telle question, elle devrait en connaître.

M. *Kohen* aborde en outre le point 3 des conclusions et recommandations contenues dans le Rapport, qui qualifie les résolutions constatant une menace contre la paix, une rupture de la paix ou un acte d'agression en tant que « decisions of normative character ».

This did not mean that there were no limitations to the Security Council's discretionary appreciation in the latter context. If those limitations existed, there was a possibility that the Security Council would not act in conformity with them. If the International Court of Justice or another court examined this kind of situation, it could declare that these limits were not respected.

As regards the same paragraph, and the characterization of measures and acts as a threat to peace, breach of the peace, or act of aggression, Mr *Kohen* observed that the Security Council simply ascertained that a given situation fell under the scope of Article 39 of the UN Charter. Even

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accepting that such characterization was not subject to judicial control, Mr Kohen could not agree to defining it as having a “normative character”.

Mr *Reisman*, as a Member of the 12th Commission, was particularly conscious of the contribution of the Rapporteur in the preparation of the Report. He was, however, uneasy with some of the discussion presented today in support of the Report. The structure of the United Nations gave responsibility for international security to an international executive, namely the Security Council. The latter was the only international security agency currently operating. Mr Reisman reiterated his uneasiness with the tendency, or process, whereby a growing number of voices undermined the decisions taken by the Security Council. The Report carved out targeted sanctions as a special area, but Mr Reisman was unsure as to whether this was warranted, as these sanctions were the means of controlling threats from an adversary that was particularly dangerous and not susceptible to political control. Mr Reisman shared the concerns about individual human rights – more protection was due in this respect. The critical issue was whether this should be achieved at the cost of jeopardising international peace and security programmes or rather by incorporating these concerns appropriately in the mechanisms operated by the Security Council. Mr Reisman referred to the *Kadi* cases noting that the CJEU was not the right agency to deal with the issues involved – rather, the compliance by the Security Council with human rights should be achieved by modifying appropriately its internal mechanisms.

The *Rapporteur* expressed his gratitude for the positive response to his Report, stating that he would address only the critical remarks made during the discussion. As regards the observations made by Mr Sicilianos and Mr Frowein, he agreed that authorized operations should be treated as a system of its own and that more focus was necessary on that particular issue. True, those resolutions had two sides; he considered them as decisions but this should be made clearer.

The Rapporteur also agreed with the suggestions of Mr Torres Bernárdez and Mr Ranjeva that the Report should be more explanatory. Indeed, that was one of the few opportunities the *Institut* would have to approach the relationship between the international and the national legal orders. Although this was, strictly speaking, not in the mandate entrusted to the Commission, he believed that this particular point could be emphasised in the resolution.

As regards the remarks of *confrère* Abi-Saab, the Rapporteur was perfectly conscious of the problem but clearly Mr Abi-Saab’s position was very different from that of Mr Reisman, who thought that the Report

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went too far in this respect. The Rapporteur's opinion was that the Security Council, as a component of the United Nations system, did face limitations to its actions stemming from the UN Charter and from rules of *jus cogens*. Unlike Mr Kohen, the Rapporteur did not think that this would automatically lead to judicial control. There should be a distinction in this regard, as any limitations could not necessarily be enforced through judicial review.

One could argue that what could not be enforced was not law, but the Rapporteur's view was that also what could not be enforced could be deemed to be "law". He acknowledged that that was debatable but he would try to spell out this point more clearly, as suggested by Mr Benvenisti. The Rapporteur intended to go back to that point.

He also shared the view of Mr Cançado Trindade. As issues of this kind – that should in principle be addressed at the international level – were actually dealt with with regional or national courts, it would be unreasonable that the ICJ were in the end precluded from doing the same. The Rapporteur expressed his uneasiness with certain conclusions of the CJEU, in his mind overstepping its mandate. Although it was difficult to achieve judicial control over Security Council acts at a universal international level, it was possible, in his mind, to reduce the level of the problem by focusing on the role of national authorities rather than on the one of the Security Council. Targeted sanctions were triggered by national initiative (listing and delisting) and this was an act of administrative law; in most countries governed by the rule of law. Public authorities could be therefore subject to judicial control in this respect. While the conclusions were drawn in these terms, the Rapporteur wished that a more thorough reflection, and perhaps more counterarguments to this point, would be possible.

As regards the question as to why the ICJ should not be entitled to examine the lawfulness of Security Council acts as a preliminary issue, the Rapporteur agreed that such a possibility existed, but many wished for more (for instance, Erika De Wet) and looked for something different. Incidental control could be mentioned in the text, but it should be borne in mind that the ICJ was not a constitutional court and that the Security Council was not the German Government. There were differences and it would not be appropriate to rely on the rule of law principle to transpose national constitutional principles to the international plane. The *Institut* should not lend itself to that. However, the Rapporteur was keen to listen to more in this respect.

In answer to Mr Reisman, the Rapporteur accepted that targeted sanctions were necessary, but nobody could be sure that there was no mistake and

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this should be remedied somehow. The point was not whether the possibilities to reach the objective would be weakened but rather how far one should go in pursuing that objective. While the Security Council had established the Ombudsman and reformed the delisting process – something that was necessary and well accepted – this has not eliminated all criticism. The Rapporteur further noted that his Report was backed up, to a certain extent, by the Security Council itself in a recent resolution quoted in the Report, according to which Member States that initiated listing or delisting should be conscious of the human rights implications of those acts. The Rapporteur would appreciate it if the Security Council continued in this line, as a way of strengthening judicial control over the actions of the Security Council.

Mrs *Infante Caffi* stated that she could not add much to the Report; she was a Member of the 12th Committee and fully endorsed the rich Report and its conclusions. She wished, however, to make two comments. The first concerned the relationship between the Security Council and the International Criminal Court; this should be dealt with separately as, for the ICC, the controlling text was the ICC Statute, rather than the UN Charter. Therefore, there was in principle a relationship of equality between the Security Council and the ICC. The only aspect where the ICC was “bound” to respect the deliberations of the Security Council concerned its decision to refer a situation to the ICC. This different framework should be clarified. Furthermore, Mrs *Infante Caffi* stressed that limitations to the Security Council’s action did not stem only from human rights norms, and there was a need for further development of international law in this regard. She also emphasised that if an issue concerning a decision of the Security Council on a threat to peace came before the ICJ, the latter would have to interpret it.

Mrs *Xue* expressed her appreciation for the work of the Rapporteur. She was a Member of the 12th Commission and her contribution had often been limited to raising questions and doubts, especially as to the possibility of an analogy between the UN system and a national constitutional system. Mrs *Xue* argued that the title of the topic was too dramatic. Indeed, the constitutional issue immediately came up; in her opinion, the Report was properly confined to the scope of the topic. In this regard, she argued that what was at stake was not really judicial control on Security Council resolutions, but rather legal control over implementation of Security Council’s decisions at national level, and this should be reflected in the title. That brought her to the second issue: from a non-European perspective, she noted that national mechanisms of implementation of Security Council resolutions and the forms of control

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thereon varied. Some States established forms of judicial control on acts of implementation, some others set up review commissions dealing with the implementation of such resolutions – and it could not be said that this was not correct. Control mechanisms did not necessarily imply the presence of courts, especially as judicial bodies might not have sufficient knowledge about Security Council resolutions and their background.

Mrs Xue furthermore wished to stress that the topic to be addressed was not only about human rights and *jus cogens*, but whether in their regard judicial control on Security Council resolutions could be exercised. She considered that the discussion should not deal with judicial review as such, but with judicial review of national implementation decisions. Indeed, the Security Council had some limitations in implementing its functions, but the UN Charter did not establish any form of judicial review of its acts; only national implementing measures were subject to review. It should also be borne in mind that, in light of Article 103 of the UN Charter, decisions of the Security Council prevailed over other international obligations of Member States. When regional or national courts reviewed such decisions, at the end of the day the issue was whether the State as such implemented its obligations under the Charter and the relevant resolution or not. In conclusion, the Report was commendable, especially for its focused scope, but further issues would have to be discussed, especially as regards the identification of the topic, which should focus only on the implementation of Security Council decisions.

Dame *Rosalyn Higgins* wished to extend her sincere congratulations to the Rapporteur and to the Commission for an interesting and fruitful piece of work. She had not fully grasped how the issue of attributability fitted in with all this, as that was a problem which did not concern review or control. Maybe she was missing something on this particular point.

Moreover, she did not share the views expressed by Messrs Frowein and Kohen, whose approach was, in her mind, too broad. Dame Rosalyn Higgins was rather close to the conclusions included in the Report. While there was a range of international resolutions in the area of peace and security for which the structure of the UN Charter suggested that they were never meant to be subject to review, at the same time the strict distinction whereby the International Court of Justice was perceived as a purely judicial body that should deal only with purely legal issues whereas the Security Council was a political body dealing with purely political questions was not tenable; in practice, it was not as simple as that.

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As regards the problem of the constitutionality of the Charter, as Mrs Xue and others had already noted, the ICJ was not meant to be a constitutional court. Nonetheless, there were hints in the case law that the ICJ had an interest in constitutional issues: for instance, in the *Expenses* advisory opinion the ICJ did address the legality of the new peacekeeping structure established within the United Nations, and in the *Wall* advisory opinion the ICJ not only accepted to answer the question raised by the General Assembly with reference to the consequences of the wall's construction, but it also referred to the legality of the measures adopted by the General Assembly. This clearly implied that there was a grey area in this respect.

A most interesting question concerned the possible conflicts between Article 103 of the UN Charter and human rights; this had been an issue for the United Kingdom as well, in connection with some cases brought to Strasbourg. As regards the CJEU, Dame Rosalyn Higgins felt that *Kadi* was indeed a strange case, as it implied that not only the ICJ, but also other bodies could review the compatibility of Security Council acts with *jus cogens*; it was rather raw that the CJEU felt better placed than the ICJ to assess incompatibility with *jus cogens*. Dame Rosalyn Higgins considered that a few things must be clarified in those grey areas.

Mr *Hafner* congratulated the Rapporteur on his excellent Report which perfectly described the state of the art. He observed that two approaches were possible: the first consisted in keeping the political and legal *status quo* as it was, and the second one in trying to change it in order to increase the control of the Security Council decisions. He argued that opting for one or the other was ultimately a political decision. He raised the question of whether the limitations of Security Council decisions flowed from the nature of its rights or from the regime of judicial review. He indicated that if the nature of its political decisions was discretionary it might be incompatible with any limitation. Finally, he drew the Rapporteur's attention to tentative conclusion N° 7(cc) and stated that he did not find the term "acting agents" adequate.

Le *Secrétaire général*, s'exprimant à titre personnel, souligne que la jurisprudence du Tribunal et de la Cour de Justice de l'Union européenne relative à l'application des sanctions ciblées est très importante pour le sujet examiné et révèle une évolution en trois temps menant à la déclaration de nullité pour violation des droits de l'homme. Il s'interroge sur l'état actuel de la jurisprudence de la Cour de Strasbourg en la matière ainsi que sur la possibilité d'une extension d'une telle jurisprudence même en dehors du domaine des droits de l'homme.

Mr *Orrego Vicuña* joined his colleagues in congratulating the Rapporteur. He suggested further highlighting the situation arising from

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the breach of due process of law or human rights on the part of UN bodies and notably the sanctions committees. He observed that when international institutions that were supposed to protect them actually violate human rights, national courts end up in being their final guardian. He emphasised that this was an inversed situation moving backwards in terms of respect of human rights and due process of law, since national courts re-obtained a role that was initially taken away from them and domestic standards replaced international standards. He raised the question as to whether such an element should be addressed in the Report. He recalled Dame Rosalyn Higgins' observations on the issue of immunity, associated with this phenomenon. He stated that total immunity in case of a breach of human rights should be avoided and suggested looking into the issue of personal responsibility of the members of UN missions. In this regard, he raised the concern that a veil of protection was cast upon such members, making it very difficult to have information on who took the contested decision.

Sir *Kenneth Keith* expressed his great appreciation for the Report. He referred to tentative conclusion N° 3 on Security Council decisions that a particular situation constituted a threat to peace, breach of peace or an act of aggression which, according to the Report, were not open to any form of judicial control. He underlined the enormous powers thus conferred to the Security Council and the difficulty for a judge, which he had personally experienced, to go far in terms of control. He suggested that emphasis should be given to the responsibility of States as decision makers and quoted in this regard the Declaration of the High-Level Meeting of the General Assembly on the Rule of Law at the National and International Levels. He highlighted that the Security Council did have to comply with the rule of law even in the absence of judicial control, an idea that was also contained in tentative conclusion N° 7(bb), relative to the legal framework established by the UN Charter, notably the Ombudsperson. He also raised the question of the status of that office. He stated, agreeing on that issue with Mrs Xue, that such a mechanism would not mean that judicial control would necessarily disappear, since there would still be an important role for courts, and primarily for the ICJ, especially in limiting the powers of individual States within the Security Council. He indicated that in this regard the ICJ's jurisprudence offered valuable material. He insisted further on the role and responsibility of the designating States making proposals for the listing or delisting. He finally turned back to tentative conclusion N° 3 and observed that it could seem a little contradictory to affirm that the Security Council faced limitations but that there was no judicial control. In order to give real body to this

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proposition, emphasis should be given to the responsibility of States exercising their great powers.

Mr *Tomka* thanked the Rapporteur and the Members of the Commission for their work. He first raised the question of the title, considering that it led to unnecessary controversy. The approach could be inverted by examining Security Council decisions as limits to control by judicial organs, although that would not be the most appropriate choice. He turned to tentative conclusion N° 2 concerning the decisions of a predominantly internal character, such as those establishing subsidiary organs or bodies. He stated that, according to the Report, those decisions were not open for judicial control. He argued that the legality of the establishment of the ICTY, which was a subsidiary body, had been the subject of an incidental judicial control in its Decision on the Defence Motion for Interlocutory Appeal on Jurisprudence of 2 October 1995 and thus suggested reformulating tentative conclusion N° 2 by removing the reference to subsidiary organs and bodies. He also had reservations concerning the formulation of tentative conclusion N° 3 excluding any form of judicial control for decisions of a predominately normative character. Mr Tomka admitted that the ICJ was by no means a constitutional court and that there was no chance of assigning it such a role in the future. He pointed out, however, that this did not mean that legal issues relating to certain Security Council resolutions could not be brought before it. He firstly indicated that the General Assembly could ask for an advisory opinion raising such a question and the ICJ would then be able to exercise its discretion in controlling the Security Council decision. He secondly noted that even in the framework of its contentious jurisdiction, the ICJ could have incidental jurisdiction over the validity of a Security Council decision in matters of peace and security. He finally congratulated the Rapporteur once again and expressed the wish that the future resolution reflect the plenary's discussion.

Mr *Tomuschat* wished to congratulate the Rapporteur for his excellent and detailed Report, which assembled all relevant sources. He considered that a distinction must be drawn between jurisdictional and substantive issues. Furthermore, the problem had to be addressed also by considering the problem of hierarchy between legal sources – notably between general international law and *jus cogens*. What source should take precedence was not altogether clear, as Article 103 of the UN Charter was embedded in the whole system of international law and *jus cogens* did constitute a threat to Article 103; this issue could not be put aside easily.

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Mr Tomuschat did not challenge the fact that the ICJ was not the constitutional court of the United Nations; that had been a deliberate choice made in San Francisco, which had not changed so far. The EU framework was different in that regard. He therefore agreed with *consæur* Xue that the focus should be on implementing measures, although that would not solve the problem of what a national court should do if it found that a Security Council resolution was incompatible with international law: “elle doit trancher”.

Mr Tomuschat furthermore did not rule out the possibility of incidental control of Security Council acts by international tribunals; the ICJ would probably not refuse to decide on such an issue and, as Mr Tomka had just recalled, the General Assembly could also request an advisory opinion on those matters. As regards paragraph 3 of the Report’s conclusions, the Rapporteur did not mention the consequences of any such findings for the Security Council.

Moreover, it could be envisaged that, in deciding measures in light of the responsibility to protect and in the interest of peace, the Security Council might be tempted, for instance, to divide a country or a people (as some instances from the past showed). In those circumstances, the wisdom of the Security Council was of course at stake. Should this kind of measure be taken, the ICJ might have to say “no”, taking a decision based on law. Mr Tomuschat did not want to jeopardize the role of the Security Council and the importance of Article 103 of the Charter, but the Security Council was not God and there were higher sources of law, which even the Security Council had to respect.

Mrs *Arsanjani* thanked the Rapporteur for the way he had conducted his business; she made her comments as a Member of the 12th Commission, but was concerned about some aspects that had emerged in the discussion because the function of the topic and of the Report was not to redraft or reconsider the constitutional structure of the UN Charter. As had been recalled, the ICJ was not a constitutional court and it would not be appropriate to rush to reach another court when there was disagreement on acts of the Security Council. More generally, there was a need for caution, and it should be stressed that the Security Council, like courts, did take self-corrective action, such as the establishment of the Ombudsman. The Security Council could take measures to safeguard human rights and international law; Mrs *Arsanjani* felt that the *Institut* would go too far in stating that international courts, even the ICJ, or national courts could review its acts.

M. *Mahiou* remercie le Rapporteur. Il partage le point de vue exprimé par d’autres membres sur un rapport riche, documenté et bien argumenté,

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qui invite à une réflexion approfondie. Il lui semble que le point le plus important concerne le paragraphe 3 des conclusions. M. Mahiou relève à cet égard la distinction de formulation par rapport aux autres parties des conclusions – on soutient qu'aucun contrôle n'est admis par rapport à la catégorie de décisions visées (« decisions of a predominantly normative character [...] are not open for any form of judicial control »). Cette formule est plus forte que les autres et trop absolue ; une telle interdiction absolue empêche tout développement futur et constitue un verrou énorme, auquel il ne peut pas souscrire.

M. Mahiou considère, en général, qu'il y a des circonstances dans lesquelles les institutions internationales peuvent s'interroger sur la légalité des décisions du Conseil de sécurité. Il remercie encore une fois le Rapporteur pour la qualité du Rapport et de son examen du sujet.

The *President* reassured *confrères* and *consœurs* that, after the voting that would take place at 5 p.m. (with the roll-call followed by the ballots), the discussion on the topic could continue until 6 p.m.

Mr *Subedi* thanked the Rapporteur for his commendable job: as a Member of the 12th Commission, he had sent some comments on it, and the Report did take them into account although the conclusions expressed in essence the Rapporteur's position, not those of the Commission, and the discussion in this regard would continue at the Commission level.

With reference to the Report, Mr Subedi shared the position of *consœur* Xue and supported a revision of the title of the subject in the direction she had indicated, focusing on the implementation at the national level of Security Council acts. Furthermore, Mr Subedi pointed out that different actors were involved in the subject matter, and the examples of *Kadi* I and II showed that the issue would not go away. Hence, clarification of the current state of the law was needed also to provide guidance for national authorities; in this respect, the task of the *Institut* should be that of examining the *lex lata*. Although Members might have different views on this point, the *Institut* was a body of lawyers trying to bring clarity in these matters, as guidance to stakeholders. Consistency and clarity of the law would have to be enhanced.

Mr *Lee* expressed his appreciation for the work of the Rapporteur and wished to respond to the hesitation the latter had expressed in his oral presentation, when he invited Members to consider whether control over national determinations would be worth exploring. Mr Lee asked the Rapporteur to clarify what he meant by "national control". If the reference was to States' self-discipline in proposing listing or delisting, that was a good area to reflect upon, as Mr Lee agreed with the

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Rapporteur that it was difficult to have external direct control of Security Council decisions. What had been put in place so far was the Ombudsman with regard to targeted sanctions: the Ombudsman was appointed under Security Council resolutions and that was the only area where there was control. Mr Lee invited the Rapporteur to clarify the relationship between the wording “contrôle judiciaire” (in French), which in his understanding had the broadest meaning, and the English wordings “judicial control” and “judicial review”, as clarifying this in the title could be of help.

The *President* gave the floor to the Rapporteur, stating that *confrère* Koroma and *consœur* Bastid-Burdeau were on the list for the discussion that would be resumed later, when others wishing to take the floor would also have an opportunity to do so.

The *Rapporteur* wished to respond to all comments made. As regards the observations of Mr Kohen on the use of the word “normative”, according to the Report any Security Council decision had three components: namely, an assessment that there was a threat to international peace; an assessment as to whether the Security Council should take an action; and an assessment as to what action ought to be taken. These three components should be clearly distinguished.

The Rapporteur also agreed with Mrs Infante Caffi that a distinction should be made with regard to the ICC and that its special position should be emphasised.

With reference to the comments of Dame Rosalyn Higgins, the Rapporteur clarified that the problem of attribution was not at issue as regards targeted sanctions, but could arise, for instance, as regards blue helmets missions or Kosovo. This was the problem he had in mind when referring to attributability, but he was open to suggestions in this regard.

As to the interesting dogmatic question posed by Mr Hafner, the Rapporteur wished to clarify that, in his mind, discretion did not mean that a given body was beyond control; perhaps his national experience influenced his position in this regard. As to the question of whether the limitations of Security Council decisions flowed from its nature or from the regime of judicial review, he observed that any restriction to judicial control did not necessarily stem from the political nature of a given organ, as judicial control also had inherent limitations.

The Rapporteur referred to the remarks of the Secretary-General and Mr Orrego Vicuña on decisions by regional courts, such as *Kadi*. These decisions were facts and nothing could be done to avoid them. In two years' time, more national courts would most probably take decisions along the same lines in the United Kingdom, in the Netherlands, in

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Canada. Perhaps in other countries as well there might be, or there were already, other decisions on these issues. The *Institut's* task was to "protect" the international level, as the Security Council should not come under the jurisdiction of national courts, which were not prepared for this task, although their judgments had some relevance internationally.

The Rapporteur also agreed with the comment of *confrère* Keith, who suggested rephrasing tentative conclusion N° 3, which was currently framed in overly absolute terms.

As regards the observations of Mr Tomka, the Rapporteur noted that many titles had been suggested, and that the 12th Commission would discuss the issue further; in the Rapporteur's opinion, however, referring only to control over implementation of Security Council acts would limit excessively the scope of the resolution to come. On the other hand, the Rapporteur shared Mr Tomka's view that the advisory function of the ICJ could be of relevance, as the General Assembly could well raise an issue in that context; the Rapporteur believed that advisory opinions should play a greater role in that respect, as they brought a significant contribution to the development of international law notwithstanding their non-binding nature. In any case, the concerns of Mr Tomka were noted and they would hopefully be included in the draft.

Mr Tomuschat's remarks on the issue of hierarchy were correct, in the Rapporteur's opinion, but he agreed that the point could be made more clearly. Also the issue of preliminary judicial control, raised by Mr Abi-Saab, deserved an extra line in the resolution.

As to Mrs Arsanjani's observations, the intention of the Commission was certainly not to redraft the Charter, but the Charter should be seen as a developing instrument, as the ICJ and others had stated. Some of its provisions had become moot while others had acquired unexpected relevance over time. Any resolution of the *Institut* should take this element into account.

With reference to the remarks of *confrère* Subedi, the Rapporteur agreed that the *Institut's* task was to give guidance on international law and that any resolution should provide guidance to national institutions. The Rapporteur also agreed that the *Institut* should call for some restraint by national courts and regional courts, as international instruments of control over Security Council decisions already existed.

The Rapporteur fully subscribed to the opinion of Mr Lee on the importance of States' self-restraint in deciding on listing and delisting; it was also true that the Report only made a brief reference to mechanisms already established by the Security Council to monitor the implementation of targeted sanctions, notably the Ombudsperson and the

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focal point. This aspect could be expanded and the future resolution of the *Institut* on this topic could include an appeal to the Security Council, drafted in hortatory terms (“should”), to further develop and strengthen those mechanisms.

Mr *Koroma* thanked the Rapporteur for his Report the clarity of which encouraged him to take the floor. He recalled that the authority of the *Institut* was a moral one and would be even greater if its resolutions were anchored in reality and were not over-ambitious. He turned to the title and indicated that it should reflect the actual objective aimed for, meaning that the Security Council should act in conformity with international law in the taking of its decisions. He asked the Commission to reconsider the title and joined Mrs *Arsanjani* in emphasising that Security Council decisions were subject to the rule of law but not to judicial review. He extensively quoted the Report in this regard and pointed out that the resolution should not be seen as trying to challenge the authority of the Security Council. He proposed substituting the current title with “Security Council and the Rule of Law” which, in his opinion, better reflected the request to the Security Council to comply with the rule of law in its decision making.

Mme *Bastid-Burdeau* s’associe aux éloges déjà adressés par ses confrères et consœurs au Rapporteur. Elle soulève un premier point relatif au but du contrôle judiciaire. Elle souligne que si pour la CIJ l’objectif est de vérifier que le droit international est respecté, pour les cours régionales ou nationales il s’agit de contrôler les actes du Conseil de Sécurité qui affectent les particuliers. A cet égard, les normes de référence applicables devraient être précisées. Elle indique en effet que seules certaines règles de protection des droits de l’homme sont généralement admises, mais que par ailleurs les différents systèmes régionaux de protection sont inégaux entre eux. Elle rappelle ensuite l’influence de la jurisprudence quant au contrôle du pouvoir discrétionnaire du Conseil de sécurité en matière de sanctions ciblées, dont la nécessité a été mise en lumière par le Rapporteur. Elle ajoute que le contrôle s’étend également aux délais de procédure et qu’il peut être non juridictionnel. Elle mentionne à ce titre le Médiateur. Elle observe que le rapport ne se réfère que trop brièvement à la Résolution 2160 de 2014 en évoquant seulement le Médiateur, alors que ladite résolution va à son sens bien plus loin et ouvre des pistes qui mériteraient d’être ajoutées en tant qu’éléments de commentaire dans le rapport. Mme *Bastid-Burdeau* précise en effet que cette résolution renforce les garanties accordées aux individus pour leur radiation des listes noires, envisage – même si ce n’est que de manière timide – l’articulation entre les procédures judiciaires nationales et le Médiateur

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qui doit en être informé aux fins d'une coordination et prévoit en outre que les Etats qui proposent des inscriptions sur les listes noires doivent se faire connaître auprès des particuliers concernés. Mme Bastid-Burdeau estime que ce dernier point est très intéressant en termes d'attribution de responsabilité. Elle conclut en invitant le Rapporteur à prendre en considération ces pistes tout en soulignant que ces commentaires n'enlèvent rien aux qualités indéniables du rapport.

Mr *Schrijver* began by congratulating the Rapporteur and then turned to his first point concerning the self-controlling mechanisms. He indicated that he was intrigued by the discussion on the Ombudsperson as well as on the ICTY as a UN subsidiary organ and suggested conducting some research on whether there were rules within the UN framework for self-control. He mentioned in this regard the example of review boards established when the UN was legally entitled to immunity. This invocation led him to his second point relative to Article 105 of the UN Charter. He noted that some domestic courts tried to give a dynamic interpretation to its scope. He raised the questions of the role of national courts in the control of the Security Council, the domestic enforcement of UN law and the inherent restraints on such control, since it was dangerous to submit the Security Council to national judicial review. Turning back to self-correcting mechanisms, he observed that the International Law Commission (ILC) Draft Articles on State responsibility and those on the responsibility of international organisations provided some room for it and recalled that Article 7 of the ILC Draft Articles on the responsibility of international organisations had been drafted with peacekeeping operations in mind. He suggested taking these observations into account for the drafting of the resolution.

Mr *Yusuf* wished to thank the Rapporteur and congratulate him on his excellent Report. He agreed with most of the Report and most of its conclusions. As regards the problem of terminology raised by previous speakers, he felt that the wording "judicial review" would be better than "judicial control".

Furthermore, Mr Yusuf wished to discuss some issues, which could represent a challenge for any future action by the Institute. He expressed his sympathy for the Rapporteur's effort to categorize various kinds of Security Council decisions, but felt it was difficult to achieve an exhaustive categorization. A first problem was that the Security Council was increasingly confronted with unprecedented challenges at international level and had to be creative in addressing those challenges. In the last few years, the Security Council had managed to innovate to a large extent, so as to deal with atypical situations at both the national and

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international levels. In this regard, Mr Yusuf recalled a measure adopted a few years before, whereby the Security Council extended by one year the term of office of a Head of State of an African country. What if a decision of this kind was challenged before the constitutional court of the country concerned? Such a situation could occur in practice and would present challenges and problems, particularly in the national legal order of Member States. A second category of situations that could raise some specific difficulties related to forms of collaboration between the Security Council and regional arrangements and organizations. The Rapporteur stated that Security Council resolutions adopted in this context were not open for challenge, and Mr Yusuf agreed that they could not be subject to scrutiny *per se*; however, any implementing measures adopted by regional organizations would certainly be open for review.

He further noted that the African Union was in the process of establishing an African Court of Justice whereas the African Court of Human and Peoples' Rights was already active. Both those bodies, the present Court and the future Court, could in principle address challenges against those implementing acts. Those things would have to be kept in mind in future discussions.

Mr *Gaja* expressed his warm congratulations to the Rapporteur for his thoughtful Report. Mr Gaja very much looked forward to less tentative conclusions than those set out in the current Report, if only in two years' time, as the ideas expressed therein needed to be better shaped. Specifically as regards tentative conclusion N° 3, Mr Gaja wished to comment on one specific issue, namely the possibility of reviewing Security Council resolutions assessing that there was a threat to the peace, a breach of the peace or an act of aggression. Mr Gaja did not envisage that a Court might challenge an assessment that was clearly a political function attributed to the Security Council. However, in some instances the Security Council linked the existence of a threat to the peace to the breach of international obligations by one particular entity. One example of this concerned the Madrid terrorist attack of 2004. Immediately after the attack, on that same afternoon, the Security Council issued a resolution (1530 (2004)) qualifying it as a threat to peace and security, and attributed it to a Basque terrorist group. It later turned out that the attack came from another source, but the attribution to ETA had never been repealed by the Security Council. Similarly, Security Council resolution 748 (1992) on the Lockerbie attack attributed to Libya – although not explicitly – acts of terrorism in violation of international law. Now, the Security Council could be right or wrong in that assessment; in the case of the Madrid terrorist attacks it had clearly been

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wrong. But the question was whether the specific factual assessment made by the Security Council could be subject to review. According to Mr Gaja, there was no reason why courts should not be in the position to address this specific issue, leaving untouched the assessment made by the Security Council as to the existence of a threat to the peace.

The *Rapporteur* thanked the Members for their comments. He firstly assured Mr Koroma that he duly noted his concerns as to what he wished to see reflected in the resolution. He indicated that he saw the point made by Mrs Bastid Burdeau, which went in the same direction as the one made by Mr Koroma, and recalled what Mr Abi-Saab had said about the necessity not to focus solely on human rights but also on rule of law standards. He thanked Mr Schrijver for the reference to Article 105 of the UN Charter and to self-control. He emphasised the importance of Dutch case law on the subject matter. He noted that Mr Gaja's observations on tentative conclusion N° 3 shared the same philosophy as those of Mr Koroma and Mrs Bastid-Burdeau concerning the importance of rule of law. He stated that he would be more flexible with regards to judicial review. He thanked the plenary for such a rich and fruitful discussion which would be reflected in the Report and would allow him to present an early version of a meaningful resolution, hopefully on Friday depending on the Commission.

The *President* thanked the Rapporteur for his brilliant Report and the plenary for its important contribution. He indicated that the 12th Commission would be able to meet soon in order to advance with the resolution and recalled Mr Dugard's suggestion for a discussion on current issues, supported by other Members. He read out the programme for the following sessions.

La séance est levée à 18 h 30.