

12^{ème} commission

Judicial Review of Security Council Decisions

*Le contrôle juridictionnel des décisions du
Conseil de sécurité*

Rapporteur : **Rüdiger Wolfrum**

La commission est composée de MM. Alvarez, Ando[†], Mme Arsanjani, M. Bennouna, Mmes Infante Caffi, Irigoin-Barrenne, MM. Lee, Orrego Vicuña, Owada, Pellet, Reisman, Rozakis, Sepúlveda-Amor, Subedi, Suy, Torres Bernárdez, Verhoeven, Mme Xue.

Contents

I. Introduction.....	15
II. Terminology	23
1. Security Council decisions	23
2. Judicial review	27
3. Targeted sanctions	28
III. Security Council decisions	29
1. Introductory remarks.....	29
2. Potential scope of Security Council decisions	29
3. Decisions attributable to the Security Council.....	31
4. Binding and self-executing effect of Security Council decisions	32
5. Systemising Security Council decisions with the view to potential judicial review	34
5.1 Security Council decisions of an internal nature.....	34
5.2 Security Council decisions on the basis of Chapter VI UN Charter	35
5.3 Security Council decisions on the basis of Chapter VIII UN Charter	36
5.4 Security Council decisions on the basis of Chapter XIV UN Charter	36
5.5 Security Council decisions on the basis of articles 13 lit. b and 16 ICC Statute	37
5.6 Security Council sanctions based on Chapter VII UN Charter ..	40
5.7 Decisions of subsidiary organs of the Security Council in the context of peacekeeping missions or the administration of territories	67
5.8 Legal Limitations to Security Council decisions, in particular targeted sanctions.....	67
5.9 National Implementation of Security Council decisions under Article 41 UN Charter, in particular targeted sanctions.....	74
IV. Internal Judicial Review	76
1. Establishment and functioning of the office of the Ombudsperson ..	76
2. Assessment.....	78
V. External Judicial Review	80
1. Introduction.....	80
2. Judicial Review by the International Court of Justice and the International Tribunal for the Prosecution of Persons Responsible	

JUDICIAL REVIEW OF SECURITY COUNCIL DECISIONS - PREPARATORY WORK

for Serious Violations of International Humanitarian Law Committed in the Territory of Former Yugoslavia (ICTY).....	81
2.1 In general	81
2.2 Pronouncements of the ICJ	82
2.3 Pronouncements of the ICTY	85
3. Assessment.....	86
4. Indirect Judicial Review by National or Regional Courts.....	87
4.1 Courts declining judicial review of acts or omissions in the context of peacekeeping operations or the international administration of territories: The question of attributability...	88
4.2 Review of Implementing Measures without having recourse to the relevant Security Council Decision.....	91
4.3 Review of Implementing Measures while having recourse to the relevant Security Council Decision.....	92
4.4 Relevance and assessment of the Security Council procedure on listing and de-listing.....	105
5. Assessment of the jurisprudence of regional and national courts...	109
VI. Conclusions.....	111

I. Introduction

1. 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 24 September 2012), amongst other assertions, it is 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.”

It is further stated in paragraph 29 of the Declaration:

“Recognizing the role under the Charter of the United Nations of effective collective measures in maintaining and restoring international peace and security, we encourage the Security Council to continue to ensure that sanctions are carefully targeted, in support of clear objectives and designed carefully so as to minimize possible adverse consequences, and that fair and clear procedures are maintained and further developed.”

2. This Declaration confirms that decisions of the Security Council also – not only States - 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 precisely describe how this obligation of the Security Council is to be implemented in respect of its decision making; paragraph 29 remains quite general in this respect.
3. It is telling, though, that Security Council resolution S/RES 2178 (2014) on combatting terrorism emphasizes the obligations of Member States to respect obligations under international law and in particular human rights law as well as respect for the rule of law rather than its own, the Security Council’s, obligations.² The resolution states in its seventh preambular paragraph amongst other things:

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).

² S/RES 2178 (2014) of 24 September 2014.

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

4. On the basis of the Declaration of the High-Level Meeting as well as of Security Council Resolution S/RES 2178 it is safe to state that respect for international law, in particular respect for international human rights law as well as for the rule of law have to play a role concerning initiating, deciding on and implementing targeted sanctions.³
5. It is to be noted in this context that no full consensus exists concerning the scope and content of the notion of the rule of law.⁴ This Report will, in principle, follow the description of the UN Secretary General in his report of 2004 on the content of the notion of the rule of law⁵ although such description addresses only states and their national order. It reads:

[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

³ See the definition below at II.3.

⁴ A vast literature exists in this respect mostly concentrating on the definition of the rule of law principle in national law. As far as international law is concerned see recently *Kenneth Keith*, *The International Rule of Law*, *Leiden Journal of International Law*, 28 (2015), 403-417; *André Nollkaemper/Machiko Kanetake* (eds), *The rule of law at the national and international levels: contestations and deference*, 2015; *Richard Collins*, *The rule of law and the quest for constitutional substitutes in international law*, *Nordic Journal of international law* 83 (2014), 87-127; *Ronald Janse*, *The UNGA resolutions on the rule of law at the national and international levels: 2006 – post 2015*, *Max Planck Yearbook of United Nations Law*, 18 (2014), 258-285; see in particular the relevance of the principle of the rule of law *Martin Krygier*, *The Security Council and the rule of law: some conceptual reflections*; *Veronica L. Taylor*, *Big Rule of Law: branding and certifying the business of the rule of law* and *Usha Natarajan*, *Accounting for the absence of the rule of law: history, culture and causality*, in: *Strengthening the Rule of Law through the UN Security Council* (eds, Jeremy Farrall and Hilary Charlesworth, 2016) at p. 13-26; 27-42; 43-57 respectively who controversially discuss the applicability of the rule of law for Security Council action in general.

⁵ See Annual Report of the UN Secretary-General on ‘The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies, UN Doc. S/2004/616, at para. 15.

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.

6. The most relevant aspects of the notion of the rule of law in respect of the issues dealt with in this Report are the accountability to law, fairness in its application, procedural transparency and respect for human rights. Addressees are, as will be demonstrated later, States involved in initiating and implementing the Security Council decisions on which the Report is focusing as well as the Security Council itself.⁶
7. The Report will concentrate on the judicial review⁷ of targeted sanctions and in particular on the system established through S/RES 1267/1989/2253 which has to be seen in the context of the system of sanctions under Chapter VII of the UN Charter as a whole.⁸ But there are also other situations where Security Council decisions are of such a nature that a judicial review is being sought in practice. These are acts pertaining to peace keeping operations and the administration of territories under the auspices of the United Nations.⁹ Another area of interest in this context will be the Security Council decisions under article 13 lit. b ICC Statute.¹⁰
8. It is safe to state already in this introductory part that the Security Council in performing its functions has to act within the constraints of the UN Charter and is bound to observe human rights norms and due process norms many of which have been introduced into international law under

⁶ The Security Council has issued three reports on the rule of law. In the first report published in 2011 the relationship between international law and the Council, and its treatment of the rule of law was examined. The second report published in 2013 focused on the work of the Council in upholding individual criminal accountability as an aspect of its rule of law agenda. The topic of the third report is the institutional architecture which the Council has established and used to advance the rule of law; see in particular on that issue *Simon Chesterman, The UN Security Council and the Rule of Law – The Role of the Security Council in Strengthening a Rule-based International System, Final report and Recommendations from the Austrian Initiative, 2004-2008*, eg: Chesterman, Simon, *The United Nations Council and the Rule of Law* (May 7, 2008), United Nations General Assembly Security Council, Doc. A/63/69-S/2008/270, 2008, NYU School of Law, Public Research Paper No. 08-57. Available at SSRN <https://ssrn.com/abstract=1279849>.

⁷ See the definition below at II.2.

⁸ See below at III.5.6.

⁹ See below under III.5.7.

¹⁰ See below under III.5.5.

the auspices of the United Nations itself. It is to be noted that the measures against individuals or entities taken in the context of targeted sanctions systems (including the implementation of targeted sanctions) 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 have no sufficient means to challenge the facts or assumptions on which their designation as being associated with terrorism was based.¹¹

¹¹ 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 juridiques des droits fondamentaux dans l'Union européenne: Equilibres et déséquilibres de la balance*, Constance Grewe et al. eds, 2010; *Clemens A. Feinäugle*, Hoheitsgewalt im Völkerrecht, 2011, at p. 141 et seq.; *Vera Gowland-Debbas*, The Security Council and Issues of Responsibility under International Law, RdC 345 (2011), 184-443; *Erika de Wet*, From Kadi to Nada, in: *Chinese Journal of International Law* 12 (2013), 787-807; *Elisa Maria Lotz*, Individualsanktionen des UN Sicherheitsrates vor dem Hintergrund der Rule of Law: Eine Untersuchung des Sanktionsregimes 1267/1989 gegen Al Qaida und verbündete Personen, Gruppen, Unternehmen und Einrichtungen, 2014; *John Beuren*, Das Al Qaida-Sanktionsregime als Ausübung supranationaler Kompetenzen durch den Sicherheitsrat, 2016. Literature also highlights the positive aspects of targeted sanctions in comparison to 'comprehensive' sanctions directed against States, see for example *Francesco Giumelli*, Understanding United Nations targeted sanctions: An empirical analysis, *International Affairs* 91 (2015), p. 1351 -1368.

9. The targeted sanctions system 1267/1989/2253¹² has developed in nature and scope into a global counter-terrorism mechanism in substance focussing on the financing of international terrorism.¹³ In its current form this system requires all States to impose a range of measures, including, in particular, asset freezing but also international travel bans and arms embargos. Such measures are imposed on individuals and entities which have been designated by a procedure managed by subsidiary bodies of the Security Council (sanctions committees). These systems referred to in this Report as targeted sanctions 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 Member States are called upon to identify individuals or groups to be included into a list administered by a sanctions committee. As far as lists¹⁴ of targeted persons and entities are concerned, a procedure has been established for updating those lists, which means adding and deleting individuals as well as groups and entities to and from such lists.
10. The fact that targeted sanctions have a direct or indirect bearing on the legal position of individuals as well as entities and thus may directly

¹² The following sanctions committees exist at the moment (September 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 (with S/RES 2253 (2015) of 17 December 2015 the Sanctions Committee, and the list accordingly, has been renamed 'S/RES 1267/1989/2253 ISIL (Da'esh) and Al-Qaida Sanctions Committee'); 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 (amended by S/RES 2216 (2015) of 14 April 2015 and by S/RES 2262 (2016) of 27 January 2016) concerning Middle East; S/RES 2206 (2015), 20 February 2015 concerning South Sudan. S/RES 2253 (2015) goes beyond renaming the Sanctions Committee but has consolidated the 1267/1989 sanctions regime with the sanctions issued against ISIL and by widening the circle of potential addressees (for details see below under II.5.6.4).

¹³ For details concerning this development see below under II.5.6.4.

¹⁴ The lists are made available under <https://www.un.org/sc/suborg/sites>, of 5 July 2016 (last visited 8 July 2016).

infringe upon their human rights¹⁵ means that the Security Council may be considered to exercise public authority directly *vis-à-vis* individuals or groups. When sanctions under Chapter VII of the UN Charter are imposed on States, the rights of individuals or groups of individuals of such a State are not directly affected, even though the indirect effect of such sanctions on the population of the targeted States has been criticized by human rights bodies.

11. Basically it is argued that the principle of the rule of law requires that the exercise of such 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 supports 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 on the international level, is limited by human rights. Their protection requires a judicial control of the measures in question.¹⁶
12. As indicated already, targeted sanctions are not the only measures which may interfere with the exercise of human rights and fundamental freedoms. In practice, individuals have been claiming damages arising

¹⁵ 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; *Ibidem*, Securing the Accountability of International Organizations, *Global Governance*, vol. 2 (2001), 131; *Karel Wellens*, Remedies against international organisations, 2002 *Eric Rosand*, The Security Council's Efforts to Monitor the Implementation of Al Qaeda/Taliban Sanctions, *AJIL*, vol. 98 (2004), at 745-763; *Erika de Wet*, Human Rights Considerations and the Enforcement of Targeted Sanctions in Europe: The Emergence of Core Standards of Judicial Protection, in: *Bardo Fassbender* (ed.), *Securing Human Rights? Achievements and Challenges of the Security Council*, 2011, p. 141-171; *Annalisa Ciampi*, Security Council Targeted Sanctions and Human Rights, in: *Bardo Fassbender* (ed.), *Securing Human Rights? – Achievements and Challenges of the Security Council*, 2011, p. 98 – 140; *Grant L. Willis*, Security Council Targeted Sanctions, Due Process and the 1267 Ombudsperson, *Georgetown Journal of International Law*, vol. 42 (2012), 675-745; *Christopher Michaelsen*, The Competence of the Security Council under the UN Charter to adopt sanctions targeting private individuals, in *A. Byrnes, M. Hayashi, C. Michaelsen* (eds.) *International Law in the New Age of Globalization*, 2013, 11-39.

¹⁶ Advocated by the Special Rapporteur (note 11), p. 18.

from acts or omissions by subsidiary bodies of the Security Council in the exercise of their functions, such as the international administration of territories or in peace keeping missions, in which those acting in official capacity allegedly infringed upon the individual's human rights. The legal issues which arise are similar but not identical with the ones connected with targeted sanctions.¹⁷

13. In practice some form of judicial review has been exercised in connection with targeted sanctions of the Security Council sanctions committees, in the context of the international administration of territories or in connection with peace keeping missions. Cases against targeted sanctions have either been initiated by individuals, by groups, or by entities and were directed against the implementation of such sanctions. In doing so all applicants invoked either an error in facts, questioned the listing procedure for violating due process and/or claimed violations of human rights. In cases where individuals brought action against acts or omissions of subsidiary bodies of the Security Council the applicants mostly claimed the violation of human rights.¹⁸
14. Most of the "judicial review" of Security Council decisions exercised until now has been of an indirect nature – considering the implementation rather than the decision itself – and undertaken by national courts, the European Court of Justice, regional human rights courts and international criminal courts.¹⁹ This may have something to do that targeted individuals were resorting there. As will be demonstrated, this report 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 sheds some light on the interpretation of a Security Council decision.
15. The Report will start by taking stock of and analyse any form of judicial review of 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 review' lacked coherency at the outset although it is by now consolidating. The Report will further contemplate whether any form of judicial review 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 and its functions

¹⁷ See below under III.5.7 and V.4.

¹⁸ See below under III.5.7 and V.4.

¹⁹ As to this jurisprudence see below at V.4.

were designed by the drafters 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 a political body having discretionary powers. Furthermore, 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 time and that the drafters of the UN Charter did not anticipate that the Security Council would direct its sanctions against individuals or private entities rather than States.²⁰ 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 in implementing the Security Council decisions. Finally the Report must necessarily assess to what extent the Security Council has established an adequate procedure to scrutinise its decisions on targeted sanctions.²¹ 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.

16. 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. Furthermore, it will be necessary to establish what is meant by judicial review.

II. Terminology

1. *Security Council decisions*

17. There are several options²² 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.
18. 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

²⁰ See on discretionary powers of the Security Council under III.5.8.1 and 5.8.5.

²¹ See III.5.6.5.4/5 and IV.1.

²² *Anne Peters*, on Art. 25, MN 8, in: Bruno Simma et al. (eds.), *The Charter of the United Nations: A Commentary*, 3rd ed., 2012.

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.²³ The key to the understanding of the term “decision” lies in how 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.²⁴ 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.

19. From the mandate of the Security Council in respect of the preservation of international peace and security²⁵ it follows that there is a presumption in favour of the binding nature of decisions of the Security Council under Chapter VII. It is the common view, though, that whether a Security Council decision is binding does not depend only on as to whether such decision was taken under Chapter VII, but also on whether it was intended to be mandatory as indicated by the wording used. 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.

²³ “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 South Africa in Namibia (South-West Africa) notwithstanding Security Council Resolution 276 (1970) Advisory Opinion ICJ Reports 1971, 16, at para. 114).

²⁴ *Peters* (supra note 22), at MN 8.

²⁵ 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. Furthermore, 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).

20. According to the ICJ in its Advisory Opinion on *Namibia* invoking Article 25 of the UN Charter²⁶ 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).²⁷ Practice does not seem to endorse the view taken by the ICJ in its Advisory Opinion on *Namibia*. Therefore the Report will not deal with decisions of the Security Council under Chapter VI of the UN Charter.
21. According to 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 review by the International Court of Justice will be dealt with below.²⁸
22. It is of particular relevance in the context of this Report whether omissions of the Security Council may be reviewed 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 in 2001.²⁹ As an illustration it may be sufficient to point to the *Behrami case*.³⁰ The European Court of Human Rights found in this case that an omission of UNMIK, a subsidiary organ of the United Nations, was attributable to the latter. This judgment³¹ will be analysed later in this Report; there it will be considered also as to whether – taking into account the discretionary power of the Security Council – it is possible to judicially review omissions of the Security Council.³²
23. Particularly since the establishment of sanctions committees, it has been discussed as to whether subsidiary organs of the Security Council set up in accordance with Article 29 of the UN Charter or other entities

²⁶ 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).

²⁷ Different *Peters* (supra note 22), at MN 11.

²⁸ See below under V.2.

²⁹ Article 2, Text in: A/RES 56/83 of 12 December 2001, Annex as corrected by A/56/49 vol. I/Corr.4.

³⁰ *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).

³¹ 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).

³² It may be necessary to distinguish between various decisions; on that see below at III.5.7.

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,³³ if the Member States do not object. States 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 Council³⁴ Member States would need to object if they regard a particular delegation of power as *ultra vires*. It is another question whether a mechanism exists so as to invoke such an objection.³⁵

24. 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 altogether.
25. 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.

³³ See ICJ Namibia Advisory Opinion (note 23), p. 52 (para. 110).

³⁴ *Erika de Wet*, The Chapter VII Powers of the United Nations Security Council, 2004 at p. 73 and 260 et seq.

³⁵ Cases exist that States have withheld financial contributions which they considered *ultra vires*. See on the question of what are the 'expenses of the Organization' (Article 17(2) of the UN Charter, *Peter Woeste/Thomas Thomma*, MN 128 et seq., in Bruno Simma et al. (eds.), *The Charter of the United Nations*, 3rd ed. 2012. It is beyond the scope of this Report to discuss this point further.

³⁶ See also, *Peters* (supra note 22), at MN 21 and *Nils Kreipe*, *Les autorisations données par le Conseil de sécurité des Nations Unies à des mesures militaires*, 2005, p. 71 et seq. for more details.

26. To summarise, decisions of the Security Council are those pronouncements of the Council itself or of its subsidiary bodies, such as sanctions committees, 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 and possible legal relevance.³⁸

2. *Judicial review*

27. Abstractly defined, judicial review 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 assessed from the point of view of the UN Charter and international law based thereupon after the decision in question has been taken and, probably, after it has been implemented.
28. 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 submitted³⁹ – 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.⁴⁰ For example, the United Kingdom, the USSR and France spoke against these proposals.⁴¹ The Belgian amendment was finally not accepted by the Legal Committee.

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 that 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 25), at 263.

³⁹ See *Ken 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.

⁴⁰ 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.

⁴¹ 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

29. In the context dealt with here two different forms of judicial review are relevant: a direct and an indirect one. A direct judicial review would assess the decision of the Security Council as such, whereas an indirect one would scrutinise the measures undertaken to implement such a decision without questioning the decision as such. It is evident, though, that even under the latter approach an interpretation of the Security Council decision in question may be undertaken. This is the approach followed in the jurisprudence of several regional courts recently.⁴²
30. Theoretically various mechanisms of judicial review exist. A judicial review may be undertaken by a court or tribunal independent from the body whose decisions are to be reviewed. As far as decisions of the Security Council are concerned the Report will deal with the role of the International Court of Justice⁴³ as well as with the jurisprudence of regional and national courts which have reviewed the implementation of Security Council decisions which had an impact on the rights of individuals or private organizations.⁴⁴ However, also self-controlling mechanisms established by the decision-making body are covered by the notion of judicial review as understood in this Report. Therefore the Report will assess the system of listing and delisting established by the Security Council from two different points of view namely as to whether this constitutes an effective review system and what impact it has respectively had – or should have – on the jurisprudence of regional or national courts.⁴⁵

3. Targeted sanctions

31. As indicated above in the Introduction and as will be elaborated more in detail in Chapter III, targeted sanctions are those decisions of the sanctions committees established by the Security Council which oblige States to take such measures as provided for in the Security Council resolution concerned against individuals or private entities listed by the relevant sanctions committee.

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: *de Wet*, (supra note 34) at 75 et seq.; see also *Roberts*, (supra note 39), at 292.

⁴² See below at V.4.

⁴³ See below at V.2.2.

⁴⁴ See below at V.4.

⁴⁵ See below at IV and V.4.4.

32. A direct judicial review of Security Council decisions has been attempted, so far, only rarely. It has been rejected or avoided by the International Court of Justice early on⁴⁶ and in the *Lockerbie* cases⁴⁷ 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*).⁴⁸ However, although declining direct judicial review the ICJ showed some flexibility concerning an indirect review, i.e. reviewing the consequences of a decision in question.
33. The International Criminal Tribunal for the former Yugoslavia in turn felt it necessary to assess the Security Council decision that established the Tribunal.⁴⁹

III. Security Council decisions

1. Introductory remarks

34. In dealing with a judicial review of targeted sanctions and other decisions of the Security Council and its subsidiary bodies it is mandatory to take into account the mandate of the Security Council as enshrined in the UN Charter and as developed in practice. It is further necessary to assess such decisions which are the result of a recent evolution of the practice of the Security Council in context with other Security Council decisions.

2. Potential scope of Security Council decisions

35. In particular when discussing a potential judicial review 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.⁵⁰ 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

⁴⁶ Advisory Opinion in the Case *Concerning Certain Expenses of the United Nations*, ICJ Reports 1962, p. 151 (168).

⁴⁷ See below under V.2.2.

⁴⁸ ICJ Reports 1996, p. 595 (611), for details see below at V.2. and 3.

⁴⁹ *Prosecutor v. Tadić (Jurisdiction)*, ILM 35 (1996), 35 (at 39 et seq.); for further details see below, at V.2.3.

⁵⁰ *Robert Kolb*, *An Introduction to the Law of the United Nations*, 2010, at 79.

dispute settlement but not for measures of collective security under Chapter VII.⁵¹

36. It has been argued that Security Council decisions, including the ones under Chapter VII of the UN Charter, are standard setting⁵² rather than operational.⁵³ This does not, in this generality, embrace the Security Council practice adequately as it has developed over the years. Security Council decisions mostly combine operational and standard setting aspects.⁵⁴ The Security Council may make legal determinations, such as what is necessary to restore international peace and security,⁵⁵ what constitutes a threat to international peace and security – decisions which are predominantly standard setting.⁵⁶
37. Contrary thereto in targeted sanctions operational aspects prevail. This is also true for decisions of the Security Council according to article 13 lit. b of the ICC Statute⁵⁷ and for Security Council decisions in the context of an international administration of territories or in the context of peace keeping missions.
38. Of particular interest in the context of this report on a potential judicial review 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 2178⁵⁸ in comparison to the original regime established under S/RES 1267 (1999) /1989 (2011).⁵⁹

⁵¹ *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 de pouvoir discrétionnaire appliquée aux organisations internationales*, RGDIP vol.107 (2003), at 567.

⁵² *Catherine Denis*, *Le pouvoir normatif du Conseil de sécurité*, 2004, at pp. 53/4.

⁵³ *Benedetto Conforti*, (1996) 43 RYDI 123 seq.

⁵⁴ On this see the comprehensive analysis of *Antonios Tzanakopoulos*, *Disobeying the Security Council: Countermeasures against wrongful sanctions*, 2011, at p. 22.

⁵⁵ See for example Security Council Resolution 687 (1991) of 3 April 1991.

⁵⁶ 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 Iraq under Security Council Resolution 1483 (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 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.

⁵⁷ The basis for such a decision of the Security Council rests in Article 41 of the UN Charter.

⁵⁸ 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

3. Decisions attributable to the Security Council

39. In literature⁶⁰ 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 taken by the Security Council itself. This is equally true for decisions of 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.⁶¹
40. 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.⁶² 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 have been coherent at the beginning.
41. 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

42. To have self-executing effect⁶³ 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.⁶⁴ The litmus test for the self-executing effect is whether

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.

⁵⁹ For details see under III.5.6.4/5.

⁶⁰ *Peters* (supra note 22) at MN 194 et seq.

⁶¹ 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 12) establishing sanctions committees. In consequence of their autonomous character, decisions taken by the International Criminal Tribunal for Rwanda (ICTR) and of the International Criminal Tribunal for the former Yugoslavia (ICTY) are not attributable to the Security Council.

⁶² For details see under III.5.6.4.1.

⁶³ See on this quite in detail *Peters* (supra note 22), at MN 45.

⁶⁴ This question of self-executing effect has been raised with respect to international treaties before national judicial and administrative fora; on that see *Thomas*

supplementary national legislation or administrative decisions are necessary to provide for the applicability of the norm concerned by the judicial or administrative fora.

43. 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.
44. 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.
45. Almost all provisions of the UN Charter are not self-executing;⁶⁵ 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.⁶⁶ This is particularly evident for the Security Council. Articles 39, 41, and 48 of the Charter, for example, deal with the competences 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.
46. 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 are concerned. But this is not decisive. Targeted sanctions explicitly rely on the implementation and enforcement power of the States they are addressing,⁶⁷ reflecting a multi-layered approach⁶⁸ according to which

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*, 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.

⁶⁵ An exception is for example Article 2(1) of the Charter prohibiting the discrimination among States.

⁶⁶ *Frowein* (supra note 25), at 256.

⁶⁷ *Alain Pellet/Alina Miron*, Sanctions in: Rüdiger Wolfrum (ed.), MPEPIL vol. IX, 2012 at MN 39 et seq.

standard setting acts undertaken on the international level are to be implemented and enforced through national mechanisms.⁶⁹ 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 below⁷⁰ have not contemplated whether the sanctions addressed to individuals were directly applicable.

47. 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.
48. 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 measures taken 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 review

5.1 Security Council decisions of an internal nature

49. 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 participation in the elections of judges of the ICJ (Article 4 ICJ Statute) or on access to the ICJ (Article 35 ICJ Statute).⁷¹ Such decisions by their very nature cannot be challenged from the “outside”, and accordingly will not be considered further in this Report. The situation in respect of the establishment of subsidiary organs under Article 29 of the UN Charter⁷² is more complex. In the Decision of 2 October 1995 on the Defence Motion for

⁶⁸ *Pellet/Miron* (supra note 67), at MN 9 and 15.

⁶⁹ See S/RES. 1267 (1999) of 15 October 1999 (on Afghanistan), paras 3 et seq.

⁷⁰ See below at V.4.

⁷¹ See also Article 93 (2) UN Charter.

⁷² See the evaluation of the Security Council practice in this respect by *Andreas Paulus*, in: Bruno Simma et al. (eds.), *The Charter of the United Nations: A Commentary*, 3rd ed., 2012.

Interlocutory Appeal on Jurisdiction (*Prosecutor v. Dusko Tadić*) the Appeals Chamber of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the territory of the Former Yugoslavia (ICTY) considered in detail the ‘legality of its [the one of the ICTY] establishment by the Security Council, solely for the purpose of ascertaining its own “primary” jurisdiction over the case before it.’⁷³ This issue will be dealt with more in detail in connection with the so far existing practice of judicial review over Security Council Decisions exercised by international courts and tribunals.⁷⁴

50. On the other hand, decisions concerning the admission of new members (Article 4 of the UN Charter speaks of recommendations to the General Assembly) are, as the ICJ pointed out in its *Advisory Opinion on Competence of Assembly regarding the admission to the United Nations*,⁷⁵ an indispensable prerequisite for the admission of new members. Therefore the ‘recommendation’ referred to in Article 4(2) of the UN Charter may be considered as a decision. However, considering the legislative history of Article 4 of the UN Charter it is evident that by participating in the decision on the admission of new members to the United Nations the Security Council is meant to introduce into such process its views on the substantive criteria for admission as set out in Article 4(1) of the UN Charter. The assessment as to whether these criteria are met cannot be reviewed judicially. Apart from that it is to be noted that the Security Council, in practice, only issues a positive recommendation or no recommendation at all. According to the *Advisory Opinion of ICJ*⁷⁶ the practice is in conformity with Article 4(2) of the UN Charter.

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

51. 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.^{77/78}

⁷³ See note 49 above at para. 20.

⁷⁴ See below at V.2.

⁷⁵ ICJ Reports 1950, p.4. at p. 9.

⁷⁶ See note 74 above.

⁷⁷ See above under II.1.

⁷⁸ 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*

5.3 Security Council decisions on the basis of Chapter VIII UN Charter

52. 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.⁷⁹ 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.⁸⁰ Accordingly, the question concerning a potential judicial control should be treated alike.⁸¹

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

53. 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 that 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.
54. 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 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.
55. 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.⁸² In delivering an advisory opinion, the International Court of Justice may engage in interpretation of the question and may answer only part thereof. It is an open question whether

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).

⁷⁹ *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.

⁸⁰ See below under III.5.6.2.

⁸¹ See note 79.

⁸² *Karin Oellers-Frahm*, on Art. 96, MN, in: Bruno Simma et al. (eds.), *The Charter of the United Nations: A Commentary*, 3rd ed., (2012).

rendering an advisory opinion constitutes a 'judicial review' since an advisory opinion may also contain the necessary control element.

56. All these decisions referred to in this subsection are characterized by the fact that the Security Council has discretionary powers as to whether to take such decisions and concerning their content. The fact alone that the Security Council has discretionary power does not in itself mean that such decisions are absolutely immune from judicial review as can be seen in the Decision of the Appeals Chamber of the ICTY on the Defence Motion for Interlocutory Appeal on Jurisdiction.⁸³ However, the discretion of the Security Council in the cases mentioned in this subsection is based on political considerations and considerations of utility outside the scope of a review to be based on legal considerations.

5.5 Security Council decisions on the basis of articles 13 lit. b and 16 ICC Statute

57. 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 ..."⁸⁴
58. 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.⁸⁵ This issue is not of direct relevance here.
59. What is 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 the case of non-Member States to the ICC Statute, such a decision of the

⁸³ See note 49 above.

⁸⁴ 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*, 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.

⁸⁵ 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.

Security Council establishes the jurisdiction of the International Criminal Court and allows the latter to act in accordance with this now established jurisdiction.^{86/87}

60. 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 on the ICC.

61. 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.⁸⁸ Both decisions, the one under article 13 lit. b ICC Statute and the one under article 16 ICC Statute, are to be treated separately.
62. 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 principal functions and even an 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.⁸⁹ This raises the question whether this competence presents the possibility for judicial review by the International Criminal Court of decisions of the Security Council under articles 16 of the ICC Statute and which grounds may be invoked.
63. To deny the International Criminal Court the right to decide on its jurisdiction when a situation has been submitted to it according to article 13 lit. b ICC Statute would make article 19 ICC Statute inapplicable in

⁸⁶ *Kaul* (supra note 85), MN 59.

⁸⁷ The difference between the legal consequences for Member States and non-Member States to the ICC Statute rests in the fact that in respect of the former the jurisdiction of the ICC already exists in principle whereas it has to be established in respect of non-Member States.

⁸⁸ This issue was not discussed at the Rome Conference.

⁸⁹ 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.

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 of the ICC Statute, *ratione temporis*, *ratione personae* and *ratione loci*.⁹⁰ Furthermore, the International Criminal Court may determine whether a case submitted is inadmissible.⁹¹

64. 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'. This decision is referred to the Prosecutor. Such a referral is not a conclusion by the Security Council that any crime under the Statute has been committed or, if so, by whom. The International Criminal Court in turn 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 chapeau of article 13 of the ICC Statute is quite clear on this issue when it states: "The Court may exercise its jurisdiction with respect to a crime referred to in article 5 in accordance with the provisions of this Statute if ...". To conclude, the language of the Rome Statute excludes that by deciding on its own jurisdiction it may review the Security Council decision referring a situation to the Prosecutor.
65. A further consideration based upon the powers and functions of the Security Council under the UN Charter endorses this finding. It is the 'primary' responsibility of the Security Council under Article 24 of the UN Charter to establish that the situation constitutes a threat to international peace. Such a finding is 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.
66. 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

⁹⁰ See on that in some detail *Pichon* (supra note 84), at p. 308 et seq.; *Luigi Condorelli/Santiago Villapando*, 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, p. 627 (649).

⁹¹ Article 19 ICC Statute.

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 it is mandated to take.⁹² Accordingly such a decision of the Security Council under article 16 ICC Statute cannot be judicially reviewed by the International Criminal Court.⁹³

5.6 Security Council sanctions based on Chapter VII UN Charter

5.6.1 In general

67. As already indicated, Security Council sanctions under Chapter VII of the UN Charter encompass in substance two decisions which are interlinked. 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 standard setting character.⁹⁴ The term ‘standard setting’ is used here to make it clear that this qualification of a situation or facts is the prerequisite for the executive measures to be taken in consequence thereto be they military or non-military. Furthermore, this qualification of a situation or facts becomes effective at the moment of its pronouncement. Second, the Security Council on that basis decides what measures shall be taken in accordance with Articles 41 or 42 of the UN Charter. This part of the decision is dominantly operational.
68. In general the objective of Security Council decisions is to maintain or restore international peace as defined by it.⁹⁵ Due to the Cold War, only few such sanctions were adopted prior to 1990.⁹⁶ 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

⁹² On that in more detail see under III.5.8.3.

⁹³ *Pichon* (supra note 84), at p.315/316

⁹⁴ 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, in: Bruno Simma et al. (eds.), *The Charter of the United Nations: A Commentary*, 3rd ed., 2012, vol. II, p. 1251 et seq. with further references.

⁹⁵ *Pellet/Miron* (note 67), MN 9 and 15.

⁹⁶ Until then the Security Council had adopted 11 resolutions with express reference to Chapter VII.

groups.⁹⁷ This does not mean that sanctions against States have become obsolete.

69. From the point of view of potential judicial review 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.⁹⁸ Furthermore, it is to be noted that the Charter does not provide for any explicit mechanism of review, judicial or otherwise.⁹⁹ It is commonly agreed that the Security Council is conceived as a strong “executive”.¹⁰⁰ It is furthermore 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 situations¹⁰¹ and are the outcome 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.¹⁰² 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.¹⁰³
70. Traditionally, non-military as well as military sanctions were directed against a State concerned. As already indicated targeted sanctions are directed against individuals or groups alone or besides States. The Security Council sanctions are implemented by the State or States to whom they are addressed. This may be one State (as in the case of

⁹⁷ *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; *Gary 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.

⁹⁸ On that see below under III.5.8.

⁹⁹ *Jeremy M. Farral*, *United Nations Sanctions and the Rule of Law*, 2007, at 73 et seq.

¹⁰⁰ *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 50), at 79.

¹⁰¹ *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.

¹⁰² *Robert C. Hildebrand*, *Dumbarton Oaks: The Origins of the United Nations and the Search for Post-war Security*, 1990, 138; *Farral* (supra note 99), at 64.

¹⁰³ S/RES 660 (1990) of 2 August 1990.

Southern Rhodesia)¹⁰⁴, a group of States, Member States (only in the case of Southern Rhodesia and North Korea)¹⁰⁵ or all States.

71. 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.¹⁰⁶ 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.¹⁰⁷

5.6.2 Military measures

72. It is generally accepted that the Security Council, instead of acting directly, may authorise Member States to use military force.¹⁰⁸ This has become an established practice¹⁰⁹ in spite of the criticism that, through this practice, the Security Council loses control over the enforcement actions undertaken by the States concerned.
73. 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.¹¹⁰ 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.^{111/112} The formula used in

¹⁰⁴ S/RES 232 (1966) of 16 December 1966, at paras 2,7.

¹⁰⁵ S/RES 1708 (2006) of 14 October 2006, at paras 8-10.

¹⁰⁶ *Hans Kelsen*, *The Law of the United Nations*, 1951, 85/86.

¹⁰⁷ *Prosecutor v. Milan and others*, Case IT-99-37-PT, Trial Chamber on Jurisdiction (6 May 2003), paras 51-57.

¹⁰⁸ *de Wet* (supra 34), at 260-263; *Linos-Alexander Sicilianos*, *Entre multilatérisme et unilatérisme : l'autorisation par le Conseil de sécurité 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 sees the operations such as the one against Iraq as based on Article 39 of the UN Charter.

¹⁰⁹ *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.

¹¹⁰ S/RES 221 (1966), 9 April 1966.

¹¹¹ 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 ...”.

¹¹² 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 108, at 273-277; *Joe*

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,¹¹³ Rwanda,¹¹⁴ Haiti,¹¹⁵ and Libya,¹¹⁶ further cases are Liberia¹¹⁷ and Côte d'Ivoire.¹¹⁸

74. 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 organisations should take action.
75. 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 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.¹¹⁹ 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.¹²⁰ The report will return to this issue in the context of discussing judicial review and its limits.¹²¹

Verhoeven, *Etats alliés ou Nations Unies? L'O.N.U. face au conflit entre l'Irak et le Koweït*, 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 34), at 281; *Dan Sarooshi*, *The United Nations and the Development of Collective Security*, 1999, 174 et seq.

¹¹³ S/RES 733 (1992) of 23 January 1992.

¹¹⁴ S/RES 918 (1994) of 17 May 1994; S/RES 925 (1994) of 22 June 1994.

¹¹⁵ S/RES 875 (1993) of 16 October 1993; S/RES 917 (1994) of 6 May 1994; S/RES 940 (1994) of 31 July 1994.

¹¹⁶ S/RES/748 (1992) of 31 March 1992.

¹¹⁷ S/RES 1497 (2003) of 1 August 1993.

¹¹⁸ S/RES 1572 (2004) of 15 November 2004.

¹¹⁹ *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 108), at 70/1.

¹²⁰ Critical in this respect, *de Wet* (supra note 34), at 280-283; Kreipe (note 36), p. 118 et seq.

¹²¹ See below under III.5.7/8.

5.6.3 Non-military measures addressing States only

76. Non-military sanctions have been issued for a range of specific objectives such as compelling an occupying State to withdraw its troops,¹²² preventing a State from developing weapons of mass destruction,¹²³ countering international terrorism,¹²⁴ protecting against human rights violations¹²⁵ and implementing the program for a peace process.¹²⁶ In all these cases the Security Council decreed that there was a threat to international peace and security.¹²⁷ The objective of the sanction concerned varies. Sanctions may intend to coerce the addressee, constrain it or send a signal.¹²⁸ Targeted sanctions may have the further objective to prevent certain activities, though.
77. In 1966 sanctions were imposed against Southern Rhodesia¹²⁹ and in 1977 against South Africa.¹³⁰ 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 an identical pattern although concentrating on an arms embargo. In both cases a sanctions committee was established which possessed different functions from the ones

¹²² Iraq/Kuwait (S/RES 661 (1990) of 6 August 1990).

¹²³ 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).

¹²⁴ Afghanistan (S/RES 1267 (1999) of 15 October 1999).

¹²⁵ 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).

¹²⁶ 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).

¹²⁷ There exists extensive literature on non-military sanctions; see for example: *Tono Eitel*, Reform of the United Nations sanctions regime, in: Sabine von Schorlemer (ed.), *Praxishandbuch UNO*, 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 Feasible?, *World Politics*, vol. 54 (2002), 373-403; *David A. Baldwin*, *Economic Statecraft*, 1985, 35-36.

¹²⁸ Guimelli (note 11) at p. 1353 with further references.

¹²⁹ S/RES 232 (1966) of 16 December 1966.

¹³⁰ S/RES 418 (1977) of 4 November 1977.

established after 1991. They were merely to gather information and to monitor the situation.¹³¹

78. After 1991 the restrictions on import and export imposed by non-military sanctions were broadened¹³² and tightened at the same time over the years.
79. 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.¹³³ The Security Council 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 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 implement sanctions against particular individuals or groups.

¹³¹ See S/RES 253 (1968) of 29 May 1968 and S/RES 421 (1977) of 9 December 1977, para. 1.

¹³² Although many of the non-military sanctions were directed against States only (South Africa, S/RES 418 (1977); Iraq, S/RES. 661 (1990); Libya, S/RES. 748 (1992); Ruanda, S/RES 918 (1994); Sudan, S/RES. 1054 (1996); Sierra Leone, S/RES1132 (1997); Ethiopia/Eritrea, S/RES. 1298 (2000); Libya; Central African Republic, S/RES 2127 (2013) several of such sanctions already targeted certain individuals mostly being members of government or the military forces: Ivory Coast, S/RES 1572 (2004), paras 9 and 11; Democratic Republic of the Congo S/RES 1596 (2005), paras 14 et seq.; North Korea, S/RES 1718 (2006); Iran, S/RES 1737 (2006), para. 10; Somalia, S/RES 1814 (2008), para. 6; Libya, S/RES 1970 (2011), paras. 6 -8. The dividing line between non-military sanctions which also prescribe measures against individuals and targeted sanctions depends upon the focus of the sanction concerned; see in this respect Beuren, note 11 who, however, only deals with the Al Qaida sanctions regime, p. 33; for details concerning the development of targeted sanctions see below under 5.6.4.1.

¹³³ ICRC, Interpretive guidance on the notion of direct participation in hostilities under international humanitarian law, 2009, p. 31/32.

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

5.6.4.1 Targeted sanctions in general

80. The first resolution to explicitly introduce targeted sanctions focussing on particular individuals and groups¹³⁴ was S/RES 1267 (1999) of 19 October 1999.¹³⁵ There are several reasons why the Security Council developed this option of targeting individuals rather than States.
81. Such approach is being based, among others, on the consideration that not States act but rather individuals which should not hide behind States. For that reason individuals were targeted even before S/RES 1267 (1999). In previous resolutions – not issued under Chapter VII – the Security

¹³⁴ 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.

¹³⁵ See on the legal regime established by this resolution *Feinäugle* (supra note 11), at 141 et seq.; *Rosemary 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 15) 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.

Council had already called upon the Taliban to end the fighting.¹³⁶ Although the S/RES 1267 sanctions system has by now become the one mostly referred to when targeted sanctions are 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. This development was influenced by the failure to internationally agree on the definition of terrorism and on a comprehensive international agreement against terrorism whose universal ratification would have been doubtful. By establishing an anti-terrorist system based upon S/RES 1267 (1999) amalgamated with S/RES 1373 (2001) of 28 September 2001 which had for objective to eradicate the funding of international terrorism the Security Council not only filled this gap but overcame the otherwise problematic universal applicability of a treaty against terrorism. One may qualify this development of the S/RES 1267 anti-terrorist sanctions system as an exercise of standard setting by the Security Council. This may be of relevance for the implementation of the sanctions decreed.

82. 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, later further amended and consolidated in S/RES. 2253 (2015) of 17 December 2015). The procedures for the two regimes on Al Qaida et al and the Taliban, respectively, differ.
83. Although all non-military sanctions ultimately aim at influencing the behaviour of individuals, albeit by addressing States, targeted sanctions modify this approach.¹³⁷ 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 with adopted Security Council resolutions. The States addressed are obliged to implement such non-military sanctions. The situation for them is different in respect of

¹³⁶ S/RES 1193 (1998) of 28 August 1998; S/RES 1214 (1998) of 8 December 1998.

¹³⁷ See *Thomas J. Biersteker, Marcos Tourinho, and Sue E. Eckert*, in: *Targeted Sanctions: The Impacts and Effectiveness of United Nations Action*, (eds. Thomas J. Biersteker, Sue E. Eckert and Marcos Tourinho), p. 11- 37 (13-17)).

military sanctions where the Security Council has to seek the co-operation of States willing to engage militarily.

84. The reasons why the Security Council shifted its focus to targeted sanctions are manifold. One reason was to meet the criticism expressed on the comprehensive sanctions against Iraq,¹³⁸ for the comprehensive sanctions being allegedly ineffective etc. But the most important consideration is that targeted sanctions offer a more flexible mechanism to prevent threats to international peace and security. This development also reflects the emerging principle of individual international responsibility¹³⁹ as evidenced in the establishment of international criminal courts.
85. Since targeted sanctions¹⁴⁰ 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 and it is equally decisive to whom such measure is attributable.
86. 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 next question of who is to decide in such a conflict whether judicial review is appropriate and whether the latter fits into the overarching system for 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 those who are responsible for the activities which allegedly constituted a threat to the peace. However, the decision making process

¹³⁸ See, for example, *Erika de Wet*, Human rights limitations to economic enforcement measures under Article 41 of the UN Charter and the Iraqi sanctions regime, *Leiden Journal of International Law* 14 (1988), 277-304.

¹³⁹ *Giumelli* (note 11), p. 1353.

¹⁴⁰ 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, concerning Sierra Leone (S/RES 1306), 2000, para. 10) the Council 'encouraged' 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 imposed obligations upon neither the civil society nor upon any other group named in this context.

concerning targeted sanctions has come under criticism for not complying with internationally accepted standards of due process.¹⁴¹

5.6.4.2 Other measures taken under the authority of the United Nations having a direct bearing upon individual rights

87. As already indicated targeted sanctions are not the only measures which may affect the rights of individuals. On several occasions subsidiary organs of the Security Council took binding decisions in the context of the international administration of territories (Kosovo, Bosnia and Herzegovina, East Timor).¹⁴² 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.

5.6.5 Preconditions for issuing targeted sanctions

88. In general, the issuing of targeted sanctions requires that the same preconditions are met as for non-military sanctions against States. However, the fact that targeted sanctions are addressed against individuals or private entities requires some additional considerations.

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

89. As indicated earlier all sanctions – apart from the one on Iraq – establish that a “threat to international peace and security”¹⁴³ justified the sanction’s decisions taken by the Security Council. Filling of this term with substance, in respect of targeted sanctions, underwent considerable development. In particular, the S/RES 1267 (1999) sanctions system, at the beginning having targeted Al-Qaida and Osama bin Laden may serve

¹⁴¹ See the literature in supra notes 11 and 15 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.

¹⁴² See *de Wet* (supra note 34), at 291, 315.

¹⁴³ 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 state that the Security Council is acting under Chapter VII of the UN Charter. Only few refer to article 41 of the UN Charter.

as an illustrative example since it was supplemented by further Security Council resolutions.¹⁴⁴

90. 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 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

¹⁴⁴ 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 analysed by *Feinäugle*, supra note 11, 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).

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 as already mentioned above. This tendency was further developed in S/RES 2253 (2015) of 17 December 2015 in paragraph 19 which states:

“Clarifies that the obligation in paragraph 1(d) of resolution 1373 (2001) applies to making funds, financial assets or economic resources or financial or other related services available, directly or indirectly, for the benefit of terrorist organisations or individual terrorists for any purpose, including but not limited to recruitment, training, or travel, even in the absence of a link to a specific terrorist act (emphasis added).”

91. This development has a significant influence on the scope of the sanctions as far as the targeted persons and entities are concerned.
92. It should also be noted, that the threat to international peace and security stems from international terrorism in general and not from an isolated activity of the individual or private entity which has been targeted. In that respect targeted sanctions differ from military and non-military sanctions directed against States. In these cases the activity to which the sanction reacts also constitutes the threat to international peace and security according to Article 39 of the UN Charter. This difference is of relevance for targeted sanctions since it is necessary for targeting a particular individual or private entity to establish that it is involved in international terrorist activities. The criteria of being involved in international terrorism underwent a significant development.¹⁴⁵

¹⁴⁵ Concerning details see III. 5.6.5.2.

5.6.5.2 Targeted individuals, groups and entities

93. S/RES 1267 (1999) was directed against all members and supporters of the Taliban and Osama bin Laden.
94. With Resolution 1333 (2000), the Security Council extended the application of the sanctions provided for under Resolution 1267 (1999). The principal shift in this sanctions regime rests on 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.¹⁴⁶ 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.¹⁴⁷ 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 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.¹⁴⁸ This modifies the objective of the sanctions from being predominantly repressive into one of a preventive nature.
95. 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

¹⁴⁶ S/RES 1333 (2000) of 19 December 2000, at para. 8.

¹⁴⁷ Ibid. para. 16.

¹⁴⁸ 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 imposed sanctions on those ‘responsible for serious violations of human rights and international humanitarian law’.

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 with 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 international peace¹⁴⁹ the policy shift as evidenced in this resolution was a matter of consequence.¹⁵⁰

96. 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 “associated with”.¹⁵¹ 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.”¹⁵² 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.
97. 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 before – but that enforcement measures are to be implemented by the addressed States which have no or only limited discretionary power with respect to the

¹⁴⁹ 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 *Feinäugle* (supra note 14), at 151/2.

¹⁵⁰ The partial re-territorialization of the Taliban did not result in a return to the previous approach.

¹⁵¹ See S/RES 1617 (2005) 29 July 2005 at para. 2.

¹⁵² 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”.

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.¹⁵³ 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 implement measures based upon a standard setting act of the Security Council.

5.6.5.3 *Measures to be taken on the basis of targeted sanctions*¹⁵⁴

98. 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 1993.¹⁵⁵ Since then, the freezing of financial assets has become common, in particular, as a measure to fight terrorism.¹⁵⁶ There is a substantive connection between targeted sanctions against terrorism and the International Convention for the Suppression of the Financing of Terrorism, 1999.¹⁵⁷ 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.¹⁵⁸
99. 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

¹⁵³ *Peters* (supra note 22), at MN 36.

¹⁵⁴ The measures to be taken are comprehensively set out in S/RES 2161 (2014) 17 June 2014.

¹⁵⁵ S/RES 841 (1993) of 16 June 1999, at para. 8.

¹⁵⁶ 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 comprehensive. This is due to the fact that terrorist gained access to natural resources using these resources for their funding.

¹⁵⁷ A/RES 54/109 of 9 December 1999.

¹⁵⁸ 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.

justified, must not have a totally disproportionate effect. This approach prevailed.

100. 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 Haiti¹⁵⁹ and specifically listed Iranian individuals involved in the nuclear activities of Iran.¹⁶⁰ 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.
101. 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.¹⁶¹
102. Another example for targeting particular goods is the arms embargoes adopted in most targeted sanctions.¹⁶² Occasionally a ban on the import of luxury goods has been issued.¹⁶³ Such a ban is meant to target the political elite in particular.

5.6.5.4 Management of the sanctions regimes

103. As already indicated the Security Council has delegated several of its responsibilities concerning the implementation of sanctions to sanctions committees.¹⁶⁴

¹⁵⁹ S/RES 914 (1994) of 27 April 1994.

¹⁶⁰ S/RES 1737 (2006) of 23 December 2006.

¹⁶¹ See S/RES 2199 (2015) of 12 February 2015.

¹⁶² See the report United Nations Arms Embargoes: Their Impact on Arms Flows and Target Behaviour, ed. by Damien Fruchart et al., 2007.

¹⁶³ Democratic People's Republic of Korea S/RES 1718 (2006) of 14 October 2006, para. 8 a) (iii).

¹⁶⁴ See the list on the established sanctions committees at note 12. 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 (see for example *Beuren*, (note 11) p. 37). 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.

104. Generally speaking, sanctions committees oversee the implementation of sanctions by States and eventually their effect on third States.¹⁶⁵ Each sanctions committee is tailored to a particular sanctions regime. This practice was established with the first sanctions regime,¹⁶⁶ concerning Southern Rhodesia and maintained, with one exception,¹⁶⁷ to date. Other sanctions committees were established to undertake responsibilities concerning sanctions regimes which were already in existence.¹⁶⁸
105. 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. Technically this does not mean that each member of the sanctions committee has a veto. Consensus means in this context that decisions are taken without resort to a vote.
106. Apart from that significant differences exist; but they all exercise their power on behalf of the Security Council.¹⁶⁹ States are obliged to implement the decisions of sanctions committees taken on behalf of the Security Council.
107. 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 effective. 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.¹⁷⁰ In particular this latter responsibility has undergone a significant evolution under S/RES 1267/1989/2253 (1999/2011/2015) Security Council resolutions.
108. The mandate of the Sanctions Committee under S/RES 1267 (1999)¹⁷¹ 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

¹⁶⁵ See *Paulus* (note 164), MN 35.

¹⁶⁶ S/RES 253 of 29 May 1968 (Southern Rhodesia).

¹⁶⁷ The exception is the Sudan, see S/RES 1070 (1996) of 16 August 1996.

¹⁶⁸ 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.

¹⁶⁹ See *Paulus* (supra note 163), at pp. 1000-1003.

¹⁷⁰ To assist sanctions committees' panels or groups of experts have been established for most of the sanctions committees.

¹⁷¹ S/RES 1267 (1999) of 15 October 1999, at para. 6.

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 ...'¹⁷²

109. 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.¹⁷³
110. 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:

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) ...

111. The Sanctions Committee was further mandated 'to make relevant information regarding implementation of these measures publicly available ...'.¹⁷⁴ 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

¹⁷² S/RES 1267 (1999) of 15 October 1999, at para. 6 (e).

¹⁷³ 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.

¹⁷⁴ In some sanction systems information may also be provided by the UN Secretary-General, the High Commissioner for Human Rights or some panels or expert groups.

entities.¹⁷⁵ In reaction to criticism concerning the lack of transparency of targeted sanctions the Security Council adopted detailed resolutions to develop a procedure concerning the listing of individuals and entities. S/RES 1456 (2003)¹⁷⁶ and 1526 (2004)¹⁷⁷ 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.”*¹⁷⁸

112. 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 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)¹⁷⁹ 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),¹⁸⁰ but it was added that Member States were encouraged to identify those parts of the statement of case which may be publicly released. Apart from that the listing procedure remained essentially the

¹⁷⁵ 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.

¹⁷⁶ Of 20 January 2003 adopted at a Meeting of Ministers for Foreign Affairs.

¹⁷⁷ Adopted 30 January 2004, see *Feinäugle* (supra note 11), at pp. 155 et seq.

¹⁷⁸ S/RES 1456 (2003) of 20 January 2003, at para. 6.

¹⁷⁹ Ibidem at paragraph 4.

¹⁸⁰ Ibidem at paragraph 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.

same¹⁸¹ with the exception that the listing focused on the aspects 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 Team¹⁸² but they may be edited to remove information the designating State considers sensitive.¹⁸³ The listing procedure was further amended for the Al-Qaida list by S/RES 2161 (2014), of 17 June 2014.¹⁸⁴ 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 available exemptions, including the possibility of submitting such requests through the Focal Point mechanism."¹⁸⁵

113. 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.
114. The listing as far as the Taliban list is concerned is regulated in S/RES 2160. Its particularity – apart from not providing for an Ombudsperson – is that the listing of individuals and entities should be undertaken only

¹⁸¹ 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.

¹⁸² S/RES 1989 (2011), annex I, para. k.

¹⁸³ 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 11) remained critical on the procedure; Beuren at p. 326 seq. (note 11) proposes some reform of the listing and the de-listing procedure.

¹⁸⁴ Paragraphs 30-40.

¹⁸⁵ Paragraph 40; see also S/RES 2253 (2015) of 17 December 2015, paragraph 52.

after consultations with the Afghan government.¹⁸⁶ The government of Afghanistan enjoys corresponding rights in respect of delisting.

115. 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.¹⁸⁷

- *Obligation of States concerning the procedure of listing*

116. 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’.¹⁸⁸ 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 of States when designating persons or entities or when implementing targeted sanctions.
117. It is a shortcoming in this respect that member States may – and in fact do – list persons having the nationality of another State. The implementation of the plea of the Security Council that international human rights are to be respected by designating States depends totally upon as to whether and to what extent the designating State is ready to extend international human rights standards to non-nationals not residing in the territory of the designating State. Further it is of relevance as to whether individuals or private entities may invoke their human rights in a judicial review procedure.¹⁸⁹ These obligations have been strengthened procedurally by the obligation of Member States to comprehensively inform targeted individuals or entities about the allegations as well as about the possibility to have recourse against their listing as set out in paragraph 53 of S/RES 2253 (2015).

¹⁸⁶ Paragraph 23.

¹⁸⁷ *Her Majesty's Treasury (Respondent) v. Mohammed Jabar Ahmed and others (FC) (Applicants)* (2010) UKSC 2 AC 534, para. 181.

¹⁸⁸ 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 in its preambular part.

¹⁸⁹ On this point see below under V.4.2./3.

5.6.5.5 *Self-control/delisting*

118. The decision to use targeted sanctions raised questions and criticism in judicial pronouncements¹⁹⁰ as well as in literature.¹⁹¹ Targeted sanctions have been criticised for the manner in which individuals are listed and have their assets frozen and their movements restricted 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 (de listing). This system has been refined over the years.^{192/193}
119. 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 delisting¹⁹⁴ and

¹⁹⁰ See below under V.4.; there exist some critical pronouncements from political institutions: In the two chambers of the Swiss parliamentary system the motion has been introduced that the Swiss government is obliged not to implement UN sanctions against individuals if the person is on the list since three years without judicial charges initiated against such person, there was no possibility of challenging the listing before an independent body and that since the person was included in the list no new material has been produced. For details see: http://www.parlament.ch/ab/frameset/d/s/4811/306539/d_s_4811_306539_306539_306688.htm (last visited 9 July 2016).

¹⁹¹ See below at V.4.4; see also the overview of *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 Sanctions*, *AJIL* (2004) vol. 98, pp. 745-763; see also the literature quoted in *supra* notes 11 and 15.

¹⁹² 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).

¹⁹³ 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/1267/pdf/1267_guidelines.pdf; on that procedure see *Feinäugle* (note 11 at notes 13-16).

¹⁹⁴ 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

in this context set up a “Focal Point” as a contact possibility for listed individuals. 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. The competences of the Focal Point were reiterated in paragraphs 75-78 in S/RES 2253 (2015) of 17 December 2015. 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.

120. This delisting procedure does not only apply to the Sanctions Committee established by S/RES 1267 (1999), but also 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).
121. Security Council Resolution 1735 (2006) of 22 December 2006 reiterated the sanctions previously imposed by S/RES 1267 (1999). It confirmed the requirements for the listing of individuals and entities as set out in previous resolutions.¹⁹⁵ The innovation of S/RES 1735 was that it provided a procedure for notifying the individuals or entities concerned after they have been listed.¹⁹⁶ Such notification includes “a copy of the publicly releasable portion of the statement of case” and some further information such as on the delisting procedure.
122. The procedure was subsequently reinforced by Security Council Resolutions 1822 (2008), 1904 (2009) of 17 December 2009¹⁹⁷ and was consolidated in S/RES 2253 (2015) of 17 December 2015. In S/RES 1904 (2009), 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. The mandate of the Ombudsperson has been confirmed by A/RES 2253 (2025). Before that, the Al-Qaida S/RES 1267/1989 and the Taliban (S/RES 1988) system had been split.

the Security Council on Strengthening international law, rule of law and maintenance of international peace and security.

¹⁹⁵ S/RES 1526 (2004) of 30 January 2004 (paragraph 17); and S/RES 1617 (2005) of 29 July 2005 (paragraph 4).

¹⁹⁶ See paragraphs 10 and 11.

¹⁹⁷ See paragraphs 20 et seq.; the Ombudsperson was originally established for 18 months only; its mandate was extended.

123. The delisting procedure for the Taliban list differs significantly from the S/RES 1267/1989/2253 system – apart from lacking an Ombudsperson –. According to S/RES 2160 (2014) of 17 June 2014¹⁹⁸ the delisting requires prior consultations with the Afghan government. The respective paragraph reads:

[R]equests that the Committee gives due regard to requests for removal of individuals who have reconciled, in accordance with the 20 July 2010 Kabul Conference Communiqué on dialogue for all those who renounce violence, have no links to international terrorist organizations, including Al-Qaida, respect the constitution, including its human rights provisions, notably the rights of women, and are willing to join in building a peaceful Afghanistan, ...

124. This approach is meant to endorse the political reconciliation process in Afghanistan setting aside preventive anti-terrorist considerations. What is to be noted as a matter of principle is that this approach concerning listing as well as delisting gives the Afghan government a dominant influence concerning the listing or delisting of particular individuals or entities which is denied to other States. In all other listing procedures the dominant role is the one of the designating State and the State whose nationality the individual possesses is not in a similar position to bring its interests to bear.
125. The establishment of the Ombudsperson is in general considered as a positive step taken by the Security Council. However, a group of likeminded States recommended to the Security Council that the mandate of the Ombudsperson should be extended to all sanctions systems.¹⁹⁹ This suggestion has so far not been taken up.
126. The establishment of the Ombudsperson procedure will be discussed in Chapter IV below devoted to internal judicial review. It will be assessed from two points of view namely whether it constitutes an adequate judicial review procedure and what, if any, impact the Ombudsperson procedure has or should have on the judicial review undertaken by regional and national courts.

¹⁹⁸ Paragraph 25.

¹⁹⁹ 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 Ombudsperson (Security Council Report: Special research Report, UN Sanctions 8 November 2013), at p. 14.

5.6.5.6 Exemptions

127. The Al-Qaida system provides for the possibility of exemptions.²⁰⁰ 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).²⁰¹

5.7 Decisions of subsidiary organs of the Security Council in the context of peacekeeping missions or the administration of territories

128. Acts or omissions of subsidiary organs of the Security Council were at issue in the *Behrami and the Saramati* case before the European Human Rights Court²⁰² as well as in *Berić and Others*,²⁰³ and in *Kalinić and Bilbija v. Bosnia Herzegovina*.²⁰⁴ The issue was to whom the act or omission in question was attributable, the United Nations or the States concerned. Whereas the early cases were not admitted the European Court changed its jurisprudence in the *Al-Jedda* case²⁰⁵ by applying the standard of “ultimate authority and control”. This approach was taken over in the case of *Netherlands v. Nuhanović*²⁰⁶ reaching the conclusion that the Netherlands when conducting the peacekeeping mission (Dutchbat) was also responsible for the failure to protect persons in its custody.²⁰⁷ This approach seems to prevail.

5.8 Legal Limitations to Security Council decisions, in particular targeted sanctions

5.8.1 Introductory remark

129. In speaking of ‘limitations to Security Council decisions’ this does not necessarily imply that there is a judicial review procedure in place. Limitations and judicial review are two different albeit interlinked issues as

²⁰⁰ S/RES 2161 (2014), paragraphs 62-64.

²⁰¹ S/RES 2160 (2014), paragraph 12.

²⁰² *Behrami v. France/Saramati v. France, Germany and Norway* (Admissibility) (2007) (71412/01 and 78166/01).

²⁰³ Decision as to Admissibility, 16 October 2007.

²⁰⁴ Admissibility [2008] 45541/04 and 16587/07.

²⁰⁵ *Al-Jedda v. The United Kingdom* (2011), ECHR, 1092.

²⁰⁶ Judgment of 6 December 2013 (<http://deeplink.rechtspraak.nl/uitspraak?id=ECLI:NL:HR2013:BZ9225>)

²⁰⁷ For details see below at V.4.1/2.

will be demonstrated. The focus of this Report is on judicial review and it will therefore touch upon limitations only to the extent necessary.²⁰⁸

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

130. 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 layers of a targeted sanction are under the responsibility of individual Member States.
131. The first layer consists of the decision of the Security Council under Article 39 UN Charter that international terrorism constitutes a threat to 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.
132. On the next layer the Security Council decides which sanctions are to be taken (financial sanctions (asset freezing), travel bans and arms embargo). Both such decisions – the decision that international terrorism constitutes a threat to international peace and the decision on the sanctions to be taken - have a predominantly standard setting 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.
133. It then falls upon the Member States – and this constitutes the third layer – to identify 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 1267/1989/2253 system to make such nominations but it is for them to decide whom to identify and what to produce as the basis for such designation. Member States have quite some discretionary power in that respect. As already mentioned the Security Council emphasized that Member States in identifying persons and entities have to respect

²⁰⁸ There is a vast literature on the limits the Security Council is facing in its decisions; see in particular the literature referred to in notes 11 and 15 above; see also the comprehensive analysis of *Peters* (note 22) at MN 72 et seq.

international law obligations, in particular human rights and international humanitarian law.

134. If and when individuals 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.

5.8.3 UN Charter

135. To what extent the Security Council's competence to issue binding decisions on sanctions is limited is discussed controversially in academic writings as well as in national or regional jurisprudence.²⁰⁹
136. Some authors conclude that the Security Council's function is to maintain international peace and security and that places it above the law.²¹⁰ Others insist, however, that the actions of the Security Council are subject to legal limitations which have their basis in the UN Charter as well as in international law.²¹¹
137. 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 present Charter", although it has been equally argued by others that the words "in accordance with the present Charter" may apply to the

²⁰⁹ See under V.4.2/3.

²¹⁰ *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.

²¹¹ *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 15), 13; *Michaelsen* (supra note 15), 14; Allain Pellet, *Peut-on et doit-on contrôler les actions du Conseil de sécurité?* in: S.F.D.I., *Symposium de Rennes, Le chapitre VII de la Charte des Nations Unies et les nouveaux aspects de la sécurité collective*, 1995.

actions of Member States or the decision of the Security Council, or both.²¹²

138. Those who accept that the powers of the Security Council are limited, instead refer to the broad wording of Article 39 of the UN Charter and the discretionary powers of the Security Council which are beyond judicial control,²¹³ or distinguish between the various elements of a Security Council decision under Chapter VII of the UN Charter. Others²¹⁴ point to the law-making function of the Security Council.
139. 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 general to provide a meaningful limitation of the powers of the Security Council.²¹⁵
140. As indicated above one has to distinguish between limitations for the Security Council in exercising its powers, the binding nature of its decisions under Chapter VII of the UN Charter and the question of a possible justiciability. It is hardly deniable that the Security Council having been established by the UN Charter must, in exercising its powers and functions act within the framework set by the UN Charter. Even if it exceeds its competences, for example, basing its decision concerning

²¹² *Bernd Martenczuk*, *The Security Council*, the International Court of Justice and Judicial Review, 535.

²¹³ *Michael Reisman*, *The Constitutional Crisis in the United Nations*, *AJIL* 87 (1993), p. 83 (93); *Krisch* (supra note 119), 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, p. 9; Case concerning Questions of Interpretation and Application of the 1971 Montreal Convention Arising from the Aerial Incident of Lockerbie (*Libyan Arab Jamahiriya v. United States of America*) (Preliminary Objections)[1998], ICJ Reports, p. 110.

²¹⁴ *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".

²¹⁵ *Martenczuk*, (supra note 212), at 542.

Article 39 of the UN Charter on wrongful facts, this does not necessarily render such decision void.²¹⁶

141. As far as the discretionary powers of the Security Council are concerned it has to be pointed out that to have discretionary powers is not tantamount to be beyond law.²¹⁷
142. 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.²¹⁸

5.8.4 Ius Cogens

143. 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.²¹⁹ 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.²²⁰ The Court of First Instance of the European Union has in the *Kadi* case supported this approach.²²¹

5.8.5 Human Rights

144. 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

²¹⁶ *Peters* (note 22), at MN 94 refers to S/RES 1530 (11 March 2004) which blamed the terrorist attack of Madrid to the ETA which was factually incorrect. Nevertheless this resolution was considered by the Member States to remain valid; see *T. O'Connell*, Naming and Shaming: The Sorry Tale of Security Council Resolution 1530 (2004), *EJIL* vol. 17 (2006), p. 954-68.

²¹⁷ See, amongst others Judge *Jennings*, *Lockerbie case*, (dissenting Opinion), (note 212), p. 110.

²¹⁸ Report of the Special Rapporteur (note 11), p. 8 (at para. 20).

²¹⁹ *Alexander Orakhelashvili*, The Impact of Peremptory Norms on the Interpretation and Application of United Nations Security Council Resolutions, at 62-63; *Peters* (note 22) MN 98 and 100 additionally refer to article 53 of the Vienna Convention on the Law of Treaties.

²²⁰ *Orakhelashvili* (supra note 219), at 63-67.

²²¹ *Yassin Abdullah Kadi v. Council and Commission*, Court of First Instance, Case T-315/01, 21 September 2005, *ILM* vol. 45, 81.

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,²²² 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,²²³ or finally by considering international human rights to be part of customary international law which is binding upon the United Nations.²²⁴ It has also been argued that human rights are binding upon the United Nations due to the fact that its members are committed.²²⁵

145. Some scholars have argued that almost every first-generation human right has attained the status of *ius cogens*.²²⁶ Such an approach faces the counter-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.²²⁷

5.8.6 Inherent Limitations

146. It has been argued that the Security Council must not abuse its powers,²²⁸ 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

²²² *Wolfrum* (supra note 51), at 84/5; comprehensively *de Wet* (note 34) at p. 219 et seq.

²²³ *de Wet* (supra note 11), at p. 195; *Erika de Wet/André Nollkaemper*, Review of Security Council Decisions by National Courts, *GYIL* 45 (2002), 166, 173; *Alexander Orakhelashvili*, The Acts of the Security Council: Meaning and Standards of Review, *Max Planck UNYB* 11 (2007), p. 143.

²²⁴ *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 15), at 137/8, 858; *Bardo Fassbender*, Targeted Sanctions Imposed by the UN Security Council and Due Process Rights, *IOLR* 3 (2006), 437, *Orakhelashvili*, supra note 219, at 149; *Rain Liivoja*, The Scope of the Supremacy Clause of the United Nations Charter, *ICLQ* 57 (2008), 583, 598; *Henry G. Schermers/Niels M. Blocker*, *International Institutional Law*, 1885, 983; *Michaelsen*, (supra note 15), 27.

²²⁵ *Bedjaoui* (supra note 211), at 7; *Reinisch* (supra note 15), at 858.

²²⁶ *Alexander Orakhelashvili*, *Peremptory Norms in International Law*, 2006, pp. 53-60.

²²⁷ *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.

²²⁸ *Peters* (supra note 22), 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.

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.²²⁹

147. The focus of this Report is on the possibility and the extent of judicial control of the relevant²³⁰ 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, the basis for this Report is that, created by the UN Charter, the Security Council is bound to respect the UN Charter.

5.9 National Implementation of Security Council decisions under Article 41 UN Charter, in particular targeted sanctions

148. As already indicated national decisions are to be taken at the 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.
149. 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 has 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 respectively the sanctions committee concerned 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. Such possibility of the sanctions committee is not

²²⁹ *Franck* (supra note 108), 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 11), at 101 et seq.; *Willis* (supra note 15), 716 et seq.

²³⁰ As to whether and on what basis human rights are binding upon the Security Council see, for example *Peters* (note 22) at MN 114-152 with further references; *Beuren* (note 11) at p. 214 with references in particular to pronouncements of the judiciary.

sufficient to establish a responsibility of the latter. The initiative to list a particular individual or private entity rests with the designating State.

150. 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.
151. 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 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 targeted sanctions are being adopted and the national level necessary for implementation.
152. 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.”*
153. 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,²³¹ which authorises the US President to implement UN Security Council

²³¹ United Nations Participation Act, SEC 5 (a). Title III of the Act, as amended, gives the President the power of a civil investigation and to freeze assets as a preventive measure.

resolutions, and the International Emergency Economic Powers Act,²³² which contains a wider mandate.²³³

154. 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 directly applicable in all Member States as are similar targeted sanctions.²³⁴

IV. Internal Judicial Review

1. Establishment and functioning of the office of the Ombudsperson

155. As already indicated the Office of the Ombudsperson was established – originally for an initial period of 18 months only – by S/RES 1904 (2009) of 17 December 2009. The mandate of the Ombudsperson was extended in S/RES 2161 (2014) until the end of 2016.²³⁵ It was last extended by S/RES 2253 (2015) until the end of the year 2017. Its main task is to assist the S/RES 1267/1989/2253 ISIL (Da'esh) and Al-Qaida Sanctions Committee when considering de-listing requests by, *inter alia* providing an analysis of, and observations on, all available to the Ombudsperson

²³² International Emergency Economic Powers Act, § 1701; under this the President may declare an “unusual and extraordinary threat” to the United States and may exercise extensive powers over economic affairs. See on that *Harold Hongju Koh*, *Why the President (Almost) Always Wins in Foreign Affairs: Lessons on the Iran-Contra Crisis*, *Yale Law Journal* vol. 97 (1988), p. 1255.

²³³ *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.

²³⁴ *Frowein* (supra note 25), at 260; *Andrea Gattini*, *Effects of Decisions of the UN Security Council in the EU Legal Order*, in: *Enzo Cannizzaro, Paolo Palchetti, and Ramses A. Wessel* (eds.), *International Law as Law of the European Union*, 2012, at p. 215 et seq.

²³⁵ Paragraphs 41-61.

relevant to the delisting request. The Ombudsperson also provides the Committee with a recommendation on de-listing.²³⁶

156. Three issues have to be noted at the outset. Firstly, the pronouncements of the Ombudspersons constitute recommendations to the Sanctions Committee although they have been strengthened significantly by S/RES 1989 (2011). Second, and related to what has been stated before, the creation of the Office of the Ombudsperson has not altered the decision making structure of the Sanctions Committee or of the Security Council; it has merely introduced a new and supplementary procedure. Third, the decision on a delisting request is a new one (compared to the decision on listing). It considers the circumstances as they stand at the time when the delisting request was filed and it decides whether the continued listing is appropriate. S/RES 1735 (2006) refers to ‘disassociation’ as a factor which may be considered in respect of a request for de-listing. Also in S/RES 1989 (2011) there is a reference to individuals and entities ‘who no longer meet the criteria’ (paragraph 20) which endorses this interpretation of the functions of the Ombudsperson. This is not tantamount to a judicial review of the original listing decision. However, the original mandate calls upon the Ombudsperson to analyse all available information.²³⁷ This means that the facts and considerations at the time of listing also are to be taken into account. These aspects of the considerations of the Ombudsperson constitute a judicial review in the meaning of this Report.
157. A request for de-listing is considered in three phases by the Ombudsperson. A request received after a preliminary determination is sent to the Sanctions Committee, the Designating State, State(s) of Nationality/residence (or Incorporation/Operation for entities), the Monitoring Team (a group of experts which assists the Committee) and other relevant States or UN bodies with the view to assemble the relevant information. The ordinary period of time for this phase is four months. Thereafter (second phase) the Ombudsperson will facilitate engagement

²³⁶ See S/RES 2253 (2015) paragraphs 54-74, more in detail Annex II to S/RES 2253 (2015). See also, *Kimberly Prost*, The Office of the Ombudsperson: A case for fair process, in: *Strengthening the Rule of Law through the UN Security Council*, (eds. Jeremy Farall and Hilary Charlesworth, 2016), p. 181 – 192 and *Erica de Wet*, Judicial challenges to the Security Council’s use of sanctions, in the same volume, at p. 193-205.

The 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 187), paras 78, 80-81 and 239.

²³⁷ Paragraph 7(c) of Annex II to S/RES 1989 (2011)

and dialogue with the petitioner as well as between the petitioner and the States concerned, the Sanctions Committee and the Monitoring Team. In this period the Ombudsperson will provide a comprehensive review of the case which will include its recommendation on the de-listing request. The third phase embraces the deliberations in the Sanctions Committee on the basis of the report of the Ombudsperson.

158. With S/RES 1989 the powers of the Ombudsperson were expanded significantly. Recommendations to the 1257/1989/2253 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.²³⁸ This reversal of the procedure from consensus required for de-listing to consensus required for continued listing does not necessarily result in an automatic de-listing if the Ombudsperson so recommends. Any member of the Committee may bring the matter within 60 days before the Security Council which has to decide within 60 days about delisting. Such decision can be vetoed.
159. A problem has been to give the Ombudsperson access to classified or confidential information. The Ombudsperson has entered into arrangements to that extent with several States; others will only share such information on a case by case basis.²³⁹
160. According to the tenth report of the Ombudsperson to the President of the Security Council of 14 July 2015²⁴⁰ the Ombudsperson has since the office was established submitted 56 cases involving requests made to the Ombudsperson by an individual, an entity or a combination of both. These cases have been resolved through the Ombudsperson process or a separate decision of the Committee. In 52 cases 39 individuals and 28 entities have been de-listed (several cases involved individuals as well as entities), one entity has been removed as an alias of a listed entity, and seven delisting requests have been refused.²⁴¹

2. Assessment

161. The Ombudsperson procedure certainly constitutes a valuable procedural innovation which provides –as far as delisting is concerned – a possible remedy for petitioners. Whether it is an efficient remedy for review

²³⁸ See the criticism even on this enhanced procedure by the Special Rapporteur (supra note 11), at p. 14/5 (paras 32-35).

²³⁹ For details see the Tenth Report of the Ombudsperson to the President of the Security Council of 14 July 2015, S/2015/533, at paragraphs 13.

²⁴⁰ S/2015/533.

²⁴¹ See report S/2015/533, para. 6.

depends somewhat on the perspective. If the notion of judicial remedies is understood to mean an external independent review procedure such as one of a court, the Ombudsperson certainly does not meet such a qualification. However this was not the objective for which the Ombudsperson procedure was set up. It is designed as a mechanism to assist the Sanctions Committee in its decisions on delisting. Its function is therefore internal and its mandate is more to evaluate the situation at the time the request was filed rather than to review the original decision on listing. Therefore the criticism against this procedure is beyond the point since it disregards the mandate of the Ombudsperson procedure. Apart from that it should be taken into consideration that in several national legal systems executive decisions are not necessarily reviewed by courts but by internal mechanisms.

162. However, even from this more moderate point of view the present system of the Ombudsperson is open for criticism. It applies only to the S/RES 1267/1989/2253 sanctions system whereas other sanctions committees which equally target individual or private entities have no similar assistance for delisting. The powers and functions of the Focal Point are much less pronounced.
163. Another element of criticism rested in the fact that the objective of transparency of decision making has not yet been fully achieved. Only since S/RES 2161 (2014) it is possible to release the comprehensive report of the Ombudsperson to specified interested States upon request and with the consent of the Committee. These included only the designating State and the States of residence/nationality/incorporation but not others. This situation has been improved as can be seen in S/RES 2253 (2015), paragraph 45 although Member States still exercise significant discretion which information to withhold from publication.
164. The main criticism, however, is that the Ombudsperson is not truly independent.²⁴² So far an 'office' of the Ombudsperson has not yet been established. Personnel is hired on the basis of consultancy contracts. The Ombudsperson declared that "the terms of the resulting consultancy contract are fundamentally inconsistent with the independent role and

²⁴² See in detail the concerns of the Tenth Report of the Ombudsperson to the President of the Security Council (note 238), at paragraphs 55 et seq. which were reiterated in paragraph 44 et seq. of the Eleventh Report of the Ombudsperson to the Security Council of 1 February 2015. Criticism and suggestions for change are also expressed in the High Level Review of UN Sanctions (UN Doc. A/69/941 –S/2015/432 and in the Proposal of Like-Minded States on Targeted Sanctions (UN Doc. S2015/867).

functions of the Ombudsperson”.²⁴³ Also the procedure for the appointment of a new Ombudsperson raised some concern.

165. As long as the internal procedure to judicially review the appropriateness for continued listing of individuals and private entities is not brought to an acceptable international standard, regional and national courts will continue to challenge the implementation of targeted sanctions or even the sanctions as such.

V. External Judicial Review

1. Introduction

166. In the following section, the most relevant judicial review procedures having assessed one way or the other Security Council resolutions adopted under Chapter VII of the UN Charter or their implementation will be scrutinized respectively. Although focusing on targeted sanctions and decisions affecting the rights of individuals or private entities taken in the context of the international administration of territories or in connection with peace keeping operations this section of the Report will also assess the relevant jurisprudence of the International Court of Justice which has dealt with Security Council decisions from a more general perspective.
167. The judgments of regional and national courts 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 the possibility to 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 consolidated after a period of development.²⁴⁴ 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, in particular the Ombudsperson procedure.

²⁴³ Ibidem (11th report) at paragraphs 61 et seq.

²⁴⁴ See *de Wet* (note 11), 787-807.

2. *Judicial Review by the International Court of Justice and the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of Former Yugoslavia (ICTY)*

2.1 In general

168. As already indicated the general question whether the International Court of Justice may exercise judicial review over Security Council measures has been discussed controversially²⁴⁵ since the Conference of San Francisco. 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.
169. 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.²⁴⁶ The arguments against judicial review of decisions of the Security Council are summarised by *Judge Schwebel* in his dissenting opinion in the Lockerbie cases:²⁴⁷

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

²⁴⁵ On the various positions taken, see *de Wet* (supra note 34), at 70 et seq.

²⁴⁶ *Michael Reisman*, *The Constitutional Crisis in the United Nations*, AJIL vol. 87 (1993), 88.

²⁴⁷ 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), 21-76.

*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.*²⁴⁸

170. 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.²⁴⁹ It is even stated that 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.²⁵⁰

2.2 Pronouncements of the ICJ

171. As indicated earlier the ICJ has had several occasions to take a decision on its mandate to assess Security Council decisions but it did so only indirectly. In its Advisory Opinion in the case *Concerning Certain Expenses of the United Nations*²⁵¹ the ICJ 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.”*²⁵²

172. In spite of this dictum the Court scrutinized in some detail the measures which had been taken, the interplay between the various organs of the

²⁴⁸ See also the Separate Opinion of Judge *ad 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.

²⁴⁹ *Martenczuk* (supra note 212), at 533; *Peter Malanczuk*, *Reconsidering the Relationship between the ICJ and the Security Council*, in: Wybo P. Heere (ed.), *International Law and The Hague's 750th Anniversary*, 190, 90; *Edward McWhinney*, *The Judicial Wisdom, and the World Court as Special Constitutional Court*, *Festschrift für Rudolf Bernhard*, 1995, 709.

²⁵⁰ *de Wet* (supra note 34), 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.

²⁵¹ Art. 17, para. 2, of the Charter.

²⁵² ICJ Reports 1962, 168.

United Nations reaching the conclusion that the measures concerned had been taken in conformity with the UN Charter.²⁵³

173. This statement was in essence reiterated in the Advisory Opinion of the ICJ on *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)*.²⁵⁴ After having rejected that the ICJ had powers of judicial review or appeal, it continued to state:

*However, in the exercise of its judicial function and since objections have been advanced the Court, in the course of its reasoning, will consider these objections before determining any legal consequences arising from those resolutions.*²⁵⁵

174. 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 compromissory clause, filed a claim with the International Court of Justice 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) and that such failure to implement S/RES 731 constituted a threat to international peace and security. It also decided that Libya was required to extradite the two Libyan citizens. The International Court of Justice 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).²⁵⁶
175. The preliminary objections were mostly dismissed for procedural reasons of no relevance in the context here. The Court, however, countered the

²⁵³ See the reasoning on p.175 -177.

²⁵⁴ ICJ Reports 1971, p. 45.

²⁵⁵ Ibidem.

²⁵⁶ *Lockerbie case Libya v United States* (supra note 213), at p. 127; *Lockerbie case Libya v United Kingdom* (note 213) 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).

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 International Court of Justice 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.^{257/258}

176. 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)*),²⁵⁹ apart from pursuing its case concerning the responsibility for acts of genocide, Bosnia-Herzegovina wanted the International Court of Justice 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.²⁶⁰
177. This jurisprudence – albeit limited – demonstrates that the International Court of Justice has, so far, not considered itself to be competent to declare a decision of the Security Council to be in violation with the UN Charter. However, this jurisprudence also indicates that the Court does consider itself competent to scrutinize objections raised against a particular Security Council decision and to interpret such decision if this is necessary to decide on an issue submitted to it.

2.3 Pronouncements of the ICTY

178. The ICTY in its Decision on the *Defence Motion for Interlocutory Appeal on Jurisprudence* of 2 October 1995²⁶¹ 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.
179. 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 thus should not consider

²⁵⁷ ICJ Reports 1998, 73-74; as to the details of the dissenting opinion see above.

²⁵⁸ On the implications of the *Lockerbie* cases see *de Wet* (note 34) at p. 72 et seq.

²⁵⁹ Provisional measures ICJ Reports 1993, 3.

²⁶⁰ Provisional measures ICJ Reports 1993, 3. Para. 2 (m), (o).

²⁶¹ ILM vol. 35 (1996), 35.

the question as to whether the establishment of the ICTY was in conformity with the UN Charter; and the issue of whether the establishment of the Tribunal was covered by Chapter VII of the UN Charter.

180. 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.²⁶² Also the ICTY discarded the argument that it was not a constitutional court. It stated:

There is no question, of course of the International Tribunal acting as a constitutional tribunal, reviewing the acts of the other organs of the United Nations, particularly those of the Security Council, its own "creator". It is not established for that purpose, as it is clear from the definition of the ambit of its "primary" or "substantive" jurisdiction in Article 5 of its Statute.

But this is beyond the point. The question before the Appeals Chamber is whether the International Tribunal, in exercising this "incidental" jurisdiction, can examine the legality of its establishment by the Security Council, solely for the purpose of ascertaining its own "primary" jurisdiction over the case before it.²⁶³

181. The decisive element in this reasoning is that the ITCY distinguished – as did the International Court of Justice in its Advisory Opinion concerning *Legal Consequences for States of the Continued Presence of South Africa in Namibia Notwithstanding Security Council Resolution 276 (1970)*²⁶⁴ – between its primary jurisdiction and its incidental jurisdiction the latter being necessary to be able to decide over the issue before it.
182. On appeal the Appeals Chamber assessed in some detail whether the establishment of the International Tribunal was covered by the powers and functions entrusted to the Security Council by Chapter VII of the UN Charter. Ultimately the Appeals Chamber came to the conclusion that the International Tribunal had jurisdiction to examine the plea against its jurisdiction based on the invalidity of its establishment by the Security Council.²⁶⁵ After an extended evaluation of Article 41 of the UN Charter as well as the appropriateness of the establishment of the International Tribunal the Appeals Chamber came to the conclusion “that the

²⁶² Ibidem at paras 23 et seq. referring to Advisory Opinion of ICJ in *Certain Expenses of the United Nations*, of 20 July 1962, ICJ Reports 1962, 151 at 155.

²⁶³ Ibidem, paragraph 20.

²⁶⁴ See note 254 above at paragraph 89.

²⁶⁵ See note 261 above at paragraph 22.

International Tribunal has been lawfully established as a measure under Chapter VII of the Charter.²⁶⁶

3. Assessment

183. When considering as to whether international courts or tribunals, and in particular the International Court of Justice, may judicially review Security Council decisions it is necessary to bear in mind the particular functions assigned to the Security Council in Chapter VII of the UN Charter. Furthermore, the interrelationship between the main organs of the United Nations as established in the UN Charter has to be taken into account. However, it is equally necessary to realize that the role of the Security Council under Chapter VII, as envisaged at the San Francisco Conference, was different from the one today. In San Francisco it was certainly not anticipated that Security Council decisions would have a direct impact upon the enjoyment of human rights of particular individuals or groups. 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) and confirmed by the Security Council itself.
184. The jurisprudence of the International Court of Justice as well as the one of the ICTY indicates a solution for the question under discussion. The primary jurisdiction of both courts do not embrace the competence to review Security Council decisions and thus differs from some national constitutional courts on the national level which may have such mandate in respect of national legal norms. However, both the International Court of Justice as well as the ICTY have confirmed that they may exercise incidental jurisdiction to review Security Council decisions if and to the extent this is necessary to decide on an issue over which they have primary jurisdiction. Considering the demands of the rule of law and human rights in respect to infringements of individual rights this approach may also become of relevance for targeted sanctions.

4. Indirect Judicial Review by National or Regional Courts

185. National and regional courts adopted various approaches concerning a judicial review 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

²⁶⁶ See note 261 above at paragraph 40.

Security Council decision as well as to the procedure applied by the Sanctions Committee. In the latter case occasionally an attempt was made to harmonize through the interpretation of the sanction concerned the obligations thereunder with the commitments under national or regional human rights standards.²⁶⁷

4.1. Courts declining judicial review of acts or omissions in the context of peacekeeping operations or the international administration of territories: The question of attributability

186. The jurisprudence in this respect wavered at the beginning. Two different types of arguments have been used to decline review. The first held 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 or national law.
187. The first type of argument was advanced by the European Court on Human Rights in the *Behrami*²⁶⁸ and the *Saramati case*.^{269/270} 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.²⁷¹ In that context the Court considered

²⁶⁷ An example to that extent is provided by *R(M)(FC) v HM Treasury* and two other actions [2008]UKHL where a committee of the House of Lords, while advising the House of Lords to refer to the European Court of Justice for a preliminary ruling went on to interpret Regulation (EC) 881/2002. This view was taken by some other national courts; for further details see *Antonios Tzanakopoulos, Disobeying the Security Council: Countermeasures against Wrongful Sanctions*, 2011, at p.132-33.

²⁶⁸ 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.

²⁶⁹ Mr Saramati complained about his arrest and detention by UNMIK by Order of the Commander of KFOR.

²⁷⁰ *Behrami v. France/Saramati v. France, Germany and Norway (Admissibility)* (2007) (71412/01 and 78166/01).

²⁷¹ *Ibid.* paras 132-141; The Grand Chamber of the ECHR ruled as follows: “In such circumstances, the Court observes that KFOR was exercising lawfully delegated

“whether the Security Council retained ultimate authority and control so 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.²⁷² Accordingly the Court held that it lacked jurisdiction *ratione personae*.²⁷³ 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.²⁷⁴

188. This jurisprudence was confirmed in the cases *Berić and Others*²⁷⁵ as well as in *Kalinić and Bilbija v. Bosnia and Herzegovina*.²⁷⁶ 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 *Galić and Blagojević v. The Netherlands*,²⁷⁷ who were both sentenced by the ICTY and claimed a violation of their procedural rights.
189. The House of Lords in its judgment in the *Al-Jedda case*²⁷⁸ dogmatically 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

Chapter VII powers of the UNSC so that the impugned action was, in principle, “attributable” to the UN...”.

²⁷² Ibid. para. 141.

²⁷³ Ibid. para. 153.

²⁷⁴ Ibid. paras 142/3.

²⁷⁵ *Berić and Others against Bosnia and Herzegovina*, Decision as to Admissibility, 16 October 2007.

²⁷⁶ Admissibility [2008] 45541/04 and 16587/07.

²⁷⁷ *Galić v. The Netherlands* [2009] 22617/07; *Blagojević v. The Netherlands* [2009] 49032/07.

²⁷⁸ *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 134), 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).

the United Kingdom to carry out functions it could not perform itself.²⁷⁹ Applying the standard of the ILC Draft Articles on the International Responsibility of International Organizations,²⁸⁰ 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.²⁸¹

190. Also in the *Ahmed* case²⁸² 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.²⁸³ Nevertheless, the Court also dealt with the procedure of listing and delisting as to whether this was equivalent to judicial review.
191. When the *Al-Jedda* case was brought before the European Court of Human Rights,²⁸⁴ the latter 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 2003²⁸⁵ the conduct of the Multinational Force in Iraq had not ceased to be attributable to the State contributing the troops.²⁸⁶ The Court on this basis reached the conclusion that it had jurisdiction.²⁸⁷ This already indicated the possibility of dual attributability.
192. This approach was firmly taken in the case *Netherlands v. Nuhanović*, Judgment of 6 September 2013 by the Supreme Court of the

²⁷⁹ Paras 23-24.

²⁸⁰ Article 6.

²⁸¹ Paras 34-36; see on this case before the European Court of Human Rights in particular *Linos-Alexandre Sicilianos*, Le Conseil de sécurité, la responsabilité des Etats et la Cour européenne des droits de l’homme: Vers une approche intégrée?, RGDIP vol. CXIX (2015), 779 (782 et seq.).

²⁸² *HM Treasury v. Mohammed Jahar Ahmed and others* (2010) UKSC2 & UKSC5; ILDC 1535 (UK 2010).

²⁸³ *Ibid.* at para. 75.

²⁸⁴ *Al-Jedda v. The United Kingdom* (2011), ECHR 1092.

²⁸⁵ Para. 13.

²⁸⁶ See at note 284, 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’.

²⁸⁷ See at note 284, at para. 86.

Netherlands.²⁸⁸ 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 approach relying on article 7 of the ILC Draft Articles on Responsibility of International Organizations.^{289/290} The ILC has recognized the possibility of a dual or multiple attributions²⁹¹ 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.

193. All these cases dealt with acts or omissions arising in the context of peacekeeping missions or the international administration of territories; as far as the judicial review of targeted sanctions were concerned the question of attributability was not considered to be of relevance.

4.2. Review of Implementing Measures without having recourse to the relevant Security Council Decision

194. In its judgment in the case *Ahmed and others v. HM Treasury*, the Supreme Court of the United Kingdom held that the government in the 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.

4.3. Review of Implementing Measures while having recourse to the relevant Security Council Decision

195. When assessing 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

²⁸⁸ <http://deeplink.rechtspraak.nl/uitspraak?id=ECLI:NL:HR:2013:BZ0225>

²⁸⁹ Text with commentaries in: GAOR, 66th session, Supp. No. 10, UN Doc. A/66/10, Add. 1.

²⁹⁰ 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.

²⁹¹ Commentary (note 289) at p. 83.

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 ultimately 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*.²⁹²

196. Other courts, however, did not shy away from reviewing the relevant Security Council resolution with the view to establishing whether it had violated international law, which is – in their view – limiting Security Council decisions.
197. Not using its discretionary power appropriately was the relevant issue in the case *A and Others v. Netherlands*, decided by a district court, Court of Appeal and the Supreme Court.²⁹³ 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.”

198. 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.²⁹⁴ The Supreme Court confirmed this finding and added that

²⁹² On that in some detail *Hollenberg* (supra note 134), at 172 et seq.

²⁹³ District Court:

<http://deeplink.rechtspraak.nl/uitspraak?id=ECLI:NL:RBSGR:2010:BL.1862>; Court of Appeal: <http://deeplink.rechtspraak.nl/uitspraak?id=ECLI:NL:GSHGR:2011:BQ4781>; Supreme Court: <http://deeplink.rechtspraak.nl/uitspraak?id=ECLI:NL:HR:2012:BX8351>.

²⁹⁴ 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

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.

199. 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 an effective remedy.²⁹⁵ 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.”

200. The judge concluded that the applicant’s right to enter Canada had been breached.²⁹⁶ 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.
201. In the case *(R)M v. HM Treasury*,²⁹⁷ 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.

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.].

²⁹⁵ [2010] 1 F.C.R. 267, paras 157 et seq.

²⁹⁶ *Ibid.* at para. 51.

²⁹⁷ [2008] UKHL 26, [2008] 2 All ER 1097.

202. 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.²⁹⁸ This approach was used by the Grand Chamber of the European Court of Human Rights in the *Al-Jedda* case.²⁹⁹ 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 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** (emphasis added). 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.*

203. The European Court of Human Rights indicated that the presumption of compliance could be rebutted, which was accepted in the *Nada* case.³⁰⁰
204. 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

²⁹⁸ Detailed on this, *Hollenberg* (supra note 134), at 181.

²⁹⁹ *Al-Jedda v. The United Kingdom*, Appl.No. 27021/08.

³⁰⁰ ECtHR, 195-196.

test”.³⁰¹ 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.³⁰² So far the Court has not established such a violation.³⁰³ 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.

205. The cases discussed so far in this Report either interpreted the relevant Security Council resolution or, by presuming its conformity with international human rights standards, 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.
206. The approach taken by the judgment of the Bosnian Constitutional Court in the *Bilbija* case³⁰⁴ 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.
207. The case of *Yassin Abdullah Kadi and Al Barakaat International Foundation v. Council of the European Union*³⁰⁵ and *Commission of the*

³⁰¹ See *Hollenberg* (supra note 134) 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.

³⁰² *Bosphorus Hava Yolları Turizm ve Ticaret Anonim Şirketi v. Ireland*, EHTT 42 (2005) 1 [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 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.

³⁰³ *Hollenberg* (supra note 134), at 102.

³⁰⁴ *Bilbija et al v. Bosnia and Herzegovina* (2006) AP-953/05.

³⁰⁵ C-402/05 P.

European Communities,³⁰⁶ (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 opposing 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.³⁰⁷ 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 applicant³⁰⁸ had argued, amongst others, that the regulations had been adopted *ultra 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”.³⁰⁹ 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.³¹⁰ 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

³⁰⁶ C-415/05 P.

³⁰⁷ 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.

³⁰⁸ Mr Kadi having been identified as being an individual associated with Usama bin Laden and the Al Qaida network was listed on 17 October 2001 on the consolidated list of the Sanctions Committee and on that basis added to the list in Annex I to Council Regulation (EC) No. 467 of 6 March 2001.

³⁰⁹ 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.

³¹⁰ 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).

question as to whether they violated *ius cogens*.³¹¹ The latter was 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.³¹²

208. 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.

³¹¹ 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, 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).

³¹² Court of First Instance (supra note 309), at para. 5.

209. The Court came to this conclusion on the basis of the consideration that “the Community judicature must, in accordance with the powers conferred upon 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.”³¹³
210. 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*”.³¹⁴
211. 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.”³¹⁵ This is an essential element in the reasoning; it

³¹³ 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; *Gráinne De Búrca*, *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 Dédoulement 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.

³¹⁴ *Ibid.* at para. 304.

³¹⁵ *Ibid.* at para. 288.

became the underlying consideration in the jurisprudence in the following years in similar cases.³¹⁶

212. 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.^{317/318}
213. The Commission on 28 November 2008 issued a new implementing regulation that listed both applicants again. It had furnished Kadi a summary, provided by the 1267 Sanctions Committee, of the reasons for his listing. Kadi challenged his listing again which resulted in the *Kadi III* case finally decided by the Grand Chamber of the European Court of Justice on July 18, 2013.³¹⁹ In this case the General Court (formerly Court of First Instance) had nullified the new regulation as far as Mr Kadi was concerned.³²⁰ The General Court referred to the serious consequences of freezing assets for the individual concerned and also pointed out that the situation had changed since Kadi was originally listed.³²¹ It stated that its task was to ensure ‘in principle the full review’ of the lawfulness of the contested regulation in the light of the fundamental rights guaranteed by the European Union.³²²

³¹⁶ 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;

³¹⁷ 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.

³¹⁸ 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; *Juliane Kokott/Christoph Sobotta*, *The Kadi Case – Constitutional Core Values and International Law – Finding the Balance*, *EJIL* vol. 23 (2012), 1015 et seq.

³¹⁹ Joined cases C-584/10P, C-593/10 P, C-595/10 P, *Commission and Others v. Kadi*.

³²⁰ Case T-85/09, *Kadi v. Commission* (2010), ECR II-5177.

³²¹ *Ibidem*, at 149 “Such measures are particularly draconian. All the applicants funds and other assets have been indefinitely frozen for nearly 10 years now and he cannot gain access to them without first obtaining an exemption from the Sanctions Committee...”.

³²² *Kadi v. Commission* (note 320) at paragraph 126; it added in paragraphs 127-129 that as long as the re-examination procedure operated by the Sanctions Committee clearly failed to offer guarantees of effective judicial protection, the review carried out by the

214. The Grand Chamber of the European Court of Justice in essence upheld the judgment of the General Court although it was less critical about the procedure.³²³ It reiterated that “the European Union implementing restrictive measures decided at the international level do not enjoy immunity from jurisdiction”.³²⁴ It further emphasized that

“...without the primacy of a Security Council resolution at the international level thereby being called into question, the requirement of the European Union institutions should pay due regard to the institutions of the United Nations must not result in there being no review of the lawfulness of such European measures, in the light of the fundamental rights which are an integral part of the general principles of the European Union.”³²⁵

and stated that the procedures provided for Kadi to have his listing reviewed did not meet the standards as established by the European Union. It further stated that its task was to ensure ‘in principle the full review’ of the lawfulness of the contested regulation in the light of the fundamental rights guaranteed by the European Union. The judgment of the Grand Chamber of the ECJ was followed only a few months later by the judgment of the European Court of Human Rights (Grand Chamber) in *Nada v. Switzerland*.³²⁶

215. In a judgment of 14 November 2007 the Federal Court of Switzerland (the judgment was later considered in the case *Nada v. Switzerland* before the European Court of Human Rights)³²⁷ 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 bilateral or multilateral in 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

Courts of the European Union measures to freeze funds can be regarded as effective only if it concerns, indirectly, the substantive assessments of the Sanctions Committee itself and the evidence undertaken by them.

³²³ Judgment of the European Court of Justice (Grand Chamber) of 18 July 2013, Joined cases C-584/10 P, C-593/10 P and C595/10 P, ECLI:EU:C:2013:518 <http://curia.europa.eu/juris/document/document.jsf?docid=139745&mode=req&pageIn dex=1&dir=&occ=first&part=1&text=&doclang=EN&cid=166096>.

³²⁴ Ibidem at paragraph 67.

³²⁵ Ibidem at paragraph 67.

³²⁶ *Nada v. Switzerland*, Appl. No. 10583/08 ECtHR (Judgment) [Grand Chamber](12 December 2013) – on that judgment see below.

³²⁷ Idem.

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.³²⁸ 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 *jus cogens* had to be respected and that it had jurisdiction to scrutinise implementing measures for a possible violation of *jus cogens*. In the case at hand, the Federal Court denied that *jus cogens* norms had been violated.

216. The Federal Court obviously considered the possibility of scrutinising UN sanctions on the ground that they might have violated *jus 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 Civil and Political Rights were able to disregard those sanctions in order to protect fundamental rights of certain individuals or organisations.³²⁹
217. 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).
218. In the already mentioned case *Nada v. Switzerland*, the European Court of Human Rights (Grand Chamber) held in its judgment of 12 September 2012³³⁰ 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

³²⁸ *Nada v. Switzerland* (supra note 326), at para. 170.

³²⁹ *Ibid.* at para. 45.

³³⁰ *Ibid.* at para. 130.

rejected the argument submitted by the responding government,³³¹ the intervening Governments of France³³² and of the United Kingdom³³³ that the measures taken emanated from Security Council resolutions and thus fell outside the scope of the jurisdiction of the Court. This view was later confirmed by the European Court of Human Rights in the case of *Al-Dulimi and Montana Management Inc. v. Switzerland*.³³⁴ The Court distinguished between the activities undertaken by KFOR³³⁵ 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).³³⁶ 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 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,³³⁷ which held that obligations under the UN Charter prevail over obligations under other international agreements. In essence,

³³¹ Ibid. at para. 103.

³³² Ibid. at para. 107.

³³³ Ibid. at para. 111.

³³⁴ Judgment of 26 November 2013 (referred to the Grand Chamber) paras 91/92 at <http://hudoc.echr.coe.int/eng?i=001-138948>. It is the particularity of this case that it dealt with Swiss measures based upon S/Res. 661 (1990) of 6 August 1990 and S/Res. 670 (1990) of 25 September 1990 establishing an embargo against Iraq in consequence of the invasion of Kuwait by Iraq. A Sanctions Committee was established by S/Res. 1483 (2003). The case had been reviewed by the Federal Court of Switzerland in judgments of 23 January 2008 and dismissed. They had emphasized the primacy of the obligations of Switzerland *vis-à-vis* the United Nations.

³³⁵ See judgment of the European Court on Human Rights in the case *Behrami and Behrami v. France*, supra note 30.

³³⁶ 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 223) 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.

³³⁷ *HAY v. HM Treasury and Secretary of State for Foreign and Commonwealth Affairs* (2009) EWHC 1677 (Admin.); ILDC 1367 (UK 2009).

the same approach was taken by the Dutch Supreme Court in the *Mothers of Srebrenica* case³³⁸ as well as by the US District Court in the *Sacks* case.³³⁹ This judgment was confirmed by the Supreme Court which, however, did not undertake a detailed review of the international law issue.³⁴⁰ The primacy of the obligations *vis-à-vis* the UN was also accepted by the European Court of Human Rights in the case of *Al-Dulimi and Montana Management Inc. v. Switzerland* in its judgment of 26 November 2013.³⁴¹ In consequence thereof it based its reasoning on a violation of the right of access to court.

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

219. In the *Ahmed* case³⁴² 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 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*

³³⁸ *Mothers of Srebrenica v. the State of the Netherlands and the United Nations*, Final appeal judgment (2012) LJN: BW 1999; ILDC 1760 (NL 2012).

³³⁹ *Bertram Sacks v. Office of Foreign Assets Control, US Department of Treasury* (2004) No. C04-108C, 4.

³⁴⁰ *Bertram Sacks v. Office of Foreign Assets Control, Department of the Treasury, et al.* (2007), US Supreme Court No. 06-948, 13.

³⁴¹ Note 334 at para. 93.

³⁴² *HM Treasury v. Mohammed Jahar Ahmed and others* (2010) UKSC2 & UKSC5; ILDC 1535 (UK 2010).

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.

220. The same position was formulated previously by Advocate General Maduro in his opinion on the *Kadi* case.³⁴³ 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.³⁴⁴ The European Court of Justice found that the S/RES 1267 procedure did not offer sufficient guarantees of judicial protection of fundamental rights.³⁴⁵ It qualified the delisting procedure as being essentially diplomatic and intergovernmental.³⁴⁶
221. 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.³⁴⁷ 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.³⁴⁸ On appeal the European Court of Justice (Grand Chamber) in its judgment of 18 July 2013³⁴⁹ intensively dealt with the delisting procedure and its relevance for the European Courts in

³⁴³ Case C-402/05 P Opinion of Advocate General Poiares Maduro (2008) ECR I-06351, 54.

³⁴⁴ Ibid. at para. 54.

³⁴⁵ Case C-402/05 P and C-415/05 P *Yassin Abdullah Kadi and Al Barakaat International Foundation v Council and Commission* (Kadi) (2008) ECR I-0635, 321/322.

³⁴⁶ Ibid. at 323 /324.

³⁴⁷ Case T/85/09 *Kadi v European Commission* (Kadi II) (2010) ECR II-05177, 149-150.

³⁴⁸ Ibid. paras 130, 132.

³⁴⁹ Supra note 323.

assessing as to whether the implementing European measures were in conformity with the European fundamental rights and appropriate. In this context the Court also referred to "... the requirements ... relating to the maintenance of international peace and security."³⁵⁰ It came to the conclusion:

The effectiveness of the judicial review guaranteed by Article 47 of the Charter also requires that, as part of the review of the lawfulness of the grounds which are the basis of the decision to list or to maintain the listing of a given person in Annex I to Regulation No 881/2002 (the Kadi judgment, paragraph 336), the Courts of the European Union are to ensure that that decision, which affects that person individually (see, to that effect, judgment of 23 April 2013 in Joined Cases C-478/11 P to C-482/11 P Gbagbo and Others v Council, paragraph 56), is taken on a sufficiently solid factual basis (see, to that effect, Al-Aqsa v Council and Netherlands v Al-Aqsa, paragraph 68). That entails a verification of the factual allegations in the summary of reasons underpinning that decision (see to that effect, E and F, paragraph 57), with the consequence that judicial review cannot be restricted to an assessment of the cogency in the abstract of the reasons relied on, but must concern whether those reasons, or, at the very least, one of those reasons, deemed sufficient in itself to support that decision, is substantiated.³⁵¹

It continued:

Having regard to the preventive nature of the restrictive measures at issue, if, in the course of its review of the lawfulness of the contested decision, ... the Courts of the European Union consider that, at the very least, one of the reasons mentioned in the summary provided by the Sanctions Committee is sufficiently detailed and specific, that it is substantiated and that it constitutes in itself sufficient basis to support that decision, the fact that the same cannot be said of other such reasons cannot justify the annulment of that decision. In the absence of one such reason, the Courts of the European Union will annul the contested decision.³⁵²

Such a judicial review is indispensable to ensure a fair balance between the maintenance of international peace and security and the protection of the fundamental rights and freedoms of the person

³⁵⁰ At paragraph 103 and further elaborated upon in paragraphs 104 – 107.

³⁵¹ Ibidem at paragraph 119.

³⁵² Ibidem at paragraph 130.

*concerned ..., those being shared values of the UN and the European Union.*³⁵³

222. As to the delisting procedure the Court stated:³⁵⁴

Such a review is all the more essential since, despite the improvements added, in particular after the adoption of the contested regulation, the procedure for delisting and ex officio re-examination at UN level they do not provide to the person whose name is listed on the Sanctions Committee Consolidated List and, subsequently, in Annex I to Regulation No 881/2002, the guarantee of effective judicial protection, as the European Court of Human Rights, endorsing the assessment of the Federal Supreme Court of Switzerland, has recently stated in paragraph 211 of its judgment of 12 September 2012, Nada v. Switzerland (No 10593/08, not yet published in the Reports of Judgments and Decisions).

223. The European Court of Human Rights reaffirmed this line of reasoning also in its judgment of 26 November 2013 in the case of *Al-Dulimi and Montana Management Inc. v. Switzerland*³⁵⁵ at para. 134:

... the Court takes the view that, for as long as there is no effective and independent judicial review, at the level of the United Nations, of the legitimacy of adding individuals and entities to the relevant lists, it is essential that such individuals and entities should be authorised to request the review by the national courts of any measure adopted pursuant to the sanctions regime. Such review was not available to the applicants. It follows that the very essence of their right of access to a court was impaired.

224. Considering the jurisprudence of the European Court of Human Rights and of the European Court of Justice as well as of several national courts it is evident that the delisting procedure is not considered to be sufficient under the guarantee of a fair trial. Furthermore, these courts all take the view that scrutinizing measures implementing targeted sanctions, which indirectly touches upon the sanctions and directly upon the listing of particular individuals is neither in violation of the primacy of Security Council decisions nor does it touch upon the functions of the Security Council. This jurisprudence does not correspond to the some jurisprudence in the United States. Kadi's claim was dismissed in the

³⁵³ Ibidem at paragraph 131.

³⁵⁴ Ibidem at paragraph 133.

³⁵⁵ Supra note 334.

D.C. Circuit in *Kadi v. Geithner*.³⁵⁶ The basis for the dismissal of Kadi's claim was based on procedural grounds.³⁵⁷

5. Assessment of the jurisprudence of regional and national courts

225. 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 hand and targeted sanctions on the other hand although the jurisprudence does not always make that distinction.
226. As far as acts or omissions in the context of peacekeeping missions or in the international administration of territories are concerned the regional or national courts at the beginning attributed these acts or omissions to the United Nations and declared that they lacked jurisdiction.
227. After the jurisprudence of the European Court of Human Rights in the *Behrami case*³⁵⁸ was in effect rejected in the judgment in the *Al-Jedda case* (House of Lords)³⁵⁹ the jurisprudence concerning attributability consolidated.
228. A further development was introduced by the Dutch Supreme Court in the case *Nuhanović* (2013).³⁶⁰ It ruled that the expulsion of the relatives of Nuhanović from the UN Compound was attributable to the Netherlands and not to UNPROFOR. This provided for the possibility of dual attribution under specific circumstances. In this context, amongst others, the statement of the Appeals Chamber in the *Tadić* case on the defence motion³⁶¹ has to be taken into consideration.

³⁵⁶ No. 09-0108, 2012 WL 898778 (D.D.C. Mar. 19, 2012).

³⁵⁷ For details see *Douglas Cantwell*, A Tale of two Kadis: Kadi II, Kadi v. Geithner U.S. Counterterrorism Finance Efforts, *Columbia Journal of Transnational Law* vol. 53 (2015), p. 652 at 680 et seq.

³⁵⁸ *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. Similarly the Hague District Court attributed the conduct of Dutchbat (UNPROFOR) in Srebrenica exclusively to the United Nations.

³⁵⁹ R (on the application of Al-Jedda)(FC) (Appellant v. Sec. of State for Defence (Resp)) (2007) UK HL58, 12 December 2007.

³⁶⁰ *The Netherlands (Ministry of Defence and Ministry of Foreign Affairs) v. Hasan Nuhanović*, Judgment 6 September 2013.

³⁶¹ 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'.

229. In particular the Dutch Supreme Court in the *Nuhanović* case based its reasoning on article 7 of the ILC Draft Articles on the Responsibility of International Organizations³⁶² 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.³⁶³
230. In respect of targeted sanctions the jurisprudence of regional and national courts at the beginning did not sufficiently distinguish between the targeted sanctions and acts or omissions in connection with peacekeeping forces or the international administration of territories. Even until recently the jurisprudence in respect of the latter is invoked as an argument against the jurisdiction of the European Court of Human Rights.³⁶⁴ Another problem was to distinguish between a targeted sanction as such and its implementation. Meanwhile a certain consolidation of the jurisprudence has been achieved. The courts in question accept – based upon Article 103 of the UN Charter – that the relevant Security Council resolutions have priority over other international law commitments and the courts do not attempt to review them. However they are interpreted and attempts are made to achieve an interpretation which allows reconciling the measures taken with regional or national human rights standards. In this context references are occasionally made to peremptory norms and that such norms might lead to limits for the Security Council which may be judged upon. The standard finding in this respect is that no such norms have been established.
231. A different approach is to leave the relevant Security Council aside as well as the implementation measure as such and to instead take issue with the lack of an appropriate review procedure tantamount to a court procedure.³⁶⁵
232. 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

³⁶² See the analysis of *Antonio Tzanakopoulos*, *Disobeying the Security Council: Countermeasures against Wrongful Sanctions*, 2011, 33 et seq.

³⁶³ A legal opinion of the UN Secretariat states that: “The responsibility for carrying out embargoes imposed by the Security Council rests with Member States, which are accordingly responsible for meeting the costs of any particular action they deem necessary for ensuring compliance with the embargo.” (1995) UNJY 465.

³⁶⁴ Judgment in the case of *Al-Dulimi and Montana Management Inc. v. Switzerland* (supra note 334) at para. 82-85.

³⁶⁵ See Judgment of the ECHR in the case *Al-Dulimi and Montana Management Inc. v. Switzerland* (supra note 334) at para. 134.

frequently emphasized by the Security Council³⁶⁶ when they decide to submit names of individuals and entities for listing and concerning the implementation of the sanctions.

233. Both approaches avoid shedding any light on human rights limitations for Security Council decisions and their justiciability – an approach favoured in some part of the literature.
234. However insisting on a court procedure neglects whether such procedure would be compatible with the functions of the Security Council. Ultimately it will result in separating the national/regional legal level from the UN legal level. Apart from that the courts in question pursuing this approach seem to be unaware that in spite of their decision that the procedural rules of the individual or entity in question have been violated the States concerned remain under an obligation to implement the targeted sanction in question.

VI. Conclusions

235. The Report has established that only some types of decisions of the Security Council may be judicially reviewed mostly those which have a direct bearing on the human rights of individuals and private entities. This does not render the issues to be addressed less important. On the contrary, any judicial review, even an indirect one, of decisions of the Security Council has to be seen from the point of view of the powers and functions entrusted to the Security Council as well as the demands for an adequate protection of human rights *vis-à-vis* the exercise of any form of public authority.
236. Decisions of the Security Council 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) shall not be reviewed judicially. Such decisions may however be interpreted and even scrutinized if this is necessary for the reviewing court or tribunal in question to fulfill its primary functions. Such approach, as practiced by the ICTY, follows a trend in the jurisprudence of the ICJ.
237. Decisions of a predominantly standard setting character such as a decision that a particular situation constitutes a threat to peace, breach of peace or an act of aggression shall not be judicially reviewed directly

³⁶⁶ See, amongst others, S/RES 2253 (2015) of 17 December 2015 at paragraph 42.

since the taking of such decisions is the function of the Security Council vested in it by Article 24 of the UN Charter. This, however, does not mean that the Security Council faces no limitations in this respect. Established by the UN Charter it has to act in compliance with the latter. This also does not mean that such decisions may not be interpreted in the context of a judicial review of implementing measures undertaken by States or the European Union.

238. 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 shall not be directly reviewed judicially 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.
239. The ICC has no mandate to judicially review decisions of the Security Council taken in accordance with articles 13 lit. b and 16 of the ICC Statute respectively. The issue whether the preservation of peace requires such a decision falls within the sole authority of the Security Council vested in it by the UN Charter. It is to be acknowledged that the ICC decides independently 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 of the ICC Statute.
240. Decisions of the Security Council on non-military sanctions under Chapter VII of the UN Charter shall not be judicially reviewed directly. These measures, although being of an operative nature, belong to the core functions of the Security Council entrusted to it alone by Chapter VII of the UN Charter.
241. This Report dealing with the judicial review of Security Council decisions concentrated on those decisions which have a direct bearing on the legal position of targeted individuals or entities and thus may directly infringe upon their human rights (targeted sanctions). Taking such decisions means that the Security Council may be considered as exercising public authority directly *vis-à-vis* individuals or groups equivalent to the exercise of public authority by a State.
242. a) According to the principle of the rule of law the exercise of public authority by whomsoever exercised must be open to some form of judicial review. This is being confirmed by the Declaration of the High-level meeting of the General Assembly as well as by the Security Council. Furthermore, the exercise of public authority, on the national

and also on the international level, is limited by human rights. Their protection requires a judicial control of the measures in question.

b) To the extent targeted sanctions directly infringe upon the enjoyment of human rights the question whether the individuals or entities concerned have the right to have recourse to judicial review is to be addressed on the basis of the protection of human rights on the international as well as on the national and the regional level. It is evident that any protective measure must take into account the object and purpose of targeted sanctions and that international terrorism has been qualified as a threat to international peace and security.

243. a) Targeted sanctions are not the only measures which may interfere with the exercise of human rights and fundamental freedoms. Acts or omissions of Security Council subsidiary bodies in the context of an international administration or territories or in the context of peace keeping missions may equally infringe upon their human rights. The legal issues which arise in this context are similar but not identical with the ones connected with targeted sanctions.

b) Acts or omissions of subsidiary organs of the Security Council, such as peace keeping missions, are attributable to the Security Council 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 (including omissions) may equally be attributed to the latter. Jurisprudence of national and regional courts has developed and now accepts a dual attributability. However, such judicial review has no mandate to directly scrutinize the activities or omissions of the subsidiary organ of the Security Council in question.

244. Targeted sanctions raise different problems. 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 implementing action undertaken by the State (EU) concerned.

245. As far as a judicial review is concerned theoretically various mechanisms exist to that extent. A judicial review may be undertaken by a court or tribunal independent from the body whose decisions are to be reviewed. However, also self-controlling mechanisms established by the decision making body concerned are covered by the notion of judicial review. It is to be noted that national systems vary in this respect. Some rather prefer an internal judicial review or a combination of internal judicial review

possibly followed by the review undertaken by independent courts or tribunals.

246. The jurisprudence of the International Court of Justice as well as the one of the ICTY indicates a solution how to deal judicially with Security Council decisions even if a direct judicial review is excluded. Although both courts acknowledge not to have the primary jurisdiction to review Security Council decisions like a constitutional court on the national level may have in respect of national legal norms, both – the International Court of Justice as well as the ICTY – have confirmed that they may exercise incidental jurisdiction to review Security Council decisions if and to the extent this is necessary to decide on an issue over which they have primary jurisdiction. Considering the demands of the rule of law and human rights in respect of infringements of individual rights this approach is also of relevance for the judicial review of targeted sanctions by international regional or national courts.
247. Most of the “judicial review” of Security Council decisions exercised until now has been of an indirect nature – considering their implementation rather than the decision itself – and has been undertaken by national courts, the European Court of Justice, regional human rights courts and international criminal courts. This review occasionally also included an interpretation or even an assessment of the content of the Security Council decision in question.
248. When considering the adoption and implementation of targeted sanctions and demands for judicial review it has to be borne in mind that the identification of individuals and entities for listing remains in the responsibility of the State taking such initiative. Such designation should – considering the human rights consequences of the listing – be done while taking into account human rights standards as well as other relevant international and national legal standards. The legal system of the State concerned should provide that such national decisions may be brought to judicial review by the individuals or entities concerned as indicated by the Security Council in S/RES 2178 (2014). Also a judicial review should be possible against the refusal of the designating State, the State of nationality or the State of residence, as the case may be, to initiate or support a delisting proposal.
249. It is a shortcoming of the listing procedure that States may – and in fact do – list persons having the nationality of another State. The implementation of the plea of the Security Council that international human rights are to be respected by designating States depends totally upon as to whether the designating State is ready to make its national review procedure available to non-nationals not residing in the territory

of the designating State. Furthermore, it is of relevance as to whether individuals or private entities may invoke their human rights in such a national judicial review procedure against a listing initiative of that State. The possibility of a deficit concerning the human rights protection of the individuals and entities in question might be somewhat ameliorated by involving the State of nationality and the State of residence in the process of a listing initiative of another State. This approach is being followed in the sanctions regime against the Taliban where consultations have to take place with the government of Afghanistan before Afghan nationals are listed or initiatives are taken for a delisting.

250. The decision of a sanctions committee to list (or not to delist) an individual or a private entity shall due to Article 103 of the UN Charter not be directly reviewed judicially by regional or national courts on the basis of the regional or national human rights standards. This does not mean, though, that in the taking of such decisions by sanctions committees do not face any legal restraints. The sanctions committees have to act within the legal framework established by the UN Charter. However, 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 on international human rights standards and the rule of law.
251. As far as the implementation of targeted sanctions by States (or the EU) is concerned it is to be noted that implementing States or entities are acting on behalf of the Security Council and in the fulfillment of their commitment *vis-à-vis* the latter. 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 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, as already indicated, reviewing the decision of the sanctions committee directly.
252. Judicially reviewing implementation measures and declaring them not to conform to the relevant human rights standards the regional or national courts should take into account that their decision does not absolve the implementing State (including the EU) from its obligation to fulfill its international commitments towards the United Nations. Such commitments remain valid.
253. a) The procedure established for delisting, in particular the Ombudsperson procedure constitutes a valuable procedural innovation which provides

– as far as delisting is concerned – a possible remedy for petitioners. Whether it is an efficient remedy for review depends on the perspective. If the notion of judicial remedies is understood to mean an external independent review procedure such as one of a court the system of the Ombudsperson does not meet such a qualification. However this was not the objective for which the Ombudsperson procedure was set up. It is designed as a mechanism to assist the sanctions committee in its decisions on delisting. Its function is therefore internal and its mandate is more to evaluate the situation at the time the request for delisting was filed rather than to review the original decision on listing although that is not excluded. Therefore the criticism against this procedure which is the basis for the most recent jurisprudence of national and regional courts is beyond the point since it disregards the mandate of the Ombudsperson procedure.

- b) However, even from a more moderate point of view the present system of the Ombudsperson is open for criticism. It applies only to the S/RES 1267/1989 sanctions system whereas other sanctions committee regimes which equally target individual or private entities have no similar assistance for delisting. The powers and functions of the Focal Point are much less pronounced.
 - c) Another element of criticism rests in the fact that the objective of transparency of decision making has not yet been fully achieved.
 - d) The main criticism, however, is that the Ombudsperson is not truly independent. So far an ‘office’ of the Ombudsperson has not yet been established.
254. The recent jurisprudence of the European Court of Human Rights followed by other courts, including the European Court of Justice, which bases its decisions on the lack of an effective judicial review by a body akin to a court does not consider as to whether such a court procedure may be integrated into the system of sanctions as provided for by Chapter VII of the UN Charter and how to harmonize it with the responsibilities of the Security Council.
255. Such jurisprudence further does not take into account that by declaring the implementation measure to be in contradiction with article 6(1) of the European Convention of Human Rights does not affect the obligation of the State concerned under the UN Charter.

DRAFT RESOLUTION

The Institute of International Law

Considering the Declaration of the High-level Meeting of the United Nations General Assembly on the Rule of Law at the National and International Level (A/RES/67/1* of 24 September 2012) in which it is stated in paragraph 2 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 and, while in addressing the Security Council, emphasizes in paragraph 29 that “we encourage the Security Council to continue to ensure that sanctions are carefully targeted, in support of clear objectives and designed carefully so as to minimize possible adverse consequences, and that fair and clear procedures are maintained and further developed”;

Keeping in mind that in general the rule of law is to be described as a principle of governance in which all persons, institutions and entities, public and private, including the State itself, are accountable to the laws that are publicly promulgated, equally enforced and independently adjudicated³⁶⁷;

Noting that already in its Amsterdam session (1957), the Institute adopted a Resolution entitled “Judicial Redress Against the Decisions of International Organs” emphasizing that “every international organization has the duty to respect the law and to ensure that the law be respected by its agents and its officials [and] that the same duty is incumbent on States as members of such organs and organizations”;

Guided by the objective that the Institute should promote the rule of law as a leading principle for States and international organizations, including the United Nations and its main organs;

Noting the judgments of national as well as regional courts having declared national or European Union measures implementing targeted sanctions against individual or entities to have violated human rights, including the right to a fair trial, of those who have been targeted;

Noting, finally, that in the adoption of measures implementing targeted sanctions care has to be taken of the protection of the

³⁶⁷ See on this Annual Report of the Secretary-General on ‘The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies’ (S/2004/616*) paragraph 6.

fundamental rights and freedoms, those being internationally shared values, of the persons concerned;

Adopts the following guiding principles:

Chapter I: General Provisions

Article 1: Use of Terms

a) Judicial review

In general judicial review constitutes an *in rem ex post facto* control of a decision or an act with the view to establishing whether this decision or act is in conformity with the applicable law. Such judicial review may be undertaken directly (of the relevant decision or act as such) or indirectly (of the implementation of a decision or in the context of a case). In the context of this Resolution the term judicial review also embraces a review of implementation measures taken by States or regional organizations as this review may result in an interpretation or indirect review of the relevant Security Council resolution.

b) Security Council decisions

Decisions of the Security Council are those pronouncements of the Council itself or of its subsidiary bodies, such as sanctions committees, which are binding upon Member States, non-Member States and other entities as the case may be, and which are to be implemented.

c) Targeted sanctions

Targeted sanctions are those decisions of sanctions committees established by the Security Council which oblige States to take such measures as provided for in the Security Council resolution concerned against individuals or private entities listed by the relevant sanctions committee.

d) Implementation measures

Measures to be taken by States or regional organizations to implement the sanctions as prescribed by the relevant Security Council decision.

Article 2: Legal restrictions for Security Council decisions and judicial review

Established by the UN Charter the Security Council has to act in conformity with the UN Charter.

Article 3: Security Council decisions not open for direct judicial review

No decision of the Security Council can be judicially reviewed directly. This does not exclude an interpretation of a Security Council decision by an international court.

Chapter II: Measures implementing Security Council decisions targeting particular individual or private entities or which otherwise infringe upon the enjoyment of human rights open for judicial review

Article 4: Decisions the implementation of which have a direct effect on the legal position of individuals

Measures taken by States or regional organizations to implement Security Council decisions targeting specific individuals or private entities as well as measures taken in the context of peacekeeping missions or the administration of territories may be judicially reviewed.

Article 5: Decision of Sanctions Committees to list

- a) The sanctions committees shall fully respect the UN Charter. The interpretation of the UN Charter is open for progressive interpretation by – amongst others – collective pronouncements of Member States.
- b) The decision of a sanctions committee to list (or not to delist) an individual or a private entity shall not be reviewed directly by regional or national courts.
- c) The bar to review decisions of a sanctions committee as referred to in lit. b) above does not preclude a review of implementation measures taken by States or regional organizations in consequence of such decisions.

Article 6: Acts or omissions undertaken in the context of peacekeeping missions or of the international administration of territories

- a) Such acts or omissions are attributable to the Security Council and may be equally attributable to individual States which results in a dual attributability. In judging claims concerning acts or omissions attributable to States in the context of peacekeeping missions or of the international administration of territories regional or national courts should bear in mind the complexity of the situation deriving from the dual attributability.
- b) Only acts or omissions attributable to the States concerned may be judicially reviewed on the basis of the relevant national, regional or international public law. However, such judicial review cannot directly scrutinize the acts or omissions of the subsidiary organ of the Security Council in question or of the Security Council itself.

Chapter III: The listing procedure

Article 7: Listing procedure and relevance for judicial review by national or regional courts

The Institute takes the view that further improvements in the listing or de-listing procedure by the Security Council would reduce the necessity felt by targeted individuals or entities to have recourse to national or regional courts.

Article 8: The procedure of the Ombudsperson under S/RES 1267 (1999)/1989 (2011) room for improvement

a) The procedure established for delisting, in particular the Ombudsperson procedure, constitutes a valuable procedural innovation which provides – as far as delisting is concerned – a possible remedy for petitioners. It is primarily designed as a mechanism to assist the Sanctions Committee in its decisions on delisting rather than to review the original decision on listing.

b) This procedure applies only to the S/RES 1267 (1999)/1989 (2011) sanctions regime but not to the others which equally target individuals and private entities with the same possible consequences on the enjoyment of human rights.

c) Accordingly the Institute recommends that the Ombudsperson system is to be applied to all such regimes, present and future, which provide for the prescription of targeted sanctions.

d) The Institute further recommends that the Ombudsperson is made truly independent and that such independence is secured by setting up an appropriate institution.

Article 9: Further improvements of the Security Council procedure on listing and de-listing which would reduce the recourse to national or regional courts

a) Means to reduce the recourse to national or regional courts exist and should be implemented. These are for example:

- strengthening of the internal review procedure by the Security Council;
- the establishment of a periodic review whether the conditions of the targeted sanctions on a particular individual or entity are still met; and
- leaving the implementing States or regional organizations some discretionary power concerning the implementation of the measures requested, by taking into consideration the circumstances of the particular case.

b) Another possibility for improving the listing process would be to involve the State of nationality and the State of residence in the process of a listing initiative by a third State.

Chapter IV: Judicial review

Article 10: Judicial review of the process of identifying individuals or entities for listing

Taking into account that the identification of individuals and entities for listing depends on the State taking such initiative, the Institute underlines that:

- such process possibly leading to a listing should be transparent for the targeted individual or entity; and
- considering the human rights consequences of the listing, such process should respect human rights standards as well as other relevant international and national standards; and
- the individual or entity be provided with the with an opportunity to have his or her listing be judicially reviewed according to the relevant national legal system.

The same principles should guide the authorities of the designating State, of the State of nationality or the State of residence, as the case may be, if they consider initiating or supporting the delisting of the individual or entity concerned.

The national authorities as well as the entities engaged in judicial review should be aware of the object and purpose of targeted sanctions.

Article 11: Implementing targeted sanctions

In implementing targeted sanctions States or regional organizations act in the fulfillment of their commitment *vis-à-vis* the Security Council. Implementation measures undertaken by States or regional organizations may be judicially reviewed from the point of view of international, regional and national human rights standards by national and regional courts.

Article 12: Restraints for judicial review by regional or national courts

a) Any judicial review of measures implementing targeted sanctions shall take into account object and purpose of such sanctions. Particular attention is to be paid in this context to Article 103 of the UN Charter.

b) Account should also be taken by any regional or national judicial review as to whether the petitioner has applied for delisting under the relevant delisting procedure. In particular any recommendation of the Ombudsperson should be taken into consideration.

c) In reviewing implementation measures and declaring them not to be in conformity with the relevant human rights standards the regional or national courts should take into account that their decision does not absolve the implementing State or regional organizations from its obligation to fulfill its international commitments towards the United Nations. Such commitments remain valid.

Epreuves après corrections
2017-04-06

