

Première question / *First question*

Judicial Review of Security Council Decisions

*Le contrôle juridictionnel des décisions du
Conseil de sécurité*

Rapporteur : **Rüdiger Wolfrum**

12^{ème} commission

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

Les travaux préparatoires figurent aux pages 11 à 113 de l'Annuaire volume 77-I.

LE CONTRÔLE JURIDICTIONNEL DES DÉCISIONS DU CONSEIL DE SÉCURITÉ

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 organisations, 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, emphasises 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 adjudicated;¹

Noting that already in its Amsterdam session (1957), the Institute adopted a Resolution entitled “Judicial Redress Against the Decisions of International Organs” emphasising 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 organisations, 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 fundamental rights and freedoms, those being internationally shared values, of the persons concerned;

Adopts the following guiding principles:

¹ See on this the 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.

JUDICIAL REVIEW OF SECURITY COUNCIL DECISIONS

Chapter I
General Provisions

Article 1
Use of terms

(a) Judicial review

In general, judicial review constitutes an *ex post facto* examination 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 organisations 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 organisations to implement the sanctions as prescribed by the relevant Security Council decision.

Article 2

Legal restrictions for Security Council decisions

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 may be judicially reviewed, but it may be interpreted in the course of review of measures for its implementation.

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Chapter II
Measures Implementing Security Council Decisions Targeting
Particular Individuals 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 organisations 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.
- (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 organisations 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 also be 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 multiple 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 scrutinise 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 national or regional courts

The Institute takes the view that further improvements in the listing or delisting procedure by the Security Council would be consistent with general

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principles of law, and could, moreover, 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, when providing for the prescription of targeted sanctions.
- (d) The Institute further recommends that the Ombudsperson be fully independent and that such independence be secured by establishing an appropriate institution.

Article 9

**Further improvements of the Security Council procedure on listing
and delisting 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 organisations 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.

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**Chapter IV
Review**

Article 10

Criteria for and 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;
- considering the possible human rights consequences of 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 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 this process should take account of the object and purpose of targeted sanctions.

Article 11

Implementing targeted sanctions

In implementing targeted sanctions States or regional organisations act in the fulfilment of their commitment vis-à-vis the Security Council. Implementation measures undertaken by States or regional organisations 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

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absolve the implementing State or regional organisations from its obligation to fulfil its international commitments towards the United Nations. Such commitments remain valid.

PROJET DE RESOLUTION

L'Institut de Droit international,

Prenant en considération la Déclaration adoptée le 24 septembre 2012 par l'Assemblée générale lors de la réunion de haut niveau sur les exigences l'état de droit (*rule of law*) aux niveaux national et international (A/RES/67/1*), dans le paragraphe 2 de laquelle il est souligné que : (i) ces exigences sont applicables à tous Etats et organisations internationales, en ce compris les Nations Unies et leurs principaux organes ; (ii) leur respect comme leur développement doivent inspirer toutes leurs actions ; (iii) et enfin que, dans son paragraphe 29, l'Assemblée générale encourage le Conseil de sécurité à continuer de s'assurer que les sanctions soient soigneusement ciblées, à l'appui d'objectifs clairs, de manière à réduire au maximum d'éventuelles conséquences préjudiciables,

Gardant à l'esprit que, de manière générale, l'état de droit (*rule of law*) participe d'un principe de bonne gouvernance aux termes duquel toutes personnes, privées ou publiques - en ce compris l'Etat lui-même -, doivent rendre compte de toute loi dûment adoptée, publiée et mise en œuvre en toute indépendance¹,

Rappelant que, dès 1957, l'Institut a adopté à Amsterdam une résolution sur le « recours judiciaire à instituer contre les décisions d'organes internationaux » (vol. 47-I), dans laquelle il est souligné que toute organisation internationale a le devoir de respecter le droit et de s'assurer que ses agents et autres fonctionnaires ou préposés y veilleront attentivement,

Ayant conscience que l'objectif de l'Institut doit être de promouvoir l'état de droit (*rule of law*) au rang d'un principe fondamental dont il importe que le respect soit assuré tant par les Etats que par les organisations internationales, en ce compris les Nations Unies et leurs principaux organes,

Prenant note que certaines décisions prises par des juridictions, tant nationales que régionales, ont déclaré incompatibles avec les droits fondamentaux de la personne humaine, en ce compris le droit à un procès équitable, certaines mesures adoptées par des autorités nationales ou par l'Union européenne pour mettre en œuvre des sanctions ciblées contre des particuliers ou autres entités privées,

Notant enfin que, dans l'adoption des mesures appelées à mettre en œuvre des sanctions ciblées, il importe de veiller à ce que la protection des

¹ Voy. le Rapport du Secrétaire général sur le Rétablissement de l'état de droit et l'administration de la justice pendant la période de transition dans les sociétés en proie à un conflit ou sortant d'un conflit (S/2004/616), par. 6.

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droits et libertés fondamentaux des personnes concernées soit assurée, ceux-ci exprimant des valeurs internationalement partagées par tous,

Adopte les principes directeurs suivants :

Chapitre I

Dispositions générales

Article 1

Expressions employées

a) Contrôle juridictionnel.

De manière générale, le contrôle juridictionnel s'entend du contrôle *ex post facto* d'une décision ou de tout autre acte juridictionnel dans le but de vérifier s'ils sont conformes au droit applicable. Un tel contrôle peut être exercé directement sur la décision en cause ou indirectement sur sa mise en œuvre. S'agissant de la présente résolution, le terme contrôle juridictionnel (*judicial review*) couvre également le contrôle des mesures prises par des Etats ou par des organisations régionales, sachant que ce contrôle peut avoir pour effet d'interpréter ou de contrôler indirectement une résolution adoptée par le Conseil de sécurité.

b) Décisions du Conseil de sécurité.

Par décision du Conseil de sécurité, il faut entendre toute décision prise par le Conseil lui-même ou par un organe subsidiaire dûment habilité – tel un comité des sanctions – dont les décisions obligent tant les Etats, qu'ils en soient ou non membres, que tout autre entité visée par le Conseil de sécurité.

c) Sanctions ciblées.

Les sanctions ciblées s'entendent de celles qui, adoptées par le Conseil de sécurité, les Comités de sanction ou tout autre organe subsidiaire mandaté à cet effet, obligent tout Etat à prendre les mesures requises pour donner effet aux sanctions adoptées à l'encontre de particuliers ou d'entités privées.

d) Mesures d'exécution.

Les mesures d'exécution s'entendent de celles qui sont prises par des Etats ou par des organisations régionales pour mettre en œuvre les décisions du Conseil de sécurité

Article 2

Restrictions juridiques aux décisions du Conseil de sécurité

Institué par la Charte des Nations Unies, le Conseil de sécurité est tenu d'agir conformément à ses dispositions.

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Article 3
Contrôle juridictionnel

Aucune décision du Conseil de sécurité ne peut être contrôlée directement par une voie judiciaire. Elle peut être interprétée lors du contrôle des mesures concernant sa mise en œuvre.

Chapitre II
Mise en œuvre des décisions du Conseil de sécurité visant des particuliers ou des entités privées restreignant les droits de l'homme

Article 4
Effet direct des décisions de mise en œuvre sur la condition juridique des particuliers

Les mesures prises par des Etats ou des organisations régionales pour mettre en œuvre des décisions du Conseil de sécurité qui visent spécifiquement des particuliers ou des entités privées peuvent être réexaminées par les tribunaux. Il en va de même de celles qui sont prises dans un contexte où est en cause une mission de maintien de la paix ou l'administration de territoires.

Article 5
Décisions d'inscription prises par les Comités des sanctions

- a) Les Comités des sanctions se conformeront pleinement aux dispositions de la Charte des Nations Unies.
- b) Aucune décision d'inscription sur une liste prise par un Comité des sanctions à propos de particuliers ou d'entités privées ne peut être révisée par des juridictions régionales ou nationales. Cette disposition est applicable aux décisions de maintien sur la liste.
- c) L'interdiction de soumettre à un tribunal les décisions d'un comité des sanctions, visée ci-dessus (b), ne préjuge pas du réexamen de mesures prises pour mettre en œuvre les dispositions adoptées par des Etats ou des organisations régionales afin de donner effet à ces décisions.

Article 6
Actions prises ou manquements survenus dans le contexte de missions de maintien de la paix ou d'une administration internationale de territoires

- a) Lorsque de tels actions ou manquements sont imputables tout à la fois au Conseil de sécurité et à des Etats individuellement, ils peuvent l'être également à l'un comme aux autres. Si elles sont appelées à juger de réclamations relatives à des actions ou omissions dans le cadre de missions de maintien de la paix ou d'une administration internationale de territoires, les juridictions, qu'elles soient nationales ou régionales, doivent toujours garder présente à l'esprit la complexité des situations résultant d'une imputabilité multiple.
- b) Seules les actions ou omissions imputables aux Etats concernés peuvent être révisées sur la base d'un droit national, régional ou

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international public. Néanmoins un tel réexamen ne peut pas avoir pour effet d'exercer un contrôle sur les actions ou les manquements d'un organe subsidiaire du Conseil de sécurité ou du Conseil de sécurité lui-même.

Chapitre III
Inscription : procédure

Article 7

La procédure d'inscription et les juridictions nationales ou régionales

L'Institut est d'avis qu'une amélioration de la procédure d'inscription ou de radiation par le Conseil de sécurité serait conforme aux principes généraux de droit et pourrait réduire la nécessité éprouvée par des particuliers ou des entités privées d'avoir recours à des juridictions nationales ou régionales.

Article 8

Amélioration de la procédure du médiateur selon les résolutions 1267 (1999) et 1989 (2011)

- a) La procédure applicable pour la radiation et en particulier celle du recours à un médiateur de manière significative la possibilité pour les requérants d'y apporter des corrections. On sait qu'elle fut originellement conçue comme un mécanisme d'assistance au Comité des sanctions, lorsque celui-ci était appelé moins à décider d'une radiation que d'en réviser les termes.
- b) La procédure n'est applicable qu'au seul régime de sanctions visé par les résolutions 1267(1999) et 1989(2011). Elle ne l'est pas s'agissant des autres régimes, lesquels néanmoins visent également des particuliers ou des entités privées ; dans l'une et l'autre hypothèse, les conséquences peuvent néanmoins être comparables, sinon identiques, à tout le moins pour ce qui concerne les droits de l'homme.
- c) L'Institut recommande dès lors que le recours à un médiateur soit organisé dans tout autre régime d'une telle nature, présent ou futur, qui organise des sanctions ciblées.
- d) Si besoin est, l'Institut recommande que le médiateur soit pleinement indépendant et que cette indépendance soit assurée par la mise en place d'une institution appropriée.

Article 9

Autres améliorations des procédures d'inscription et de radiation organisées par le Conseil de Sécurité

- a) Dispositions appelées à améliorer la procédure suivie par le Conseil de sécurité pour limiter les recours à des juridictions nationales ou régionales :
 - renforcer la procédure interne de révision qui est propre au Conseil de sécurité ;

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- organiser une révision périodique de manière à vérifier si les sanctions ciblées contre des particuliers ou d'autres entités quelconques demeurent pertinentes ;
 - laisser aux Etats et aux organisations régionales un certain pouvoir discrétionnaire dans la mise en œuvre des mesures prises à cet effet, en prenant en considération les circonstances propres à chaque cas particulier.
- b) Une autre possibilité d'améliorer la procédure d'inscription serait d'impliquer l'Etat de la nationalité et l'Etat de résidence dans la procédure dont un Etat tiers aurait pris l'initiative.

Chapitre IV
Contrôle

Article 10

**Critères et identification des particuliers ou des entités
pour l'inscription dans la liste**

Sachant que l'identification des individus ou autres entités visés par une inscription dépend de l'Etat qui en prend l'initiative, l'Institut entend souligner que :

- la technique qui conduit à une inscription devrait être d'une parfaite transparence pour celui qui en est le destinataire, que ce soit un particulier ou toute autre entité privée ;
- tenant compte des conséquences possibles que l'inscription peut avoir sur les droits de tout individu, un tel procédé devrait respecter, outre les droits de l'homme, tout autre standard national ou international pertinent en la matière ;
- tout particulier ou quelque autre entité privée doit se voir reconnaître la possibilité de mettre en cause devant un tribunal l'inscription qui les vise, de manière à ce qu'elle puisse être réexaminée en justice conformément aux dispositions du droit national de l'Etat qui est à l'origine de cette désignation.

Ces principes devraient être suivis tant par les autorités de l'Etat dont l'intéressé a la nationalité que de celui dans lequel il a sa résidence, selon les particularités de l'espèce. Il en va ainsi en tous les cas si ces autorités estiment devoir prendre l'initiative d'une inscription ou d'une radiation, que soit en cause un particulier ou toute autre entité.

Tant les autorités nationales que les entités impliquées dans ce processus devraient prendre en considération de l'objet et de la raison d'être des sanctions qui les concernent.

Article 11

Mise en œuvre des sanctions ciblées

Lorsqu'ils mettent en œuvre des sanctions ciblées, les Etats ou les organisations régionales doivent agir conformément à leurs obligations

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envers le Conseil de sécurité. Les mesures prises à cet effet par des Etats ou par des organisations régionales peuvent être contrôlées par les tribunaux pour ce qui concerne le respect des standards internationaux, régionaux ou nationaux de protection des droits de l'homme.

Article 12

Retenue dans l'exercice du contrôle juridictionnel par les tribunaux nationaux ou régionaux

- a) Tout contrôle juridictionnel des mesures de mise en œuvre des sanctions ciblées doit tenir pleinement compte de l'objet et du but des sanctions. Une attention particulière doit être réservée en pareil contexte à l'article 103 de la Charte des Nations Unies.
- b) Il convient de tenir compte de tout contrôle juridictionnel, national ou régional, qui aurait été exercé à ce propos, de manière à vérifier si le demandeur a sollicité ou non une radiation conformément à la procédure adoptée à cet effet. Toute recommandation éventuelle du médiateur doit surtout être dûment prise en considération à cet égard.
- c) Si la mise en œuvre des sanctions est déclarée non conforme aux standards pertinents en matière de protection des droits de l'homme, les cours et tribunaux, qu'ils soient nationaux ou régionaux, devraient tenir compte de ce que leur décision ne dispense pas l'Etat ou les organisations régionales de s'acquitter de leurs obligations envers les Nations Unies, sachant que ces obligations demeurent pleinement en vigueur.

Lundi 4 septembre 2017 (après-midi)

La séance est ouverte à 15 h 50 sous la présidence de M. *Sreenivasa Rao*.

The *President* invited the Rapporteur to present his report and draft Resolution.

The *Rapporteur* announced that he would begin with an overview of the report, which would be brief, given that the matter had already been discussed in Tallinn and in Tokyo, and would be aimed at presenting the essential background to those new to the *Institut*. Moreover, the important matter was the Resolution, and all changes were properly reflected in the Report.

The Rapporteur reported first that in modifying the report, he had been very much helped by the records of the discussions in Tallinn. The work of the 12th Commission had also been facilitated by the inter-sessional meeting in Heidelberg, without which it would have been very difficult to achieve a final text. In order to assist the discussion, the Rapporteur presented a synopsis of the draft Resolution, with the corresponding provisions in the other language, as was the working practice at the International Tribunal for the Law of the Sea. The Rapporteur thanked Mr Verhoeven for his work in

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translating the draft Resolution into French. The Rapporteur added that the 12th Commission had met the previous day for a very constructive discussion, which he hoped was reflected in the content of the draft Resolution.

The report was traditionally structured, beginning with an introduction with terminology and a description of what the report is all about, namely, a description of judicial decisions of national and international courts and whether those decisions were appropriate. He recalled that judicial decisions on the subject had not developed coherently at first, but there was now a body of jurisprudence. The report raised the question as to whether this jurisprudence reflected a proper understanding of the object and purpose of Security Council decisions, and answered this question in the negative.

The Rapporteur stressed that it was absolutely necessary to balance the need for effective functioning of the Security Council with protection of human rights and look into potential violations of human rights. As far as the term “judicial review” was concerned, this term was made part of the title of the 12th Commission when it was established in Santiago de Chile, and this could only be changed by the plenary.

On the substance, the report defined judicial review as a decision taken by a court or tribunal, which was independent from the body whose decision was being revised. Although not perfectly covered by judicial review, the report addressed the self-controlling mechanism of a Security Council review of its own actions. The report addressed the extent to which this self-control mechanism was to be considered by national and international courts.

The report went through the various decisions of the Security Council and established those which might be the subject of judicial review, which were mostly those based on Chapter VII. When analysing Security Council decisions, sanctions under Chapter VII and targeted sanctions, there was often a confusion of language. Targeted sanctions often addressed States, but had an additional element in comparison to classical sanctions, namely, they were adopted in respect of individuals. Like “classical” sanctions, targeted sanctions responded to a threat to international peace and security, but in a different manner. For example, the invasion of Kuwait by Iraq was a threat to international peace and security. In contrast, in the *Kadi* case, no one said that Mr Kadi’s actions themselves constituted a threat to international peace and security. Rather, his individual activities contributed towards such a threat.

Targeted sanctions started following the situation in Afghanistan and became more forceful. Chapters 5.2 and 5.6 of the report dealt with how targeted sanctions developed. The Rapporteur outlined the management of targeted sanctions, as effected through the listing and delisting procedures. The information for these procedures was produced by States and was used in the Sanctions Committee and in targeted sanctions. The listing and

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delisting procedures had undergone significant changes.

The Security Council was concerned with threats to peace and with collating and evaluating the information produced. The Rapporteur was not able to avoid dealing with the question of the extent to which the Security Council was limited in its functions. This was beyond the mandate of the 12th Commission. The report mentioned the various strands without attempting to suggest a solution.

The next Chapter went through the regional and human rights courts, described the various pronouncements, and, by way of a change from the previous report, highlighted pronouncements with longer explanations of the functions of the Security Council. The report elaborated upon the judicial “control” carried out by the ICJ in its Advisory Opinion on *Legal Consequences for States of the Continued Presence of South Africa in Namibia* and the decision in the *Lockerbie* case. The Rapporteur observed that an interdependent strand of jurisprudence had emerged from various courts and tribunals in which Security Council resolutions had been directly or indirectly judicially reviewed.

The Rapporteur presented a synopsis of the draft Resolution. The draft Resolution followed the general structure of Resolutions of the *Institut*. It began with preambular provisions referring to the key elements of the report, such as the Declaration of the High-Level Meeting of the United Nations General Assembly on the Rule of Law; the Annual Report of the Secretary General on “The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies”; and the Amsterdam Session of the *Institut*. The preamble highlighted the objective that the *Institut* should promote the rule of law as a leading principle for State and international organisations, and noted the judgments of national as well as regional courts having declared that national or European Union measures implementing targeted sanctions against individual or entities had violated the human rights of those targeted.

The Rapporteur emphasised that there was no national or regional decision saying that a Security Council’s decision was null and void or in violation of international law. All national and regional courts dealt mainly with implementation measures. Three main trends could be observed, which are: implementation through interpretation; criticising the regime or the sanctions procedure; and simple inaction. The *Rapporteur* outlined the changes made to the draft Resolution, noting that there was no change to the preamble.

Draft Article 1(a) omitted the words “*in rem*”. The word “control” was replaced with “examination” in the English language, with no change to the French language, since the word “control” was appropriate in French but not in English. There was no change to letters (b) to (d) of Article 1.

In draft Article 2, the words “and judicial review” were deleted from the title.

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Draft Article 3 was subject to significant changes. The word “direct” was deleted from the title. Additional text had been introduced, so as to provide that “No decision of the Security Council may be judicially reviewed, but it may be interpreted in the course of review of measures for its implementation.” There was no change to draft Article 4. Draft Article 5 had been amended to ensure that the Sanctions Committee would fully respect the United Nations Charter.

There was some change to draft Article 6. The words “are attributable to the Security Council and may also be attributable to individual States” were introduced because States were also involved in formulating targeted sanctions. These actions were attributable to States. This was reflected at the end of draft Article 6, letter (a). The word “directly” had been deleted from letter (b) of Article 6.

In relation to draft Article 7, dealing with the listing procedure, the Rapporteur emphasised that the draft Resolution did not endorse judicial review by national and regional courts, as currently practised, without some reservation. First and foremost, it was for the Security Council to establish a procedure so that there was no incentive to seek recourse to judicial review in national or regional courts. It was impossible to avoid that such recourse would lead to fragmented jurisprudence. The listing and delisting procedure could and should be improved. States should be more cautious and the Security Council more forthcoming.

Draft Article 8 was critical of the Ombudsperson. The criticism was found in letters (a), (c), and (d). In particular, the Ombudsperson was not fully independent, but was established with the purpose of assisting the Sanctions Committee, and the regime only applied to one type of sanction.

Draft Article 10 concerned the criteria and processes of identifying targeted persons. The 12th Commission had worked on the basis of consensus, but here there were some diverging views. The Rapporteur encouraged discussion on this point, particularly in relation to the point expressed in the last paragraph of draft Article 10.

Draft Article 11 was a *plaidoyer* addressed to States and regional organisations; draft Article 12 was a similar provision addressed to national and regional courts. The Rapporteur noted that in the practice of the Security Council, there was already a tendency in this direction, and expressed the hope that the work of the *Institut* was perhaps having a positive effect on the practice of the Security Council.

The *President* thanked the Rapporteur for his very good introduction to this highly complex area of law, and invited Members to reflect on the report. He opened the floor for general comments on the report and draft Resolution, beginning with Members who were not members of the 12th Commission, but first invited the Rapporteur to make some clarifications in relation to the draft Resolution.

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The *Rapporteur* emphasised that references to “direct or indirect” review had been removed from draft Article 3 and from the whole text. He read aloud a correction to the text of draft Articles 3 and 7, noting that the revision to draft Article 3 was an amendment that should have been brought to the Members’ attention.

Mr *Lowe* requested clarification on the relationship between Article 5(b), which provided that the decision of a sanctions committee to list (or not to delist) an individual or a private entity “shall not be reviewed by regional or national courts” and Article 10, in which the *Institut* “underlines” *inter alia* that “the individual or entity to be provided with an opportunity to have his or her listing be judicially reviewed according to the relevant national legal system”. The latter provision suggested that an individual should be provided with an opportunity to have measures reviewed. Mr *Lowe* asked how these provisions were intended to sit together.

Mr *Treves* expressed his gratitude to the *Rapporteur* and the 12th Commission for the amendment to draft Article 3, but found it problematic to use the word “can” or “may”. He questioned whether the consequence of review would be an internationally wrongful act, and found that the phrases “cannot” or “may not” did not solve this question. In relation to the *Lockerbie* case before the ICJ, as documented at paragraph 174 of the report, it seemed that the Court did not think it could not review, but rather it preferred not to carry out such a review. Mr *Treves* enquired whether this point had been considered by the 12th Commission.

The *President* noted that the question was whether there was a better way of dealing with this matter to preserve the freedom of States to take measures, as the word “cannot” was too mandatory.

Mr *Schrijver* made a number of substantive comments. He noted that a number of errors had been made in the Security Council system, but there were considerable improvements, including the establishment of the Ombudsperson office. In relation to substantive law, he referred to the yardstick of substantive and procedural human rights protection. There had been many problems. A major distinction in the report was between internal review within the United Nations and external review. The Office of the Ombudsperson was a transformative development in relation to internal review, but much more could be done. It was possible to be more creative. A dozen committees were in place, resulting in fragmented regimes without one overarching committee. Mr *Schrijver* believed that by taking a closer look at the functioning of sanctions committees, many things could be improved.

Mr *Schrijver* doubted whether one could dictate to courts to refrain from reviewing Security Council decisions, but found it somewhat miraculous that courts hitherto had exercised so much self-discipline. He found the judgment of the European Court of Justice satisfactory in the case of *Kadi II*, as this

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served a major function in delimiting the proper role of the reviewing court. While most courts had exercised some self-restraint, one could only hope that courts would develop more coherent boundaries.

Mr Schrijver elaborated on the pertinent experience of the Dutch courts. By way of correction to the position represented at paragraph 228 of the report, Mr Schrijver explained that the Dutch Supreme Court in the case of *Nuhanović* did not rule that there was no attribution of responsibility to the United Nations, but rather that that organisation had immunity from jurisdiction. As noted at paragraph 192 of the report, the Supreme Court adopted the principle of dual attribution of responsibility and held the Netherlands responsible for the acts of the Dutch battalion of the United Nations peacekeeping mission at Srebrenica.

Regarding regional courts, Mr Schrijver drew attention to the 2016 judgment in the case of *Al-Dulimi and Montana Management Inc. v. Switzerland*, which paragraph 218 of the report addressed somewhat in passing. This judgment was a significant point of reference, as it summarised the trends in jurisprudence and upheld the proposition that in principle it was not possible to review Security Council resolutions; however, if there was a complaint of arbitrariness, a fully-fledged judicial review was possible.

In view of the fact that domestic and regional courts encountered problems exercising jurisdiction over Security Council measures, Mr Schrijver considered that perhaps it was necessary to revive the facility of advisory jurisdiction. Mr Schrijver referred for instance to the approach taken by the Netherlands by signing Protocol 16 to the European Convention on Human Rights, empowering Dutch courts to refer questions to the European Court of Human Rights for an advisory opinion. Mr Schrijver saw progress towards clarity in this field as a long march, and encouraged the *Institut* to come up with creative ideas in pursuit of this destination.

Sir Kenneth *Keith* suggested a textual amendment which was small, but of real substance, namely, the removal of the word “judicial” from the title of the 12th Commission’s work, which related in significant part to non-judicial processes. To refer to “Review of Security Council Decisions” would better reflect the more holistic object of the Commission’s work, which was concerned not only with courts’ enquiries after the event, but also with getting procedures right in the first place, and would thus give a more accurate sense of the scope of the Resolution.

Mr *Reisman*, who was a member of the 12th Commission and had had reservations about the earlier draft Resolution, was delighted with the evolution of the Resolution towards a set of recommendations that accorded with the Charter of the United Nations. He expressed gentle but firm disagreement with Mr Schrijver’s point concerning judicial review. In his opinion, it was contradictory to state on the one hand that Articles 25 and 103 require compliance, and still maintain on the other hand

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that review was possible. These two propositions did not accord.

Mr Reisman considered that what was missing from the draft was a preambular statement, reflecting the Resolution's *leitmotif*, and suggested adding: "Mindful of the assignment made to the Security Council for the maintenance of international peace and security, and devising responses to threats to international peace". This was a reference to the true issues at stake in the discussion. Recalling that the sanctions committee was established to deal with the financing of terrorism, Mr Reisman agreed with Mr Schrijver in acknowledging that there had been abuses. In his view, the focus should be on procedures which respected the exclusive authority of the Security Council while ensuring the upholding of human rights. The *Kadi* judgment, although well intentioned and striving for this balance, was problematic because it denied the effect of Article 25 of the Charter, which was one of the fundamental struts of world order. It was important to find ways of dealing with human rights abuses without undermining the principal tenets of the Charter.

Sir Christopher *Greenwood* raised two points. Firstly, on a micro-level, the *Lockerbie* order of the ICJ made in 1992 highlighted that this was an area where the work of the 12th Commission intersected with the work of the 3rd Commission, namely, provisional measures. It was worth keeping in mind that the *Lockerbie* decision was adopted in the context of provisional measures and, to decide properly on the issue, the Court would have needed to hear the positions of the Parties in full. This decision was therefore not a good guide, one way or the other. Secondly, it was important to bear in mind that before 1990, the criticism made was that the Security Council did not use sanctions more. After 1990, it was that the Security Council did not target only guilty individuals but rather entire populations. To risk having a fragmented network of courts applying different standards of correctness of listing, or different standards of procedure, was to risk regression. As a consequence, there would be more emphasis on military action, universal sanctions, or Security Council inaction. None of these alternatives was desirable. It was necessary to make it clear that national courts may review measures of implementation, but may not review the decision of the Security Council to adopt sanctions, or actions of the Sanctions Committee.

The *Secretary-General*, expressing himself in a personal capacity, confined his comment to the general question of the possibility of any kind of review by international courts and tribunals. It was not controversial that there was no constitutional review. The second question was the possibility of so-called indirect judicial review, namely, the possibility for international courts or tribunals to analyse whether decisions of the Security Council were in accordance with the Charter of the United Nations and other obligations of the Security Council. This was addressed in the report at paragraph 184, which documented that both the International Court of Justice and the ICTY had confirmed that they might exercise incidental jurisdiction to review

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Security Council decisions if and to the extent that this was necessary to decide on an issue over which they had primary jurisdiction.

The Secretary-General considered that this position should be reflected in the draft Resolution. He agreed with Mr Treves as regards the verbs to be employed, and suggested the consideration of a third alternative to “cannot” and “may not”, namely, the verb “to be”. One might say for instance that Security Council decisions “are not” subject to direct judicial review. Finally, it considered that the reference to the possibility of interpretation of Security Council decisions was not enough. It is necessary to consider the situation where a court or tribunal might need to go beyond interpretation and ascertain whether a Security Council decision was or was not in conformity with the Charter of the United Nations or general international law.

M. Pellet déclare se sentir un peu perdu dans le débat pour deux raisons. D'une part, il avait compris que l'heure était aux remarques générales sur le rapport présenté par M. Wolfrum. D'autre part, selon l'indication du Président, priorité serait donnée d'abord aux membres associés qui n'étaient pas là lors de la précédente session avant que la parole ne soit attribuée aux membres de l'Institut. Observant que ce schéma n'était plus respecté, M. Pellet déclare avoir des observations tant générales que substantielles sur le rapport présenté.

S'agissant de ses observations générales, M. Pellet souligne que trois points devront retenir l'attention du Comité de rédaction. Il s'agit, d'abord, à son avis, d'harmoniser les différences entre les textes français et anglais du rapport. En outre, il faudrait éliminer certaines incohérences, notamment au niveau de la traduction du terme anglais « shall » par celui français « devrait ». Enfin, il faudrait éviter d'employer les titres des articles du projet de résolution comme substituts des chapeaux de ces articles.

S'agissant de ses remarques de fond, M. Pellet note qu'une chose est désormais acquise : les juridictions nationales ne peuvent pas remettre en cause les résolutions du Conseil de sécurité. Toutefois, souligne-t-il, celles-ci pourraient, sous couvert de l'interprétation, essayer d'atténuer les écarts que le Conseil de sécurité se permettrait à l'égard du texte de la Charte et des normes de *jus cogens*. Toutefois, M. Pellet déclare être choqué par les positions défendues par Sir Christopher Greenwood et M. Reisman. De son point de vue, malgré toute l'étendue des pouvoirs du Conseil de sécurité, celui-ci demeure lié par son instrument constitutif, la Charte, ainsi que par les normes de *jus cogens*. S'interrogeant sur la capacité des juridictions nationales et régionales d'exercer un contrôle sur l'exercice des pouvoirs du Conseil de sécurité, M. Pellet soutient qu'il est possible que ces juridictions ne soient pas habilitées à le faire. En revanche, poursuit-il, les juridictions mondiales comme la Cour internationale de Justice devrait pouvoir exercer un tel contrôle. Malgré ces points de divergence, M. Pellet affirme souscrire à l'interprétation que Sir Christopher Greenwood fait de l'ordonnance en 20

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indication de mesures conservatoires de la Cour internationale de Justice dans l'affaire *Lockerbie*.

Mme *Boisson de Chazournes* remercie le Rapporteur pour la qualité de son rapport et du projet de résolution proposé. Elle a à cet égard trois commentaires. Premièrement, Mme Boisson de Chazournes, réitérant l'importance des titres des articles du projet de résolution, déclare que la formulation du titre de l'article 2 du projet de résolution exprime une philosophie qui ne lui convient pas. À son avis, cette disposition ne traite pas des restrictions juridiques applicables au Conseil de sécurité comme l'indique son titre ; elle porterait plutôt sur l'encadrement juridique qui gouverne son action. Toujours concernant l'article 2, Mme Boisson de Chazournes s'interroge sur le fait qu'il ne fasse référence qu'à la Charte en omettant les principes fondamentaux de l'ordre juridique contemporain.

Deuxièmement, Mme Boisson de Chazournes s'interroge sur la formulation de l'article 3 du projet de résolution. Sur cette question, elle déclare adhérer au point de vue exprimé par M. Treves au sujet du choix entre les verbes « cannot » et « may not ».

Troisièmement, Mme Boisson de Chazournes note que l'esprit du projet de résolution s'articule autour de deux points. Il s'agirait, d'une part, de prendre en compte les améliorations apportées par le Conseil de sécurité au système des sanctions, notamment à travers l'institution d'un médiateur, d'autre part, de suggérer l'extension des pouvoirs de ce dernier à d'autres régimes de sanctions ciblées. Cependant, cette approche ne va pas assez loin. Elle relève que des mécanismes, autres que le médiateur, pourraient être institués. Elle constate sur ce point que les Etats ont proposé des mécanismes judiciaires ou encore l'établissement d'institutions par un panel d'inspection pour contrôler les sanctions décidées par le Conseil de sécurité. L'article 8 pourrait donc être élargi et envisager d'autres mécanismes de contrôle, surtout ceux qui respectent le principe de l'impartialité.

Mr *Ronzitti* expressed the view that the Resolution had to be delimited more clearly in relation to its object. There were political questions which could hardly be the object of a Resolution. Secondly, the definition of "decisions" would clearly encompass binding Resolutions. Mr Ronzitti questioned whether a recommendation of the Security Council could be the subject of judicial review. Thirdly, Mr Ronzitti highlighted the possibility of a contradiction between a Security Council decision and domestic law. For example, a Security Council resolution could be in conflict with a national constitution and would therefore not be implemented for that reason. Mr Ronzitti added his support to the view expressed by Mr Treves. He congratulated the Rapporteur and the 12th Commission on an excellent report.

M. *Ranjeva* remercie M. Wolfrum et la commission pour l'excellence du rapport qu'il considère être un guide vers le droit chemin. Il considère que

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l'essentiel de son point de vue a été dit par le Secrétaire général, M. Pellet et Mme Boisson de Chazournes. Il déclare dès lors focaliser son intervention autour de deux points. Premièrement, il ne pense pas que l'Institut doive s'imposer une quelconque autocensure ou refuser de se projeter dans le futur. A son avis, l'article 2 du projet de résolution présenté ne ferait de sens que dans cette hypothèse. Au contraire, M. Ranjeva estime que l'Institut doit faire preuve de créativité et non se contenter de codifier la pratique antérieure. Deuxièmement, M. Ranjeva estime qu'il est indispensable de clarifier la portée de la jurisprudence *Lockerbie* puisqu'elle est assez souvent invoquée pour justifier l'immunité des actes du Conseil de sécurité. À son avis, la décision de la Cour internationale de Justice dans cette affaire n'a pas tranché la question du contrôle au fond des résolutions du Conseil de sécurité puisque tel n'était pas le problème juridique de l'espèce. Cette décision, rappelle-t-il, fut rendue au cours d'une procédure en indication de mesures conservatoires par laquelle l'Etat défendeur voulait paralyser et rendre sans objet les décisions du Conseil de sécurité. Pour M. Ranjeva, tel était le problème juridique qui se posait devant la Cour et c'est celui que la Cour a résolu.

Mr *Koroma* thanked the Rapporteur for the quality of the report. Mr Koroma recalled his earlier career in the United Nations during the Cold War, during which anything to do with the Security Council was taken extremely seriously. Associating himself with the views expressed by Mr Pellet, he maintained that the powers entrusted to the Security Council were not unlimited. Under Article 25 of the Charter, Member States "agree to accept and carry out the decisions of the Security Council in accordance with the present Charter." This provision confirmed that it was not intended to give *carte blanche* to the Security Council. The Security Council was not omnipotent and could not act *ultra vires* in contravention of the Charter. It was for this reason that Security Council resolutions were assumed to be consistent with each other and to be in accordance with international law. Respecting the powers of the Security Council under Chapter VII did not preclude review of its decisions. Rather, if those decisions were found to be defective as matter of fact or law, they ought to be reviewed.

Mr Koroma highlighted the powerful role accorded to the Office of the Ombudsperson. Under its present constitutive instrument, the Office of the Ombudsman was not required to explain its decisions to anyone. Its powers should be strengthened further. Mr Koroma was in favour of a proposition that would recommend the functioning of the Office to be more transparent.

The *President* thanked the members for their attentive consideration of the report and adjourned the session.

La séance est levée à 18 h 15.

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DRAFT RESOLUTION REVISED 1

The Institute of International Law,

Considering that according to Article 24, paragraph 2, of the United Nations Charter the Security Council shall “act in accordance with the purposes and principles of the United Nations” and that “the specific powers granted to the Security Council for the discharge of these duties are laid down in Chapters VI, VII, VIII, and XII”;

Considering the Declaration of the high-level meeting of the United Nations General Assembly on the rule of law at the national and international levels (A/RES/67/1* of 24 September 2012), paragraph 2 of which states that the rule of law applies to all States equally, and to international organisations, 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 paragraph 29 of which, addressing the Security Council, emphasises 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 includes a principle according to 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 adjudicated;¹

Noting that already in its Amsterdam session (1957), the Institute adopted a Resolution entitled “Judicial Redress Against the Decisions of International Organs”, emphasising 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 organisations, including the United Nations and its main organs;

Noting the judgments of national as well as regional courts having declared that national or European Union measures implementing targeted sanctions against individuals or entities 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 fundamental rights and freedoms, those being internationally shared values, of the persons concerned;

¹ See on this the 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.

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Adopts the following guiding principles:

**Chapter I
General Provisions**

**Article 1
Use of terms**

(a) Judicial review

In general, judicial review constitutes an *ex post facto* examination of a decision or an act with a 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 organisations 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 or individuals 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

These are measures to be taken by States or regional organisations to implement the sanctions as prescribed by the relevant Security Council decisions.

Article 2

Legal restrictions for Security Council decisions

Established by the Charter of the United Nations, 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 may be judicially reviewed. However, the Institute takes note that 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

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decide on an issue over which they have primary jurisdiction. In respect of targeted sanctions, this means, in the view of the Institute, that targeted sanctions may be interpreted in the course of reviewing measures for their implementation.

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 organisations 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 subject to the applicable law.

Article 5

Decision of sanctions committees to list

- (a) Sanctions committees shall fully respect the Charter of the United Nations.
- (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 (b) above does not preclude a review of implementation measures taken by States or regional organisations 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 United Nations and may also be 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 multiple 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 may not scrutinise the acts or omissions of the subsidiary organ of the Security Council in question or those of the Security Council itself.

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**Chapter III
Listing Procedure**

Article 7

Listing procedure and national or regional courts

The Institute takes the view that further improvements in the listing or delisting procedure by the Security Council would be consistent with general principles of law and could, moreover, 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, in particular the Ombudsperson procedure, established for delisting 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 sanctions committees in their 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 others which equally target individuals and private entities with the same possible consequences for the enjoyment of human rights.
- (c) Accordingly, the Institute recommends that the Ombudsperson procedure be applied to all such regimes, present and future, when providing for the prescription of targeted sanctions and that its procedure is rendered more transparent.
- (d) The Institute further recommends that the Ombudsperson be fully independent and that such independence be secured by establishing an appropriate institution.
- (e) The Institute also recommends that the Security Council develops further procedures with a view to ensure a better protection of targeted individuals or entities.

Article 9

**Further improvement of the Security Council procedure on listing
and delisting which would reduce recourse to national or regional courts**

- (a) Means to reduce recourse to national or regional courts are for example:
 - strengthening of the internal review procedure by the Security Council;
 - establishment of a periodic review as to whether the conditions of the targeted sanctions on a particular individual or entity are still met; and

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- leaving the implementing States or regional organisations 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

Review

Article 10

Criteria for, and 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:

- (a) such process possibly leading to a listing should be transparent for the targeted individual or entity;
- (b) considering the possible human rights consequences of listing, such process shall respect human rights standards and should also respect other relevant international and national standards; and
- (c) the individual or entity be provided with an opportunity to have their listing 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 of the State of residence, as the case may be, if they are considering initiating or supporting the delisting of the individual or entity concerned.

The national authorities as well as the entities engaged in this process shall take into account the object and purpose of targeted sanctions.

Article 11

Implementing targeted sanctions

In implementing targeted sanctions States or regional organisations act in the fulfilment of their commitment vis-à-vis the Security Council. This does not exclude that implementation measures undertaken by States or regional organisations 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 the object and purpose of such sanctions. Particular

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attention is to be paid in this context to Article 103 of the Charter of the United Nations.

- (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 relevant human rights standards the regional or national courts should take into account that their decision does not absolve the implementing State or regional organisation from its obligation to fulfil its international commitments towards the United Nations. Such commitments remain valid.

PROJET DE RESOLUTION REVISE 1

L'Institut de Droit international,

Prenant en considération l'article 24, paragraphe 2, de la Charte des Nations Unies selon lequel le Conseil de sécurité « agit conformément aux buts et principes des Nations Unies » et qui prévoit que « les pouvoirs spécifiques accordés au Conseil de sécurité pour lui permettre d'accomplir lesdits devoirs sont définis aux Chapitres VI, VII, VIII et XII »,

Prenant en considération la Déclaration adoptée le 24 septembre 2012 par l'Assemblée générale lors de la réunion de haut niveau sur les exigences l'état de droit (*rule of law*) aux niveaux national et international (A/RES/67/1*), dans le paragraphe 2 de laquelle il est souligné que : i) ces exigences sont applicables à tous Etats et organisations internationales, en ce compris les Nations Unies et leurs principaux organes ; ii) leur respect comme leur développement doivent inspirer toutes leurs actions ; iii) et enfin que, dans son paragraphe 29, l'Assemblée générale encourage le Conseil de sécurité à continuer de s'assurer que les sanctions soient soigneusement ciblées, à l'appui d'objectifs clairs, de manière à réduire au maximum d'éventuelles conséquences préjudiciables,

Gardant à l'esprit que, de manière générale, l'état de droit (*rule of law*) participe d'un principe aux termes duquel toutes personnes, privées ou publiques - en ce compris l'Etat lui-même -, doivent rendre compte de toute loi dûment adoptée, publiée et mise en œuvre en toute indépendance¹,

Rappelant que, dès 1957, l'Institut a adopté à Amsterdam une résolution sur le « recours judiciaire à instituer contre les décisions d'organes internationaux » (vol. 47-I), dans laquelle il est souligné que toute

¹ Voy. Le Rapport du secrétaire général sur le Rétablissement de l'Etat de droit et l'administration de la justice pendant la période de transition dans les sociétés en proie à un conflit ou sortant d'un conflit (S/2004/616), par. 6.

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organisation internationale a le devoir de respecter le droit et de s'assurer que ses agents et autres fonctionnaires ou préposés y veilleront attentivement,

Ayant conscience que l'objectif de l'Institut doit être de promouvoir l'état de droit (*rule of law*) au rang d'un principe fondamental dont il importe que le respect soit assuré tant par les Etats que par les organisations internationales, en ce compris les Nations Unies et leurs principaux organes,

Prenant note des décisions prises par des juridictions, tant nationales que régionales, qui ont déclaré l'incompatibilité avec les droits fondamentaux de la personne humaine, en ce compris le droit à un procès équitable, de certaines mesures adoptées par des autorités nationales ou par l'Union européenne pour mettre en œuvre des sanctions ciblées contre des particuliers ou autres entités privées,

Notant enfin que, dans l'adoption des mesures appelées à mettre en œuvre des sanctions ciblées, il importe de veiller à ce que la protection des droits et libertés fondamentaux des personnes concernées soit assurée, ceux-ci exprimant des valeurs internationalement partagées par tous,

Adopte les principes directeurs suivants :

Chapitre I

DISPOSITIONS GÉNÉRALES

Article 1

Expressions employées

a) Contrôle juridictionnel

De manière générale, le contrôle juridictionnel s'entend du contrôle *ex post facto* d'une décision ou de tout autre acte juridictionnel dans le but de vérifier s'ils sont conformes au droit applicable. Un tel contrôle peut être exercé directement sur la décision en cause ou indirectement sur sa mise en œuvre. S'agissant de la présente résolution, le terme contrôle juridictionnel (*judicial review*) couvre également le contrôle des mesures prises par des Etats ou par des organisations régionales, sachant que ce contrôle peut avoir pour effet d'interpréter ou de contrôler indirectement une résolution adoptée par le Conseil de sécurité.

b) Décisions du Conseil de sécurité

Par décision du Conseil de sécurité, il faut entendre toute décision prise par le Conseil lui-même ou par un organe subsidiaire dûment habilité – tel un comité des sanctions – dont les décisions obligent tant les Etats, qu'ils en soient ou non membres, que tout autre entité ou particulier visé par le Conseil de sécurité.

c) Sanctions ciblées

Les sanctions ciblées s'entendent de celles qui, adoptées par le Conseil de sécurité, les Comités de sanction ou tout autre organe subsidiaire

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mandaté à cet effet, obligent tout Etat à prendre les mesures requises pour donner effet aux sanctions adoptées à l'encontre de particuliers ou d'entités privées.

d) Mesures d'exécution

Les mesures d'exécution s'entendent de celles qui sont prises par des Etats ou par des organisations régionales pour mettre en œuvre les décisions du Conseil de sécurité.

Article 2

Restrictions juridiques aux décisions du Conseil de sécurité

Institué par la Charte des Nations Unies, le Conseil de sécurité est tenu d'agir conformément à ses dispositions.

Article 3

Contrôle juridictionnel

Aucune décision du Conseil de sécurité ne peut être contrôlée directement par une voie judiciaire. Toutefois, l'Institut prend note que la Cour internationale de Justice et le TPIY ont confirmé qu'ils peuvent exercer un contrôle à titre incident des décisions du Conseil de sécurité si et dans la mesure où ceci est nécessaire pour trancher une question sur laquelle ils se prononcent à titre principal. Ayant égard aux sanctions ciblées, cela signifie, selon l'Institut, que les sanctions ciblées peuvent être interprétées lors du contrôle des mesures concernant leur mise en œuvre.

Chapitre II

**Mise en œuvre des décisions du Conseil de sécurité visant des particuliers
ou des entités privées restreignant les droits de l'homme**

Article 4

(Effet direct des) Décisions de mise en œuvre sur la condition juridique des particuliers

Les mesures prises par des Etats ou des organisations régionales pour mettre en œuvre des décisions du Conseil de sécurité qui visent spécifiquement des particuliers ou des entités privées peuvent être réexaminées par les tribunaux selon le droit applicable. Il en va de même de celles qui sont prises dans un contexte où est en cause une mission de maintien de la paix ou l'administration de territoires.

Article 5

Décisions d'inscription prises par les comités des sanctions

- a) Les comités des sanctions se conformeront pleinement aux dispositions de la Charte des Nations Unies.
- b) Aucune décision d'inscription sur une liste prise par un comité des sanctions à propos de particuliers ou d'entités privées ne peut être révisée par des juridictions régionales ou nationales, sans autre

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validation. Cette disposition est applicable aux décisions de maintien sur la liste.

- c) L'interdiction de soumettre à un tribunal les décisions d'un comité des sanctions, visée ci-dessus b), ne préjuge pas du réexamen de mesures prises pour mettre en œuvre les dispositions adoptées par des États ou des organisations régionales afin de donner effet à ces décisions.

Article 6

Actions prises ou manquements survenus dans le contexte de missions de maintien de la paix ou d'une administration internationale de territoires

- a) Lorsque de tels actions ou manquements sont imputables tout à la fois aux Nations Unies et à des États individuellement, ils peuvent l'être également à l'un comme aux autres. Si elles sont appelées à juger de réclamations relatives à des actions ou omissions dans le cadre de missions de maintien de la paix ou d'une administration internationale de territoires, les juridictions, qu'elles soient nationales ou régionales, doivent toujours garder présente à l'esprit la complexité des situations résultant d'une imputabilité multiple.
- b) Seules les actions ou omissions imputables aux États concernés peuvent être révisées sur la base d'un droit national, régional ou international public. Néanmoins un tel réexamen ne peut pas avoir pour effet d'exercer un contrôle direct sur les actions ou les manquements d'un organe subsidiaire du Conseil de sécurité ou du Conseil de sécurité lui-même.

Chapitre III

Inscription : procédure

Article 7

La pertinence de la procédure d'inscription pour l'exercice du contrôle juridictionnel par les juridictions nationales ou régionales

L'Institut est d'avis qu'une amélioration de la procédure d'inscription ou de radiation par le Conseil de sécurité serait conforme aux principes généraux de droit et pourrait réduire la nécessité éprouvée par des particuliers ou des entités privées d'avoir recours à des juridictions nationales ou régionales.

Article 8

Amélioration de la procédure du médiateur selon les résolutions 1267 (1999) et 1989 (2011)

- a) La procédure applicable pour la radiation et en particulier celle du recours à un médiateur améliorent de manière significative la possibilité pour les requérants d'y apporter des corrections. On sait qu'elle fut originellement conçue comme un mécanisme d'assistance au comité des sanctions, lorsque celui-ci était appelé moins à décider d'une radiation que d'en réviser les termes.

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- b) La procédure n'est applicable qu'au seul régime de sanctions visé par les résolutions 1267 (1999) et 1989 (2011). Elle ne l'est pas s'agissant des autres régimes, lesquels néanmoins visent également des particuliers ou des entités privées ; dans l'une et l'autre hypothèses, les conséquences peuvent néanmoins être comparables, sinon identiques, à tout le moins pour ce qui concerne les droits de l'homme.
- c) L'Institut recommande dès lors que le recours à un médiateur soit organisé dans tout autre régime d'une telle nature, présent ou futur, qui organise des sanctions ciblées et que cette procédure soit plus transparente.
- d) Si besoin est, l'Institut recommande que le médiateur puisse être pleinement indépendant et que cette indépendance soit assurée, sinon garantie, par la mise en place d'une institution appropriée.
- e) L'Institut recommande également que le Conseil de sécurité développe d'autres procédures qui assurent une protection accrue des individus ou entités ciblées.

Article 9

**Autres améliorations des procédures d'inscription et de radiation
organisées
par le Conseil de sécurité**

- a) Dispositions appelées à limiter les recours à des juridictions nationales ou régionales :
 - renforcer la procédure interne de révision qui est propre au Conseil de sécurité ;
 - organiser une révision périodique de manière à vérifier si les sanctions ciblées contre des particuliers ou d'autres entités quelconques demeurent pertinentes ;
 - laisser aux Etats et aux organisations régionales un certain pouvoir discrétionnaire dans la mise en œuvre des mesures prises à cet effet, en prenant en considération les circonstances propres à chaque cas particulier.
- b) Une autre possibilité d'améliorer la procédure d'inscription serait d'impliquer l'Etat de la nationalité et l'Etat de résidence dans la procédure dont un Etat tiers aurait pris l'initiative.

**Chapitre IV
Contrôle**

Article 10

**Critères et identification des particuliers ou des entités pour
l'inscription dans la liste**

Sachant que l'identification des individus ou autres entités visés par une inscription dépend de l'Etat qui en prend l'initiative, l'Institut entend souligner que :

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- a) la technique qui conduit à une inscription devrait être d'une parfaite transparence pour celui qui en est le destinataire, que ce soit un particulier ou toute autre entité privée ;
- b) tenant compte des conséquences possibles que l'inscription peut avoir sur les droits de tout individu, un tel procédé doit respecter les droits de l'homme et devrait également respecter tout autre standard national ou international pertinent en la matière ;
- c) tout particulier ou quelque autre entité privée doit se voir reconnaître la possibilité de mettre en cause devant un tribunal l'inscription qui les vise, de manière à ce qu'elle puisse être réexaminée en justice conformément aux dispositions du droit national de l'Etat qui est à l'origine de cette désignation.

Ces principes devraient être suivis tant par les autorités de l'Etat dont l'intéressé a la nationalité que de celui dans lequel il a sa résidence, selon les particularités de l'espèce. Il en va ainsi en tous les cas si ces autorités estiment devoir prendre l'initiative d'une inscription ou d'une radiation, que soit en cause un particulier ou toute autre entité.

Tant les autorités nationales que les entités impliquées dans ce processus doivent prendre en considération de l'objet et de la raison d'être des sanctions qui les concernent.

Article 11

Mise en œuvre des sanctions ciblées

Lorsqu'ils mettent en œuvre des sanctions ciblées, les Etats ou les organisations régionales doivent agir conformément à leurs obligations envers le Conseil de sécurité. Ce qui n'exclut pas que les mesures prises à cet effet par des Etats ou par des organisations régionales peuvent être contrôlées par les tribunaux pour ce qui concerne le respect des standards internationaux, régionaux ou nationaux de protection des droits de l'homme.

Article 12

Retenue dans l'exercice du contrôle juridictionnel par les tribunaux nationaux ou régionaux

- a) Tout contrôle juridictionnel des mesures de mise en œuvre des sanctions ciblées doit tenir pleinement compte de l'objet et du but des sanctions. Une attention particulière doit être réservée en pareil contexte à l'article 103 de la Charte des Nations Unies.
- b) Il convient de tenir compte de tout contrôle juridictionnel, national ou régional, qui aurait été exercé à ce propos, de manière à vérifier si le demandeur a sollicité ou non une radiation conformément à la procédure adoptée à cet effet. Toute recommandation éventuelle du médiateur doit surtout être dûment prise en considération à cet égard.
- c) Si la mise en œuvre des sanctions est déclarée non conforme aux standards pertinents en matière de protection des droits de l'homme, les

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cours et tribunaux, qu'ils soient nationaux ou régionaux, devraient tenir compte de ce que leur décision ne dispense pas l'Etat ou les organisations régionales de s'acquitter de leurs obligations envers les Nations Unies, sachant que ces obligations demeurent pleinement en vigueur.

Mardi 5 septembre 2017 (matin)

La séance est ouverte à 9 h 50 sous la présidence de M. *Sreenivasa Rao*.

The *President* invited the Rapporteur of the 12th Commission, Mr Wolfrum, to continue to present his report following the first plenary meeting which had taken place the previous day. The President explained that there remained speakers on his list of Members wishing to comment on the draft Resolution, and that additional names could be added. He gave the floor to Mr Wolfrum.

The *Rapporteur* thanked the President for giving him the floor, and Members for the suggestions he had received. He stated that on the basis of the interventions received the previous day he had already introduced changes to the text of the draft Resolution. As far as Article 3 was concerned, he asked that Members look at the new text, which would be distributed shortly. In relation to Sir Kenneth Keith's comments, he said that he was open to deletion of the word "judicial". With respect to the comments made by Sir Christopher Greenwood and Mr Reisman, he had accommodated their concerns by adding wording in the preamble of the draft Resolution. In relation to the Secretary-General's comments made in a personal capacity, he had inserted wording that to a great extent accommodated them. Concerning Mr Pellet's statements about the International Court of Justice, the Rapporteur agreed with Mr Pellet and a change had been made accordingly. With respect to Mrs Boisson de Chazournes' suggestion to change the wording in Article 2 from "restrictions" to "framework", he was unsure as to the English equivalent and would reflect on it. He stated that he had also made additions to Article 8, and with respect to comments made by Mr Ranjeva and Mrs Boisson de Chazournes, he noted that their suggestions could not be fully taken into account. He suggested including wording to the effect that the Security Council was best placed to decide what could be done without endangering the object and purpose of its measures. With respect to the drafting proposals made by Mr Koroma, he acknowledged that Mr Koroma was correct in the comments he had made and that it would be the task of the Drafting Committee to deal with those matters, although some drafting changes had already been made. As far as his remarks about the need for transparency in the decision-making process of the Ombudsperson were concerned, the Rapporteur took those comments on board.

The *President* opened the floor to discussion.

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Mr *Tyagi* congratulated the Rapporteur on his work on the draft Resolution. He noted, first, that the title gave the impression that the *Institut* was dealing with a subject that concerned the judicial review of Security Council decisions in general. In fact, it was not. It was dealing with a specific category of decisions, namely decisions on targeted sanctions in the specific context of terrorism. He queried whether a recent category of targeted sanctions, namely those relating to the proliferation of weapons of mass destruction, had been taken into account in the draft Resolution. Second, he commented that there must be transparency, fairness and equality in the decisions taken by the Security Council. Third, he suggested including in the preamble a mention of the shortcomings inherent in the composition and functioning of the Security Council. Finally, he noted that judicial review at the international level was very limited. He considered that if the *Institut* excluded judicial review at the national level, the international community would be deprived of their contribution. He made reference to a legislative amendment introduced in 1975 in India which purported to restrict the scope of judicial review in that country, and which had been declared unconstitutional and void by the Indian Supreme Court. He considered that it was unrealistic for international lawyers to expect national courts to accept internationally-imposed restrictions on the scope of their jurisdiction.

Mr *Oxman* expressed his gratitude to all those who had contributed to the work of the 12th Commission. He noted that the draft Resolution did not clearly refer to respect for the commitment to the Charter of the United Nations and its principal organs, which he considered should be included. He also proposed the inclusion of wording to the effect that the rule of law depended itself upon the maintenance of international peace and security. Accordingly, he proposed that following the fourth preambular paragraph, which began with the word “guided”, the text of the draft Resolution should read: “*recognising* that the rule of law including the protection of human rights is itself dependent on maintenance of international peace and security”. This idea was already suggested in the preambular text but would be better expressed more directly. Second, he proposed amending Article 12, by adding a new paragraph to the effect that “judicial review of measures implementing Security Council decisions shall be consistent with all relevant provisions of the Charter of the United Nations including in particular Articles 24, 25, 39 and 103”. In that regard, he had considered making an express reference to the International Court of Justice, but was persuaded that it was unnecessary as it would open issues not necessary to those under consideration. He considered it better not to discuss the powers of the Court. Messrs Koroma and Treves had adverted to certain concerns. Those concerns could be addressed by limiting Article 3 to national and regional courts, and making no mention of the International Court of Justice or other international tribunals. Further, he proposed that all provisions that addressed judicial review be similarly limited to national and regional courts. He thought that

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that would be logical because the cases from national and regional courts concerned issues different from those on the international plane. He considered that the *Institut*'s work would be more effective by avoiding that issue. Were these proposals adopted, he noted that there would in turn be consequential changes, which could be addressed by the Drafting Committee, and proposed to transmit such suggestions directly to the Rapporteur.

The *President* suggested that specific drafting requests be made in writing, and that Members limit their comments to the substance of the changes they proposed.

Mr *Orrego Vicuña* congratulated the Rapporteur on his work. He remarked that the thrust of the debate the previous day had appeared to be concerned with the identity of who had the right to review Security Council decisions. He recalled what Sir Robert Jennings had written that there was no general power of review of Security Council decisions, but that in the exercise of its jurisdiction, a court might look at issues of interpretation and ultimately the legality of a Security Council decision. That statement remained valid. There was still no power to judicially review Security Council decisions. However, that did not prevent a court from doing so if it had to make a decision because that was precisely its mission. He observed that the way in which Article 3 was currently drafted was that the Security Council had absolute powers which were not amenable to judicial review. Second, he referred to the principle of transparency. He noted that decisions taken by the Security Council Sanctions Committee were virtually anonymous because although there was a committee of a certain membership, the particular individuals taking the decisions remained anonymous. That meant that anyone could say anything and hide behind the institutional framework of the Sanctions Committee. He considered that that state of affairs was a source of arbitrariness and discrimination which might give rise to breaches of other rights under the Charter, including human rights. His suggestion was to call for the identification of those taking part in the decision-making processes in the Sanctions Committee. He recognised that the counterargument to his proposal was that, if named, such individuals might be at risk of being targeted by terrorists. Nevertheless, he thought such transparency would require decision-makers to look to the legality and detail of what they were approving more carefully.

Mrs *Arsanjani* stated that she was a member of the 12th Commission. She said that the task was not an easy one for the Rapporteur. She agreed with what Sir Christopher Greenwood and Mr Reisman had said the previous day. She referred to remarks made by Mr Schrijver the previous day that it had been courts that had first responded to problems arising from Security Council decisions concerning targeted sanctions. She noted that in fact it was States, the High Commissioner for Human Rights and non-governmental organisations, rather than courts, that were the first to identify problems

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relating to the absence of due process. It was not the judicial review process that corrected the inadequacies of such decisions. In response, the Security Council sought continuously to address the criticisms that were rightly levelled at it. Further, with respect to transparency, she noted that subsequent Security Council resolutions asked States to bring to light problems relating to implementation of resolutions, and relevant case law and rules that they considered the Security Council needed to take account of. She further noted that the sanctions committee required that when a State proposed that an individual be subject to the listing process, a detailed statement must be provided, and could be made public. She took issue with the suggestion that the names of those sitting on the sanctions committee must be released, as she thought that would give rise to security considerations for those persons. Concerning the proposal to remove the reference to international courts from Article 3 of the draft Resolution, she reminded Members that that was not a new proposal; it was one which had been made by Belgium at the San Francisco conference. That proposal had been defeated, for two reasons. First, there was no comparison to be made with the functioning of constitutional checks and balances and the Security Council. Second, Chapter I of the Charter had been amended. Article 21, which was mentioned in the preamble of the draft Resolution under consideration, provided that the Security Council had to function in accordance with the purposes and principles of the Charter of the United Nations. Those were the reasons raised in San Francisco as to why there was no need for the Security Council to be subject to judicial review. She noted her uneasiness with limiting the text to national and regional courts as it would appear not to apply to international courts and tribunals.

The *President* thanked Mrs Arsanjani for her contribution. As a matter of procedure, he asked speakers to identify the specific matters they did not agree with in the draft Resolution, rather than making more general comments.

Mr *McLachlan* associated himself with the views expressed by Sir Christopher Greenwood the previous day. The efficacy of responses to terrorist actions should not be undermined. However, the rule of law applied to international procedures as much as it did to national ones. The *Institut* addressed the failings in the international system and he noted that recourse to national and regional courts had arisen as a matter of substantive injustice at the international level. His concern was that the *Institut* should not condemn recourse to national courts where remedies were unavailable at the international level. Rather, the focus should be on improving international remedies and, if that was the case, the need to resort to remedies at the national level would be reduced as a consequence. He suggested amendments to Article 9 which he submitted to the Rapporteur.

Mrs *Xue* expressed her general reservation on the draft Resolution as a whole, and her regret that, as a member of the 12th Commission, she had to

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reiterate that reservation to the plenary as a whole. She stated that she shared many of the views expressed the previous day and the present day by other Members, and expressed her appreciation for the Rapporteur's spirit of compromise. She proceeded to make a number of comments. First, she noted that the purpose of the draft had not yet been clearly identified. The President had asked Members to indicate what they wanted in the draft. What she wanted was to strengthen human rights protection in the implementation of Security Council decisions. She had anticipated that that would be the focus of the draft Resolution. Instead, the judicial review of Security Council decisions had become the focus. She noted that, as others had indicated, there were various means to correct the current situation and she questioned why judicial review had been singled out as the most effective remedy. The decisions of national and regional courts did not address those crucial points. On the contrary, they gave rise to serious legal issues that bore on the international structure, and the Security Council's role in maintaining international peace and security. Second, she considered that the scope of the sanctions in the draft Resolution was unclear. She noted that at certain points reference was made to all sanctions, and at other times to targeted sanctions. In fact, she observed, all sanctions were targeted, whether to States, to organisations or to individuals. She recalled that the consequence of Security Council sanctions had been a topic on the agenda of the 6th Committee. She acknowledged, however, that more recently, in the context of the fight against terrorism, targeted sanctions against individuals had been adopted, and that some of those measures had gone too far, violating individual human rights, which must be addressed. However, those deficiencies had to be addressed within the United Nations system itself, rather than in the form of legal remedies before national or regional courts. She considered it to be a constitutional issue for the United Nations, and for its Member States. The violation of human rights appeared at the level of the implementation of Security Council decisions, but the disease was deficiency in the system at the international level. She considered that the *Institut* should review the mechanisms in place at the international level rather than focus on the case of national or regional courts. Third, she addressed judicial review in international law. She acknowledged that others gained inspiration from that national mechanism, but considered that if the purpose was to advocate in favour of judicial review, that was not a topic that the *Institut* should pursue. The term "judicial" could be misleading and she questioned what the constitutional framework for judicial review was in this context. Judicial review amounted to the review of the constitutionality of an act. When it came to a national or regional court, was it based on treaty obligations or human rights? She questioned whether national judges could understand such international issues, and considered that responses from States could vary greatly. Further, she noted that "review" meant to overrule a decision. The *Institut* was dodging the issue by referring to "interpretation" in the draft Resolution. At the national level, judicial review referred to the competence

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to address the legality of a decision. However, at the international level, the concern was failings in the structure of the system, bearing in mind that Security Council decisions were made for the purpose of maintaining international peace and security. She considered that those were matters that must be dealt with first, before the *Institut* could turn to the implementation of Security Council decisions.

Mr *Benvenisti* suggested that the draft Resolution should reflect the wording contained in Security Council resolution 2368 (2017) recognising “that development of security and human rights are mutually reinforcing and are vital to an effective and comprehensive approach to countering terrorism”. He stressed the need to emphasise respect for human rights in the preamble and Article 7 of the draft Resolution. He noted that Article 2 referred to the legal mandate of, and restrictions to, Security Council decisions. He proposed including specific wording referencing human rights. In response to Mrs *Arsanjani*’s suggestion concerning the prohibition of national and regional courts to review Security Council decisions, he suggested the following wording: “The United Nations Charter does not provide for the judicial review of Security Council decisions by States and of their courts. In the course of review of such decisions, national courts, as well as international courts, should take into account the mandate and restrictions on Security Council decisions.” He noted that Article 7, by reference to indirect review by courts, should not be presented in a negative way, and the wording in Security Council resolution 2178 relating to counter-terrorism measures should be taken into account.

La séance est suspendue à 11 h 00 et reprend à 11 h 50.

The *President* gave the floor to Mr *Wolfrum* to address comments made by Members on the draft Resolution.

Mr *Wolfrum* stated that there was perhaps a misunderstanding. He noted that some Members had criticised the draft Resolution, stating that there should be no discussion about the judicial review of Security Council decisions by the International Court of Justice. He clarified that there was no reference to it in the draft Resolution. Article 3 provided that the *Institut* simply took note of the absence of the judicial review of such decisions. He suggested that it might be better to reintroduce the term “directly” in Article 3, which had been removed from the previous draft, to clarify the point. He stressed that it was not the intention of the draft Resolution to address the review of Security Council resolutions by the International Court of Justice. He stated that the draft Resolution touched on political nerves but that the best compromise needed to be reached. He noted that it was too late in the day for the draft Resolution to address the regime on nuclear proliferation as developments in that area were too recent and needed to be addressed at a later stage.

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The *President* noted that there were still Members who wished to provide comments on the draft Resolution.

Mr *Lowe* had three points. First, he noted that in the discussion Members had made a distinction between the Security Council and national governments, whereas he noted that it was the same group of individuals taking decisions in different fora. There was a risk that the Security Council could be used as a vehicle by some governments to push through measures that could not be achieved through the checks and balances existing at the national level. Second, there were two different categories of review. It was agreed that there should not be a review as to whether a particular situation constituted a threat to international peace and security. He stressed, however, that the situation was very different as regards Security Council decisions that placed individuals on a list and thereby effectively imposed criminal sanctions on them or permitted measures to be taken in relation to their property which would constitute *prima facie* violations of international law if taken at the national level. He reiterated his concern as to whether Article 5(b) was compatible with Article 10(c). Third, he expressed his reservations about the adequacy of national review mechanisms. He observed that individuals had been placed on a sanctions list by reason of being “closely associated” with certain individuals or bodies, or for “providing financial services to or in support of” a particular body. He considered those criteria to be too vague and noted that individuals had to have access to the evidence against them in order to have a proper basis on which to challenge the decision to list them. Such information was not available to individuals in the context of national review mechanisms because governments did not provide courts with such information. The *Kadi* case, and others, could be referred to in that respect. Implementation was thus difficult to review. Further, the converse objection could be made. If governments had to reveal their evidentiary basis on which individuals were listed, and if that basis could be challenged, there would be a chilling effect on the willingness of governments to transmit such information. Rather than risk such decisions being challenged, governments would revert to national systems and shy away from multinational structures. He agreed with Mrs *Xue* that it was necessary to address deficiencies in the existing system, which may be remedied by administrative, and not just judicial, processes.

Mr *Kazazi* congratulated the Rapporteur and the 12th Commission on their work. He stated that the first sentence of Article 3 gave the impression that the Security Council was not accountable. He noted that a powerful and strong Security Council was necessary to carry out its Charter-mandated functions and that the Charter did not provide for the review of the Security Council decisions. However, the Security Council was also accountable for its actions. He clarified that he was not suggesting that there should be a general power of review of Security Council actions. Such mechanisms should not necessarily be judicial, but they must exist. He observed that the

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blanket language in Article 3 was problematic. He stated that what was under consideration was a very important topic and should not be rushed. He agreed with comments made by other Members on the importance of respecting the human rights in imposing sanctions, and on the need for transparency, in particular on listing and delisting of individuals.

Mr *Lee* stated that he was a member of the 12th Commission but shared comments made by others the previous day and the present day. He noted that only three Articles of the draft Resolution, namely Articles 1 to 3, corresponded to the title of the Resolution. By contrast, Articles 4 to 12 dealt with implementing measures of targeted sanctions. He queried whether that was acceptable to Members. He commented that the subject matter of the draft Resolution appeared to have been watered down from what the 12th Commission had been asked to do. He stated that the *Institut* at present had not made a significant contribution to the subject due to the restrictive approach adopted in the title. He stressed that the *Institut* must make a significant contribution. He congratulated the Rapporteur on his flexibility in incorporating the suggestions made by Members.

M. *Kamto* félicite le Rapporteur et les membres de la commission pour le travail accompli. Il fait trois remarques d'ordre général. Le débat autour de l'article 3 et les suggestions selon lesquelles les décisions du Conseil de sécurité ne pourraient faire l'objet d'un contrôle juridictionnel le laissent perplexe. Il considère qu'il n'existe aucun fondement dans la Charte des Nations Unies pour une affirmation aussi absolue. Il doute par ailleurs qu'il soit possible de créer un organe qui ait le pouvoir de s'émanciper du texte dont il émane. Il considère qu'il convient de ne pas faire la confusion entre l'inexistence d'un mécanisme procédural de contrôle direct et l'impossibilité de principe d'un tel contrôle. S'il est certain qu'aucun Etat ne peut directement attirer en justice le Conseil de sécurité, le contrôle peut aussi s'exercer dans le cadre de la procédure d'avis consultatif ou bien d'une manière incidente au contentieux. Il se réfère ensuite au titre du projet de résolution, qui ne reflète, selon lui, pas exactement son contenu. Il propose qu'il soit révisé pour inclure une référence explicite aux sanctions ciblées. Il suggère l'intitulé suivant : « Le contrôle juridictionnel des décisions du Conseil de sécurité en matière de sanctions individuelles ». Sa deuxième remarque porte sur l'efficacité des contrôles nationaux et régionaux. Il considère qu'on s'attendrait à ce qu'ils tirent des conséquences concrètes en vue de la réparation des violations subies par les individus. Cependant, les décisions nationales ou régionales se limitent à un constat de la violation. Sa troisième et dernière remarque porte sur les failles dans le mécanisme existant, qui relèvent de l'évidence. La création des comités de sanctions, qui ne sont pas expressément prévus par la Charte, aurait dû s'accompagner de la création d'un organe de contrôle, qu'il soit de nature juridictionnelle ou pas.

Mrs *Pinto* congratulated the 12th Commission on its work. She raised a point of consistency with international law. She stated that the draft

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Resolution addressed Security Council resolutions and human rights, in particular the cardinal right of review. She agreed with others that, in Article 7, a reference to human rights should be added. Additionally, with respect to Article 9, she suggested changes should be made. She understood the Rapporteur's desire to preserve the integrity of Security Council decisions. However, it should be drafted in a different way. The point was to reduce recourse to courts. She said that only improvements in the United Nations system, and the creation of new mechanisms for that purpose, should be addressed.

M. *Mahiou* fait une proposition concrète d'amendement de l'article 3, qui devrait commencer, selon lui, par l'expression : « En l'état actuel du droit international ... ». Cet amendement a l'avantage d'exprimer un constat portant sur la situation juridique actuelle, et non pas une injonction de ne pas faire car si la Charte des Nations Unies ne prévoit pas de contrôle des décisions du Conseil de sécurité, elle ne l'interdit pas, ce qui laisse le débat ouvert. En outre, il préserve les possibilités d'évolution future. Sa deuxième remarque est à la fois de nature rédactionnelle et de fond. Il note que le projet de résolution tantôt fait référence conjointement à l'inscription et à la radiation et tantôt il ne se réfère qu'à l'inscription (par exemple, les articles 5, 9 et 10). Il demande s'il s'agit d'un choix délibéré ou non, et, en cas de réponse positive, quelle est la raison de ce choix.

Mr *Reisman* commented on Article 3 of the draft Resolution, and a revision recently introduced. He noted that three functions were now covered: first, the absence of judicial review of Security Council decisions; second, the ancillary review of such decisions by other bodies in contradiction with the first sentence; and three, the interpretation of such decisions in the course of their implementation. He noted that the latter function was anodyne, but not the two former functions. He stated that according to his understanding, judicial review amounted to one body looking at the actions of another body in order to check whether that body exercised its functions correctly or abused them. He expressed concern, if this was the correct understanding of judicial review, as to whether one could say, on the one hand, that no decision of the Security Council could be judicially reviewed, that is, that nobody could determine that the Security Council had exceeded its jurisdiction; and, on the other hand, acknowledge that the same body could exercise its own ancillary jurisdiction. If that was considered a valid point, he suggested retaining the first sentence of Article 3 and replacing the remaining text with the following: "However, in respect of targeted sanctions this means in the view of the Institute that such sanctions may be interpreted in the course of their implementation."

Mr *Chimni* agreed with those Members who had stated that some form of judicial review was possible. He suggested deleting Article 3 in its entirety. Article 2, with the inclusion of a reference to human rights, would serve to assist in the interpretation of Article 11 of the draft Resolution. He

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considered that those changes would meet the objections that others had raised.

The *Rapporteur* said that he had taken note of all the interventions. He said that he would not make reference to speakers but to the provisions in the draft Resolution. In relation to Article 2, he noted the suggestion that there should be a reference to human rights. That could be easily accommodated. In relation to Article 3, a number of proposals had been made. One was to delete the Article in its entirety. He said that he thought that that would meet the expectations of the majority of the Members. Another proposal was to reintroduce the term “directly” into Article 3. He also noted the suggestion to delete the reference to ancillary jurisdiction, which he said he would consider. He noted that no comments had been made on Article 4. He said that he would consider whether the terms “listing” and “delisting” had been applied consistently throughout the draft. In relation to Article 5(b), his recommendation was to leave it as it was, but he suggested making amendments to Article 10. The idea was to distinguish the activities of the Security Council Sanctions Committee from the States proposing individuals to be listed, and he suggested making changes to Article 10(c) and the following paragraph to reflect that. With respect to Article 9(a), it appeared that the first sentence had been misunderstood. That was something that could be easily remedied to allow the introduction of the idea that it was first and foremost the obligation of the Security Council to provide a procedure on targeted sanctions that was in accordance with the Charter of the United Nations and human rights. The amendment would have an impact on national and regional courts. He proposed producing a new draft for circulation during the afternoon meeting.

Mr *Tyagi* stated that he had quite a few suggestions to make. First, the scope of the draft Resolution should be restricted and that should be reflected in the title. It should be made clear that the *Institut* was addressing targeted sanctions in the context of terrorism. He criticised the length of the second preambular paragraph, and proposed deleting the quotation taken from the General Assembly resolution mentioned therein. Third, he questioned whether the draft Resolution covered presidential statements, and suggested that they should be covered. With respect to the third preambular paragraph relating to the rule of law, he observed that it was essentially a definition used in domestic law contexts. He suggested the addition of a preambular paragraph to read “*recognising* the need for reform in the structure and functioning of the Security Council”. Finally, in relation to targeted sanctions decisions adopted by the Security Council, he noted that there were effectively three kinds of decisions: listing, delisting and not listing decisions. All three decisions must be subject to principles of due process.

The *President* thanked the Members for their comments. He observed that the discussion had been intense and the comments made were valid. He stated that the *Institut* must now close the discussion. Each Article would be

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examined and amendments made, following which a vote would be taken. Subsequently, each of the Articles would be finalised. He stressed that it was time to make a collective decision, and that a vote on the draft Resolution would be taken subsequently.

La séance est levée à 12 h 55.

DRAFT RESOLUTION REVISED 2

Judicial Review of Security Council Decisions

[Judicial Review in the Field of Targeted Sanctions]

The Institute of International Law,

Considering that according to article 24, paragraph 2, of the United Nations Charter the Security Council shall “act in accordance with the purposes and principles of the United Nations” and that “the specific powers granted to the Security Council for the discharge of these duties are laid down in Chapters VI, VII, VIII, and XII”,

Considering the Declaration of the high-level meeting of the United Nations General Assembly on the rule of law at the national and international levels (A/RES/67/1* of 24 September 2012), paragraph 2 of which states 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 paragraph 29 of which, addressing the Security Council, emphasizes 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 includes a principle according to 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 adjudicated,¹

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,

¹ See on this the 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.

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Recognising that the realisation of the rule of law, including the protection of human rights, is itself dependent on the maintenance of international peace and security,

Noting the judgments of national as well as regional courts having declared that national or European Union measures implementing targeted sanctions against individuals or entities 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 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 *ex post facto* examination of a decision or an act with a 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 or individuals 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

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These are measures to be taken by States or regional organizations to implement the sanctions as prescribed by the relevant Security Council decisions.

Article 2

Legal framework for Security Council decisions

Established by the Charter of the United Nations, the Security Council has to act in conformity with that Charter and human rights.

Article 3

Security Council decisions not open for judicial review

The Institute notes that at present there is no prevailing tendency to judicially review decisions of the Security Council directly. However, in respect of targeted sanctions, this means in the view of the Institute that such sanctions may be interpreted in the course of their implementation.

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 subject to the applicable law.

Article 5

Decision of sanctions committees to list

- (a) Sanctions committees shall fully respect the Charter of the United Nations including human rights.
- (b) The decision of a sanctions committee to list or not to delist an individual or a private entity shall not be reviewed by regional or national courts.
- (c) The bar to review decisions of a sanctions committee as referred to in 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 United Nations and may also be 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

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international administration of territories, regional or national courts should bear in mind the complexity of the situation deriving from the multiple 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 may not scrutinize the acts or omissions of the subsidiary organ of the Security Council in question or those of the Security Council itself.

Chapter III

Listing

Article 7

Listing and delisting procedures and national or regional courts

The Institute takes the view that further improvements in the listing or delisting procedure by the Security Council would be consistent with general principles of law and could, moreover, 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, in particular the Ombudsperson procedure, established for delisting 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 sanctions committees in their 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 others which equally target individuals and private entities with the same possible consequences for the enjoyment of human rights.
- (c) Accordingly, the Institute recommends that the Ombudsperson procedure be applied to all such regimes, present and future, when providing for the prescription of targeted sanctions and that its procedure is rendered more transparent.
- (d) The Institute further recommends that the Ombudsperson be fully independent and that such independence be secured by establishing an appropriate institution.
- (e) Considering that it is first and foremost for the Security Council to establish a procedure for listing and delisting which meets the relevant standards of the Charter of the United Nations, including human rights, the Institute also recommends that the Security Council develop further procedures with a view to ensure a better protection of targeted individuals or entities.

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Article 9

Further improvements to the Security Council procedure on listing and delisting

- (a) Without prejudice to Article 8(e) above, the Institute recommends further improvements to the Security Council procedures on listing and delisting. These are for example:
- strengthening of the internal review procedure by the Security Council;
 - establishment of a periodic review as to 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 a 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
Review**

Article 10

Criteria for, and 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:

- (a) Such process possibly leading to a listing should be transparent for the targeted individual or entity; and
- (b) Considering the possible human rights consequences of listing, such process shall respect human rights standards and should also respect other relevant international and national standards; and
- (c) The individual or entity be provided with an opportunity to have the national decision on their listing judicially reviewed according to the relevant national legal system.

This principle shall guide the authorities of the designating State, of the State of nationality or of the State of residence, as the case may be, if they are considering initiating or supporting the delisting of the individual or entity concerned.

The national authorities as well as the entities engaged in this process of listing and delisting shall take into account the object and purpose of targeted sanctions.

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Article 11
Implementing targeted sanctions

In implementing targeted sanctions, States or regional organizations act in the fulfilment of their commitment *vis-à-vis* the Security Council. This does not exclude that 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 the object and purpose of such sanctions. Particular attention is to be paid in this context to Article 103 of the Charter of the United Nations.
- (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) A judicial review of measures implementing Security Council decisions shall be consistent with all relevant provisions of the Charter of the United Nations, including in particular Articles 24, 25, 39 and 103.
- (d) In reviewing implementation measures and declaring them not to be in conformity with relevant human rights standards the regional or national courts should take into account that their decision does not absolve the implementing State or regional organization from its obligation to fulfil its international commitments towards the United Nations. Such commitments remain valid.

PROJET DE RESOLUTION REVISE 2

Le contrôle juridictionnel des décisions du Conseil de sécurité
[Le contrôle juridictionnel en matière de sanctions individuelles]

L'Institut de Droit international,

Prenant en considération l'article 24, paragraphe 2, de la Charte des Nations Unies selon lequel le Conseil de sécurité « agit conformément aux buts et principes des Nations Unies » et qui prévoit que « les pouvoirs spécifiques accordés au Conseil de sécurité pour lui permettre d'accomplir lesdits devoirs sont définis aux Chapitres VI, VII, VIII et XII »,

Prenant en considération la Déclaration adoptée le 24 septembre 2012 par l'Assemblée générale lors de la réunion de haut niveau sur les exigences l'état de droit (*rule of law*) aux niveaux national et international (A/RES/67/1*), dans le paragraphe 2 de laquelle il est souligné que : (i) ces

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exigences sont applicables à tous Etats et organisations internationales, en ce compris les Nations Unies et leurs principaux organes ; (ii) leur respect comme leur développement doivent inspirer toutes leurs actions ; (iii) et enfin que, dans son paragraphe 29, l'Assemblée générale encourage le Conseil de Sécurité à continuer de s'assurer que les sanctions soient soigneusement ciblées, à l'appui d'objectifs clairs, de manière à réduire au maximum d'éventuelles conséquences préjudiciables,

Gardant à l'esprit que, de manière générale, l'état de droit (*rule of law*) participe d'un principe aux termes duquel toutes personnes, privées ou publiques – en ce compris l'Etat lui-même –, doivent rendre compte de toute loi dûment adoptée, publiée et mise en œuvre en toute indépendance¹; *Rappelant* que, dès 1957, l'Institut a adopté à Amsterdam une résolution sur le « recours judiciaire à instituer contre les décisions d'organes internationaux » (vol. 47-I), dans laquelle il est souligné que toute organisation internationale a le devoir de respecter le droit et de s'assurer que ses agents et autres fonctionnaires ou préposés y veilleront attentivement,

Ayant conscience que l'objectif de l'Institut doit être de promouvoir l'état de droit (*rule of law*) au rang d'un principe fondamental dont il importe que le respect soit assuré tant par les Etats que par les organisations internationales, en ce compris les Nations Unies et leurs principaux organes,

Considérant que l'accomplissement de l'état de droit, y inclus la protection des droits de l'homme, dépend du maintien de la paix et de la sécurité internationale,

Prenant note des décisions prises par des juridictions, tant nationales que régionales, qui ont déclaré l'incompatibilité avec les droits fondamentaux de la personne humaine, en ce compris le droit à un procès équitable, de certaines mesures adoptées par des autorités nationales ou par l'Union européenne pour mettre en œuvre des sanctions ciblées contre des particuliers ou autres entités privées,

Notant enfin que, dans l'adoption des mesures appelées à mettre en œuvre des sanctions ciblées, il importe de veiller à ce que la protection des droits et libertés fondamentaux des personnes concernées soit assurée, ceux-ci exprimant des valeurs internationalement partagées par tous,

Adopte les principes directeurs suivants :

Chapitre I
Dispositions générales
Article 1
Expressions employées

a) Contrôle juridictionnel

¹ Voy. Le Rapport du secrétaire général sur le rétablissement de l'Etat de droit et l'administration de la justice pendant la période de transition dans les sociétés en proie à un conflit ou sortant d'un conflit (S/2004/616), par. 6.

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De manière générale, le contrôle juridictionnel s'entend du contrôle *ex post facto* d'une décision ou de tout autre acte juridictionnel dans le but de vérifier s'ils sont conformes au droit applicable. Un tel contrôle peut être exercé directement sur la décision en cause ou indirectement sur sa mise en œuvre. S'agissant de la présente résolution, le terme contrôle juridictionnel (*judicial review*) couvre également le contrôle des mesures prises par des Etats ou par des organisations régionales, sachant que ce contrôle peut avoir pour effet d'interpréter ou de contrôler indirectement une résolution adoptée par le Conseil de Sécurité.

b) Décisions du Conseil de sécurité

Par décision du Conseil de Sécurité, il faut entendre toute décision prise par le Conseil lui-même ou par un organe subsidiaire dûment habilité – tel un comité des sanctions – dont les décisions obligent tant les Etats, qu'ils en soient ou non membres, que tout autre entité ou particulier visé par le Conseil de Sécurité.

c) Sanctions ciblées

Les sanctions ciblées s'entendent de celles qui, adoptées par le Conseil de sécurité, les Comités de sanction ou tout autre organe subsidiaire mandaté à cet effet, obligent tout Etat à prendre les mesures requises pour donner effet aux sanctions adoptées à l'encontre de particuliers ou d'entités privées.

d) Mesures d'exécution

Les mesures d'exécution s'entendent de celles qui sont prises par des Etats ou par des organisations régionales pour mettre en œuvre les décisions du Conseil de sécurité.

Article 2

Cadre juridique aux décisions du Conseil de Sécurité

Institué par la Charte des Nations Unies, le Conseil de sécurité est tenu d'agir conformément à ses dispositions et aux droits de l'homme.

Article 3

Contrôle juridictionnel

L'Institut prend note du fait qu'il n'existe pas actuellement de tendance dominante en faveur d'un contrôle judiciaire direct des décisions du Conseil de sécurité. Toutefois, en ce qui concerne les sanctions ciblées, cela signifie, selon l'Institut, qu'elles peuvent être interprétées lors de leur mise en œuvre.

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Chapitre II

Mise en œuvre des décisions du Conseil de sécurité visant des particuliers ou des entités privées restreignant les droits de l'homme

Article 4

(Effet direct des) Décisions de mise en œuvre sur la condition juridique des particuliers

Les mesures prises par des Etats ou des organisations régionales pour mettre en œuvre des décisions du Conseil de sécurité qui visent spécifiquement des particuliers ou des entités privées peuvent être réexaminées par les tribunaux selon le droit applicable. Il en va de même de celles qui sont prises dans un contexte où est en cause une mission de maintien de la paix ou l'administration de territoires.

Article 5

Décisions d'inscription prises par les comités des sanctions

- a) Les comités des sanctions se conformeront pleinement aux dispositions de la Charte des Nations Unies, y inclus les droits de l'homme.
- b) Aucune décision d'inscription sur une liste prise par un comité des sanctions à propos de particuliers ou d'entités privées ne peut être révisée par des juridictions régionales ou nationales. Cette disposition est applicable aux décisions de maintien sur la liste.
- c) L'interdiction de soumettre à un tribunal les décisions d'un comité des sanctions, visée ci-dessus (b), ne préjuge pas du réexamen de mesures prises pour mettre en œuvre les dispositions adoptées par des Etats ou des organisations régionales afin de donner effet à ces décisions.

Article 6

Actions prises ou manquements survenus dans le contexte de missions de maintien de la paix ou d'une administration internationale de territoires

- a) Lorsque de tels actions ou manquements sont imputables tout à la fois aux Nations Unies et à des Etats individuellement, ils peuvent l'être également à l'un comme aux autres. Si elles sont appelées à juger de réclamations relatives à des actions ou omissions dans le cadre de missions de maintien de la paix ou d'une administration internationale de territoires, les juridictions, qu'elles soient nationales ou régionales, doivent toujours garder présente à l'esprit la complexité des situations résultant d'une imputabilité multiple.
- b) Seules les actions ou omissions imputables aux Etats concernés peuvent être révisées sur la base d'un droit national, régional ou international public. Néanmoins un tel réexamen ne peut pas avoir pour effet d'exercer un contrôle sur les actions ou les manquements d'un organe subsidiaire du Conseil de Sécurité ou du Conseil de sécurité lui-même.

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**Chapitre III
Inscription**

Article 7

**La procédure d'inscription et de radiation et les juridictions nationales
ou régionales**

L'Institut est d'avis qu'une amélioration de la procédure d'inscription ou de radiation par le Conseil de Sécurité serait conforme aux principes généraux de droit et pourrait réduire la nécessité éprouvée par des particuliers ou des entités privées d'avoir recours à des juridictions nationales ou régionales.

Article 8

**Amélioration de la procédure du médiateur selon les résolutions
1267 (1999) et 1989 (2011)**

- a) La procédure applicable pour la radiation et en particulier celle du recours à un médiateur améliorent de manière significative la possibilité pour les requérants d'y apporter des corrections. On sait qu'elle fut originellement conçue comme un mécanisme d'assistance au comité des sanctions, lorsque celui-ci était appelé moins à décider d'une radiation que d'en réviser les termes.
- b) La procédure n'est applicable qu'au seul régime de sanctions visé par les résolutions 1267(1999) et 1989(2011). Elle ne l'est pas s'agissant des autres régimes, lesquels néanmoins visent également des particuliers ou des entités privées ; dans l'une et l'autre hypothèses, les conséquences peuvent néanmoins être comparables, sinon identiques, à tout le moins pour ce qui concerne les droits de l'homme.
- c) L'Institut recommande dès lors que le recours à un médiateur soit organisé dans tout autre régime d'une telle nature, présent ou futur, qui organise des sanctions ciblées et que cette procédure soit plus transparente.
- d) Si besoin est, l'Institut recommande que le médiateur soit pleinement indépendant et que cette indépendance soit assurée par la mise en place d'une institution appropriée.
- e) Considérant qu'il est de la plus haute importance pour le Conseil de sécurité d'établir des procédures d'inscription et de radiation qui remplissent les standards de la Charte des Nations Unies, y inclus les droits de l'homme, l'Institut recommande également que le Conseil de sécurité développe d'autres procédures qui assurent une protection accrue des individus ou entités ciblés.

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Article 9

**Autres améliorations des procédures d'inscription et de radiation
organisées par le Conseil de sécurité**

- a) Sans préjudice de l'article 8 e) ci-dessus, l'Institut recommande des améliorations additionnelles aux procédures d'inscription et de radiation. Parmi celles-ci :
 - renforcer la procédure interne de révision qui est propre au Conseil de sécurité ;
 - organiser une révision périodique de manière à vérifier si les sanctions ciblées contre des particuliers ou d'autres entités quelconques demeurent pertinentes ;
 - laisser aux Etats et aux organisations régionales un certain pouvoir discrétionnaire dans la mise en œuvre des mesures prises à cet effet, en prenant en considération les circonstances propres à chaque cas particulier.
- b) Une autre possibilité d'améliorer la procédure d'inscription serait d'impliquer l'Etat de la nationalité et l'Etat de résidence dans la procédure dont un Etat tiers aurait pris l'initiative.

Chapitre IV

Contrôle

Article 10

**Critères et identification des particuliers ou des entités pour
l'inscription dans la liste**

Sachant que l'identification des individus ou autres entités visés par une inscription dépend de l'Etat qui en prend l'initiative, l'Institut entend souligner que :

- a) La technique qui conduit à une inscription devrait être d'une parfaite transparence pour celui qui en est le destinataire, que ce soit un particulier ou toute autre entité privée ;
- b) tenant compte des conséquences possibles que l'inscription peut avoir sur les droits de tout individu, un tel procédé doit respecter les droits de l'homme et devrait également respecter tout autre standard national ou international pertinent en la matière ;
- c) tout particulier ou quelque autre entité privée doit se voir reconnaître la possibilité de mettre en cause devant un tribunal, et conformément aux dispositions du droit national pertinentes, la décision nationale concernant son inscription sur la liste

Ces principes doivent être suivis tant par les autorités de l'Etat dont l'intéressé a la nationalité que de celui dans lequel il a sa résidence, selon les particularités de l'espèce. Il en va ainsi en tous les cas si ces autorités estiment devoir prendre l'initiative d'une inscription ou d'une radiation, que soit en cause un particulier ou toute autre entité.

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Article 11

Mise en œuvre des sanctions ciblées

Lorsqu'ils mettent en œuvre des sanctions ciblées, les Etats ou les organisations régionales doivent agir conformément à leurs obligations envers le Conseil de sécurité. Ce qui n'exclut pas que les mesures prises à cet effet par des Etats ou par des organisations régionales peuvent être contrôlées par les tribunaux pour ce qui concerne le respect des standards internationaux, régionaux ou nationaux de protection des droits de l'homme.

Article 12

Retenue dans l'exercice du contrôle juridictionnel par les tribunaux nationaux ou régionaux

- a) Tout contrôle juridictionnel des mesures de mise en œuvre des sanctions ciblées doit tenir pleinement compte de l'objet et du but des sanctions. Une attention particulière doit être réservée en pareil contexte à l'article 103 de la Charte des Nations Unies.
- b) Il convient de tenir compte de tout contrôle juridictionnel, national ou régional, qui aurait été exercé à ce propos, de manière à vérifier si le demandeur a sollicité ou non une radiation conformément à la procédure adoptée à cet effet. Toute recommandation éventuelle du médiateur doit surtout être dûment prise en considération à cet égard.
- c) Le contrôle juridictionnel des mesures de mise en œuvre des décisions du Conseil de sécurité doit être conforme aux dispositions pertinentes de la Charte des Nations Unies, et en particulier les articles 24, 25, 39 et 103.
- d) Si la mise en œuvre des sanctions est déclarée non conforme aux standards pertinents en matière de protection des droits de l'homme, les cours et tribunaux, qu'ils soient nationaux ou régionaux, devraient tenir compte de ce que leur décision ne dispense pas l'Etat ou les organisations régionales de s'acquitter de leurs obligations envers les Nations Unies, sachant que ces obligations demeurent pleinement en vigueur.

Mardi 5 septembre 2017 (après-midi)

La séance est ouverte à 15 h 30 sous la présidence de M. *Sreenivasa Rao*.

The *President* gave the floor to the Rapporteur.

The *Rapporteur* indicated that the discussion and vote would proceed on an article-by-article basis. He added that he would recall what changes had been made where relevant, and suggested that the plenary first examine the substantive provisions of the draft Resolution before discussing the preamble.

The *President* invited the Rapporteur to explain the changes that had been made to the draft Resolution.

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The *Rapporteur* indicated that two alternative titles had been provided for the draft Resolution to meet the concerns expressed by Mr Tyagi and others. He noted that minor changes had been introduced in the second paragraph of the preamble. He emphasised that a more significant amendment proposed by Mr Oxman had been retained in the preamble, recognising that “realisation of the rule of law, including the protection of human rights, is itself dependent on the maintenance of international peace and security”.

The *Rapporteur* underscored that no changes had been made to Article 1. With respect to the title of Article 2, he observed that it now incorporated the notion of legal “framework” for Security Council decisions, as opposed to “restrictions” regarding the same. He explained that the concept of “cadre juridique” had been introduced in the French version to reflect this amendment, following the suggestion of Mrs Boisson de Chazournes. He further remarked that a reference to human rights had been included in the text of Article 2 to accommodate concerns voiced by many members, given that the Security Council must act in conformity with both the Charter of the United Nations and human rights.

The *Rapporteur* opined that the most extensive changes had been introduced in Article 3, adding that it was a complicated provision to read. He proceeded to read the revised text of Article 3, which addressed Security Council decisions not open for judicial review. He stressed that the following limb had been added: “However, in respect of targeted sanctions, this means in the view of the Institute that such sanctions may be interpreted in the course of their implementation.” He clarified that the notion of “primary jurisdiction” had been deleted from the previous iteration of the provision, at the request of Mr Reisman. The *Rapporteur* mentioned that no significant changes had been introduced in Article 4. By contrast, he highlighted a consequential change in Article 5(a), which now included human rights alongside the Charter of the United Nations as warranting full respect by sanctions committees. He observed that no amendments had been made to Article 6, while indicating that the Commission had broadened the ambit of Article 7 to include not only listing but also delisting procedures.

The *Rapporteur* drew attention to the newly formulated letter (e) in Article 8, which introduced the idea that “it is first and foremost for the Security Council to establish a procedure for listing and delisting which meets the relevant standards of the Charter of the United Nations, including human rights”. He added that the inclusion of this wording was meant to address the requests made by some members, in particular Mrs Xue. He recalled that Article 9 had been criticised, prompting the Commission to add the limb “[w]ithout prejudice to Article 8(e) above, the Institute recommends further improvements to the Security Council procedures on listing and delisting”, which was followed by wording taken from the original provision.

In order to address the concerns expressed by Mr Lowe, the *Rapporteur* noted the amendment made to Article 10(c), which envisaged that the

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individual or entity subjected to the listing procedure be provided with an opportunity to “have the national decision on their listing” be judicially reviewed “according to the relevant national legal system”. The Rapporteur insisted that he was aware that views diverge from one national system to another and recognised that the question of secrecy was not binding on courts everywhere. He continued by stressing that the principle enshrined in Article 10(c), was made mandatory for the relevant actors by deleting the hortatory expression “should” and replacing it with the term “shall”.

Finally, turning to Article 12, the Rapporteur explained that the most important change was that letter (c) had now become letter (d) and that fresh text was introduced in a new letter (c), as suggested by Mr Oxman. In particular, the new letter (c) provided that “[a] judicial review of measures implementing Security Council decisions shall be consistent with all relevant provisions of the Charter of the United Nations, including in particular Articles 24, 25, 39 and 103”. The Rapporteur concluded by reiterating that these amendments had been made to accommodate as many concerns as possible, although not all suggestions made by Members could be implemented. In his opinion, the revised draft Resolution constituted a fair reflection of the debates in the plenary.

The *President* invited comments on Article 1.

Mr *Ronzitti* reiterated a concern he had voiced previously regarding recommendations formulated by the Security Council. While the report tackled this issue, it was not reflected in the draft Resolution, which only addressed Security Council decisions. However, he recalled that some Security Council recommendations could invite States to adopt sanctions, which might lead both to some countries implementing them and challenges before domestic courts. Mr *Ronzitti* proposed including a clause in Article 1(b) along the following lines: “Without prejudice to any examination of a Security Council resolution recommending sanctions, the present Resolution applies only to decisions of the Security Council.” The provision could then continue with the text currently found at Article 1(b).

M. *Pellet* signale plusieurs problèmes concernant l’article 1. Premièrement, il suggère de supprimer le terme « juridictionnel » dans l’expression « tout autre acte juridictionnel » et se dit perplexe par rapport aux termes « *decision or act* » dans le libellé de la version anglaise. Il soutient qu’il faut plutôt s’en tenir à l’expression « toute décision du Conseil de sécurité » dans cette disposition, sous réserve du sort qui serait fait à la précédente proposition formulée par M. *Ronzitti*. Deuxièmement, M. *Pellet* relève qu’il serait préférable de revenir sur la lettre (a) de l’article 1 après avoir discuté de l’article 3. A ce titre, il s’interroge sur la possibilité d’un consensus au sein de l’*Institut* au sujet du terme « indirectement », qui figure à cette disposition. Il suggère toutefois de réserver la discussion de fond pour plus tard.

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Il regrette que le projet de résolution semble exclure la Cour internationale de Justice de son champ. Or, dans l'éventualité où cette approche serait retenue, il estime qu'il faudrait signaler cette exclusion expressément dans le libellé de l'article. Pour ce faire, il propose l'ajout de l'expression « à l'exclusion d'un éventuel contrôle par la Cour internationale de Justice ou toute autre juridiction universelle » à la fin de la lettre (a). Sinon, M. Pellet maintient qu'il faut introduire la Cour internationale de Justice dans le projet de résolution.

Se penchant sur la lettre (c) de l'article 1, il souligne que la version française comprend une précision qui ne figure pas dans le texte anglais, c'est-à-dire les termes « ou tout autre organe subsidiaire mandaté à cet effet » qui apparaissent après l'expression « les Comités de sanction ». Il trouve qu'il serait utile d'aligner le texte anglais sur la version française. Finalement, M. Pellet soulève une observation relativement à la lettre (d) de l'article 1. Contrairement à la version française qui se lit bien, le texte anglais devrait débiter par « [t]hese implementation measures are measures to be taken ... », plutôt que de se référer au titre de l'article à l'aide du terme « [t]hese » seulement. Cette observation vaut pour tout le projet de résolution.

The *President* stressed that Mr Pellet had raised important points, especially the proposal to first discuss Article 3 of the draft Resolution before opening the debate surrounding Article 1. While he confirmed that this approach would not constitute a formal amendment, he queried whether this could be one way to proceed with the plenary discussion.

The *Rapporteur* opined that Article 3 was very complicated and preferred to first conclude the discussion on Articles 1 and 2, and to address all other provisions on a one-by-one basis. That said, he did not exclude the possibility of coming back to provisions discussed earlier at a later stage of the debate.

M. *Ranjeva* souhaite offrir des observations à caractère général. Premièrement, il invite le comité de rédaction à clarifier l'applicabilité du projet de résolution aux décisions de la Cour internationale de Justice et des autres juridictions pertinentes. Deuxièmement, il fait observer que l'usage des adverbes – plus précisément les termes « directement », « indirectement » et « également » à la lettre (a) de l'article 1 – prête à confusion. Il préconise le remaniement de la deuxième phrase de cette disposition, en y substituant les termes « [u]n tel contrôle peut être exercé sur la décision en cause et/ou sur sa mise en œuvre ». Finalement, il s'étonne que la lettre (b) de l'article 1 semble créer une catégorie qui pourrait éventuellement signifier que des Etats puissent s'affranchir de l'obligation d'obéissance, alors que les résolutions du Conseil de sécurité obligent les Etats par principe.

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M. *Kamto* avance des remarques d'ordre essentiellement rédactionnel et s'interroge sur la conformité du projet de résolution au modèle de rédaction de l'Institut. Les dispositions comprises sous le titre « Expressions employées » à l'article 1 lui posent problème. En particulier, il relève que l'article 1 débute en donnant une définition de contrôle juridictionnel mais rappelle que l'Institut n'est pas mandaté pour adopter des définitions d'ordre général. En définitive, il souligne que les deux premières phrases de l'article 1 n'échappent pas à cette impression et il est plutôt en faveur de l'adoption de définitions aux fins de la résolution. Il suggère que la résolution se résume à l'essentiel, sans que les lettres (b), (c) et (d) définissent les termes qui y sont visés de manière générale. Par exemple, il n'est pas nécessaire de préciser que « [p]ar décision du Conseil de sécurité, il faut entendre ... » car il est suffisant d'indiquer « [d]écision du Conseil de sécurité : toute décision prise par le Conseil de sécurité. »

Le *Secrétaire général* invite les membres à faire suivre toutes questions et propositions d'amendement purement de style ou de forme au comité de rédaction, plutôt que de les présenter à l'assemblée plénière. Il rappelle que l'article 32 du règlement permet de présenter par écrit au Président toutes propositions et tous amendements, ce que certains membres ont déjà fait. Il insiste sur le besoin d'avancer dans les travaux et de procéder au vote.

Mr *Reisman* reflected on the fact that the function of judicial review was not to establish the content of the reviewed decision, but rather to set aside said decision if it was not in conformity with the applicable law. What was of critical interest here were the consequences of such review rather than the intellectual operation *per se*. Such mechanism was therefore a very powerful intervention in the constitutional decision-making process of the United Nations, highlighting the tremendous importance of the Resolution under discussion. Mr Reisman therefore suggested revising the draft Resolution with a view to focusing on this essential question of setting aside an act if it was not in conformity with the applicable law.

Sir Christopher *Greenwood* wished to comment on the tentative alternative titles of the draft Resolution. Were the more restrictive title to be adopted, it would make a difference with regard to the content of the substantive provisions of the instrument. He therefore pondered whether it would not be more appropriate to first discuss the scope of the Resolution and its title. In such case, he would favour a focus on targeted sanctions so that the *Institut's* contribution through this Resolution would be more relevant.

The *President* welcomed this fundamental observation before giving the floor to Mrs Xue.

Referring to Article 1(a) of the draft Resolution, Mrs *Xue* concurred with Mr *Kamto* about the importance of this provision and that its discussion was not purely a drafting exercise. Its first sentences were as a matter of fact very

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general and raised questions as to what was actually meant to be addressed in the context of the Resolution. In fact, there was no international definition of judicial review. Such definition would in addition bear on the scope of the present Resolution. However, the content of Article 1(a) was difficult to reconcile with the draft Resolution's guiding principles. Consequently, Mrs Xue suggested that the plenary reconsider and review the definition set out at Article 3. According to her, these definitions could be substantially narrowed down to ensure that the scope of the draft Resolution was not too ambitious.

The *President* recalled that Mr Reisman and Sir Christopher Greenwood had suggested narrowing down the notion of judicial review itself and only in respect to targeted sanctions, respectively. The President offered to begin by debating those two issues before addressing the remainder of the draft Resolution. He gave the floor to the Rapporteur.

The *Rapporteur* welcomed Sir Christopher Greenwood's suggestions about reviewing the title first, as it would ease the remaining work. However, he argued that the debate should first take place on the title, followed by Articles 1 and 3, and only then by a discussion of the preamble.

Mrs *Arsanjani* agreed with the Rapporteur's proposal to examine the title first. She further suggested that the term "in the field of" be deleted, and the relevant phrase revised to "Judicial Review of Measures Implementing Targeted Sanctions".

Pour M. *Verhoeven*, le contrôle juridictionnel est celui mené par une juridiction au sujet de tout acte. Tout en relevant la difficulté accrue que le contrôle d'une décision politique emporte, il estime donc aisé de délimiter de manière fonctionnelle le sujet à l'étude.

Mr *Schrijver* believed that the reference to the Security Council should be kept in the title to ensure that the scope of the Resolution excluded other international organisations or decision-makers at the international level. He also wondered whether the adjective "judicial" was really needed as listing and delisting procedures, which were not of a judicial nature, were addressed in the Resolution. He therefore suggested shortening the title to "Review of Security Council Decisions in the Field of Targeted Sanctions", or to a shorter alternative.

The *President* understood Mr Schrijver's suggestion implying the inclusion of the topics of listing and delisting and other peacekeeping operations in the scope of the Resolution. These were matters that would be decided once the discussion of the title had been concluded.

Mr *Koroma* reminded the plenary that an editorial committee would undertake specific drafting changes after their discussion. Welcoming Sir Christopher Greenwood's proposal, he favoured the following version of the title: "Review of Security Council Decisions in the Field of Targeted Sanctions".

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Noting an emerging consensus, the *President* suggested proceeding to a vote on this proposal.

Sir Kenneth *Keith* expressed his concerns about the title's narrowness which contrasted with non-judicial matters dealt with at Articles 7 to 11 of the draft Resolution. He questioned whether the term "judicial" should appear at all in the title. In his view, limiting the title to judicial review will inevitably limit the scope of the text. Reiterating an opinion that he had defended earlier, he advocated that the resulting provision should govern the "scope" of the draft Resolution's terms rather than their "use".

The *President* noted that Sir Kenneth *Keith*'s last comment referred more to Article 1 than the title. He added that debate should resume on this provision after a vote on the title had taken place.

Mr *Oxman* suggested combining the proposals already submitted in the following manner: "Review of Measures Implementing Security Council Decisions in the Field of Targeted Sanctions".

M. *Pellet* soutient la proposition de M. Schrijver, qui rejoint aussi celle avancée par Sir Kenneth *Keith*, de supprimer l'adjectif « judicial » dans le titre, ce qui donnerait en français : « Le contrôle des décisions du Conseil de sécurité en matière de sanctions individuelles. » Par ailleurs, il fait part de son désaccord avec la proposition de Mme *Arsanjani* qui, selon lui, reviendrait à effacer les articles 2 et 3 de la résolution dans la mesure où cette dernière porte tout autant sur le contrôle que sur le non-contrôle des résolutions du Conseil de sécurité.

The *President* invited the Rapporteur to make a new proposal.

The *Rapporteur* proposed the following title: "Review of Measures Implementing Decisions of the Security Council in the Field of Targeted Sanctions".

Mr *Benvenisti* suggested deleting "Measures" in this proposal.

Mrs *Arsanjani* queried what was being put to a vote and argued that, contrary to what Mr *Pellet* submitted, her proposal would not limit the scope of the Resolution.

The *Secretary-General* recalled that, according to the practice of the *Institut*, a proposal made by the Rapporteur was submitted in its entirety to the plenary for a vote. He added that Members could vote against that proposal, should they wish to do so.

Mr *Reisman* expressed his willingness to vote on the proposed title.

Dans un nouveau point d'ordre, le *Secrétaire général* rappelle la procédure à suivre en matière de vote en séance plénière : le Rapporteur lit premièrement la proposition et le Président soumet ensuite la proposition au vote ; et la même procédure est répétée pour chaque article avant le vote final sur la résolution dans son entièreté.

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Mr *Lowe* expressed his deep concern regarding the forthcoming vote on the title. To him, such a change would call into question the relevance of the Commission's background work in relation to the Resolution being put to a vote.

The *President* agreed with Sir Christopher Greenwood's earlier view that the title change might imply that peacekeeping operations had to be excised from the draft Resolution. However, he recalled Mrs Arsanjani's assurances that her proposal would not affect the substantive provisions of the draft.

Le *Secrétaire général* intervient pour rappeler que la séance plénière a la compétence pour changer les titres des résolutions. S'il comprend les préoccupations de M. Lowe, la séance plénière n'en a pas moins compétence pour décider sur la base du travail accompli.

The *Rapporteur* added that it had been agreed during the Commission's deliberations that the title would in fact only be changed by the plenary. He hoped that these clarifications would alleviate Mr Lowe's concerns.

The *President* asked the *Rapporteur* whether he had a final proposal to submit to the plenary.

The *Rapporteur* introduced the proposed new title in the two working languages. He repeated the English version of the title: "Review of Measures Implementing Decisions of the Security Council in the Field of Targeted Sanctions". Continuing in French, he provided the translation of the title, which read as follows: "Contrôle des mesures de mise en œuvre des décisions du Conseil de sécurité en matière de sanctions ciblées".

The *President* invited the Members to vote on the proposed new title of the draft Resolution.

Le *Secrétaire général* annonce que les résultats du vote à main levée sont les suivants : 35 voix pour, 8 voix contre et 8 abstentions.

The *President* observed that there was a proposal concerning Article 1(a) of the draft Resolution.

The *Rapporteur* indicated that, when examining that provision, the suggestions made by Mr Tyagi should be taken into consideration. He recalled that according to those suggestions, two key terms were missing from Article 1, namely "international rule of law" and "presidential statements". The *Rapporteur* disagreed with the first suggestion.

Mr *Tyagi* expressed the view that the amendment was clear but wished to draw attention to another amendment relating to a preambular paragraph.

The *President* interjected to postpone the discussion of that additional amendment.

The *Rapporteur* favoured the retention of the text of Article 1 as it currently stood, but explained that the expression "a decision or an act" was meant to include other acts, such as "presidential statements" by the Security

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Council that had been mentioned by Mr Tyagi. He opined that this provision should be put to a vote.

M. *Ranjeva* n'a pas d'objection à formuler sur le texte de l'article 1 mais puisque le titre du projet de résolution a été changé, il suggère qu'on supprime l'adjectif « juridictionnel » à la lettre a). Se ralliant en partie à la position défendue par M. Kamto, il propose de remanier le texte de la lettre a), qu'il intitulerait tout simplement « Contrôle », comme suit : « Le contrôle s'entend du contrôle *ex post facto* d'une décision ou de tout acte dans le but de vérifier s'ils sont conformes au droit applicable. Un tel contrôle peut être exercé directement sur la décision ou indirectement sur sa mise en œuvre ». Dans l'éventualité où le texte viserait le contrôle juridictionnel, M. *Ranjeva* se demande si ce dernier serait *ultra petita* par rapport au titre même du projet de résolution, et pourrait créer de la confusion dans l'esprit du lecteur. En revanche, il rappelle que, du point de vue *rationae materiae*, ce contrôle pourrait viser des mesures prises par des Etats ou des organisations.

The *President* mentioned that the Drafting Committee would look into the rationale behind this Article when revising its text. He opined that the deletion of the word “judicial” in Article 1(a) could be accommodated to align with the new title of the draft Resolution.

Mrs *Arsanjani* indicated that she agreed with Mr *Ranjeva*'s proposal. She further suggested deleting letter (a) as it did not add much to the text, and expressed doubt as to whether providing a general definition would be helpful at this stage.

Mr *Koroma* considered that the sentences of Article 1 on the use of terms should be reordered so that the second and third sentences came first in that provision. He did not see the necessity of providing a general definition and endorsed the view that the relevant terms should be defined “In the context of this Resolution”, as per the wording of the third sentence.

Sir Christopher *Greenwood* agreed that the idea of a scope provision to be included as an Article before Article 1, as suggested by Sir Kenneth Keith, should be useful in refining the subject matter of the draft Resolution. He supported Mr *Ranjeva*'s point that the definition of “review” would make it unnecessary to include a definition of “judicial review” at this stage, although such definition might be necessary later on if the Drafting Committee retained that concept in the final draft.

M. *Pellet* est d'accord avec M. *Ranjeva* pour l'instant. Il n'est en effet pas nécessaire d'inclure une définition du « contrôle juridictionnel » dans le projet de résolution actuel. Cependant, il reconnaît qu'une telle définition pourrait s'avérer nécessaire à l'avenir. Il rebondit sur les propos de M. *Ranjeva*, estimant que les deux premières phrases sont suffisantes et que le projet de résolution peut se limiter à la définition de « contrôle ». Il entérine également l'approche préconisée par M. *Koroma* en rappelant qu'il n'est pas nécessaire de fournir une définition générale, ou holistique, mais

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plutôt une définition « aux fins de la présente résolution ». M. Pellet ajoute qu'il faudrait remanier les deux premières phrases de la lettre a) comme suit : « Aux fins de la présente résolution, le contrôle s'entend du contrôle *ex post facto* d'une décision ou de tout autre acte du Conseil de sécurité dans le but de vérifier s'ils sont conformes au droit applicable. Un tel contrôle peut être exercé directement sur la décision en cause ou indirectement sur sa mise en œuvre ».

The *President* invited the Rapporteur to make a proposal in light of the foregoing discussion.

The *Rapporteur* concluded that the plenary was totally divided on parts of the draft Resolution which had never raised any controversy previously. He expressed regret at the current state of affairs. He suggested that the discussion be adjourned to give the Commission time to address the matters raised in the plenary. He concluded by stating that he had expected discussion over Article 3 but not on Articles 1 and 2, which had been submitted for the Members' consideration two years previously.

The *President* suspended the discussion on the draft Resolution and suggested that the Members take the matters discussed under advisement. In the meantime, he pointed out that the Rapporteur would consult informally with the Commission and submit proposals to the plenary in due course. He also encouraged any Members who were so inclined to consult informally with the Commission.

La séance est levée à 16 h 45.

Mercredi 6 septembre 2017 (après-midi)

La séance est ouverte à 14 h 50 sous la présidence de M. *Sreenivasa Rao*.

The *President* announced that order of business would commence with the vote on each Article of the draft Resolution of the 12th Commission. The Rapporteur had reconvened the Commission during the morning session, when all those with concerns had been able to express them, and the Members had then been presented with the revised draft Resolution before the luncheon adjournment. The President proposed proceeding directly to the vote on each draft Article, paragraph by paragraph, and that in the interests of time, those who wished to state their reasons would be given the opportunity to do so after the vote.

DRAFT RESOLUTION REVISED 3

Review of Measures Implementing Decisions of the Security Council in the Field of Targeted Sanctions

The Institute of International Law,

Considering that according to article 24, paragraph 2, of the United Nations Charter the Security Council shall “act in accordance with the purposes and principles of the United Nations” and that “the specific powers

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granted to the Security Council for the discharge of these duties are laid down in Chapters VI, VII, VIII, and XII”,

Considering the Declaration of the high-level meeting of the United Nations General Assembly on the rule of law at the national and international levels (A/RES/67/1* of 24 September 2012), paragraph 2 of which states 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 paragraph 29 of which, addressing the Security Council, emphasises 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”,

Recalling Security Council Resolution 2178 (2014) which reaffirms that Member States must ensure that “any measures 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”,

Keeping in mind that in general the rule of law includes a principle according to 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 adjudicated,¹

Noting that already in its Amsterdam session (1957), the Institute adopted a Resolution entitled “Judicial Redress Against the Decisions of International Organs”, emphasising that “every international organisation 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 organisations”,

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

Recognising that the realisation of the rule of law, including the protection of human rights, is itself dependent on the maintenance of international peace and security,

Noting the judgments of national as well as regional courts having declared that national or European Union measures implementing targeted sanctions against individuals or entities 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 fundamental rights and

¹ See on this the 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.

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freedoms, those being internationally shared values, of the persons concerned,

Adopts the following guiding principles:

Chapter I
General Provisions

Article 1
Use of terms

For the purposes of this Resolution:

- (a) “Review” means an *ex post facto* examination of a decision or an act with a view to establishing whether this decision or act is in conformity with applicable law.

Review can take various forms. It may be judicial, administrative or internal, and may be direct or indirect.

- (b) “Security Council decisions” means 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 or individuals as the case may be, and which are to be implemented.
- (c) “Targeted sanctions” means those decisions adopted by the Security Council, sanctions committees, or any other subsidiary organ 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” means measures taken by States or regional organisations to implement the sanctions as prescribed by the relevant Security Council decisions.

Article 2
Scope

This Resolution is concerned with the review of measures implementing decisions of the Security Council in the field of targeted sanctions taken by States or regional organisations.

Article 3
Legal framework for Security Council decisions

The Security Council shall act in conformity with the Charter of the United Nations including provisions protecting human rights.

Considering that it is first and foremost for the Security Council to establish a procedure for listing and delisting which meets the relevant standards of the Charter of the United Nations, including provisions protecting human rights, the Security Council should develop further procedures with a view to ensuring a better protection of targeted individuals or entities.

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Article 4

Security Council decisions and their review

The Charter of the United Nations does not permit review of decisions of the Security Council by national or regional courts.

However, measures implementing targeted sanctions may be reviewed by national or regional courts. In the course of such review, those courts may interpret Security Council decisions.

Chapter II

Measures implementing Targeted Sanctions of the Security Council

Article 5

Decision of sanctions committees to list and delist

- (a) Sanctions committees shall fully respect the Charter of the United Nations including provisions protection human rights.
- (b) The decision of a sanctions committee to list or not to delist an individual or a private entity may not be reviewed directly by regional or national courts.
- (c) The bar to review decisions of a sanctions committee as referred to in (b) above does not preclude a review of implementation measures taken by States or regional organisations in consequence of such decisions.

Chapter III

Listing and Delisting

Article 6

Listing and delisting procedures and national or regional courts

Further improvements in the listing or delisting procedure by the Security Council would be consistent with general principles of law and could, moreover, reduce the necessity felt by targeted individuals or entities to have recourse to national or regional courts.

Article 7

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

- (a) The procedure, in particular the Ombudsperson procedure, established for delisting 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 sanctions committees in their 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 others which equally target individuals and private entities with the same possible consequences for the enjoyment of human rights.

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- (c) Accordingly, the Institute recommends that the Ombudsperson procedure be applied to all such regimes, present and future, when providing for the prescription of targeted sanctions and that its procedure is rendered more transparent.
- (d) The Institute further recommends that the Ombudsperson be fully independent and that such independence be secured by establishing an appropriate institution.

Article 8

Further improvements to the Security Council procedure on listing and delisting

- (a) In accordance with Article 3 above, the Security Council should improve procedures on listing and delisting. Such improvements may include for example:
 - strengthening of the internal review procedure by the Security Council;
 - establishment of a periodic review as to whether the conditions of the targeted sanctions on a particular individual or entity are still met; and
 - leaving the implementing States or regional organisations some discretionary power concerning the implementation of the measures requested, by taking into consideration the circumstances of a 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
Review**

Article 9

Identifying individuals or entities for listing and delisting

Taking into account that the identification of individuals and entities for listing originates with the States taking such initiative, the Institute underlines that:

- (a) such process possibly leading to a listing should be transparent for the targeted individual or entity;
- (b) considering the possible human rights consequences of listing, such process shall respect international, regional and national human rights standards; and
- (c) the individual or entity be provided with an opportunity to have the national decision on their listing judicially reviewed according to the relevant national legal system.

LE CONTRÔLE JURIDICTIONNEL DES DÉCISIONS DU CONSEIL DE SÉCURITÉ

This principle shall guide the authorities of the designating State, of the State of nationality or of the State of residence, as the case may be, if they are considering initiating or supporting the delisting of the individual or entity concerned.

The national authorities as well as the entities engaged in this process of listing and delisting shall take into account the object and purpose of targeted sanctions.

Article 10

Implementing targeted sanctions

In implementing targeted sanctions, States or regional organisations act in the fulfilment of their obligations under the Charter of the United Nations in respect of decisions of the Security Council.

This does not exclude that implementation measures undertaken by States or regional organisations may be reviewed as set forth in Article 3.

Article 11

Review by regional or national courts

- (a) Any judicial review of measures implementing targeted sanctions shall take into account the object and purpose of such sanctions. Particular attention is to be paid in this context to Article 103 of the Charter of the United Nations.
- (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) Review of measures implementing Security Council decisions shall be consistent with all relevant provisions of the Charter of the United Nations, including in particular Articles 24, 25 and 103.
- (d) In reviewing implementation measures and declaring them not to be in conformity with relevant human rights standards the regional or national courts should take into account that their decision does not absolve the implementing State or regional organisation from its obligation to fulfil its international commitments towards the United Nations. Such commitments remain valid.

PROJET DE RESOLUTION REVISE 3

Contrôle des mesures de mise en œuvre des décisions du Conseil de sécurité en matière de sanctions ciblées

L'Institut de Droit international,

Prenant en considération l'article 24, paragraphe 2, de la Charte des Nations Unies selon lequel le Conseil de sécurité « agit conformément aux buts et principes des Nations Unies » et qui prévoit que « les pouvoirs

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spécifiques accordés au Conseil de sécurité pour lui permettre d'accomplir lesdits devoirs sont définis aux Chapitres VI, VII, VIII et XII »,

Prenant en considération la Déclaration adoptée le 24 septembre 2012 par l'Assemblée générale lors de la réunion de haut niveau sur les exigences l'état de droit (*rule of law*) aux niveaux national et international (A/RES/67/1*), dans le paragraphe 2 de laquelle il est souligné que : (i) ces exigences sont applicables à tous Etats et organisations internationales, en ce compris les Nations Unies et leurs principaux organes ; (ii) leur respect comme leur développement doivent inspirer toutes leurs actions ; (iii) et enfin que, dans son paragraphe 29, l'Assemblée générale encourage le Conseil de Sécurité à continuer de s'assurer que les sanctions soient soigneusement ciblées, à l'appui d'objectifs clairs, de manière à réduire au maximum d'éventuelles conséquences préjudiciables,

Rappelant la résolution du Conseil de sécurité 2178(2014) réaffirmant que les Etats membres doivent veiller « à ce que les mesures qu'ils prennent pour combattre le terrorisme soient conformes à toutes les obligations que leur fait le droit international, en particulier le droit international des droits de l'homme, le droit international des réfugiés et le droit international humanitaire »,

Gardant à l'esprit que, de manière générale, l'état de droit (*rule of law*) participe d'un principe aux termes duquel toutes personnes, privées ou publiques - en ce compris l'Etat lui-même -, doivent rendre compte de toute loi dûment adoptée, publiée et mise en œuvre en toute indépendance¹,

Rappelant que, dès 1957, l'Institut a adopté à Amsterdam une résolution sur le « recours judiciaire à instituer contre les décisions d'organes internationaux » (vol. 47-I), dans laquelle il est souligné que toute organisation internationale a le devoir de respecter le droit et de s'assurer que ses agents et autres fonctionnaires ou préposés y veilleront attentivement,

Conscient que l'objectif de l'Institut doit être de promouvoir l'état de droit (*rule of law*) au rang d'un principe fondamental dont il importe que le respect soit assuré tant par les Etats que par les organisations internationales, en ce compris les Nations Unies et leurs principaux organes,

Considérant que l'accomplissement de l'état de droit, y inclus la protection des droits de l'homme, dépend du maintien de la paix et de la sécurité internationale,

Prenant note également des décisions prises par des juridictions, tant nationales que régionales, qui ont déclaré l'incompatibilité avec les droits fondamentaux de la personne humaine, en ce compris le droit à un procès

¹ Voy. le Rapport du Secrétaire général sur le rétablissement de l'état de droit et l'administration de la justice pendant la période de transition dans les sociétés en proie à un conflit ou sortant d'un conflit (S/2004/616), par. 6.

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équitable, de certaines mesures adoptées par des autorités nationales ou par l'Union européenne pour mettre en œuvre des sanctions ciblées contre des particuliers ou autres entités privées,

Notant enfin que, dans l'adoption des mesures appelées à mettre en œuvre des sanctions ciblées, il importe de veiller à ce que la protection des droits et libertés fondamentaux des personnes concernées soit assurée, ceux-ci exprimant des valeurs internationalement partagées par tous,

Adopte les principes directeurs suivants :

Chapitre I

Dispositions générales

Article 1

Expressions employées

S'agissant de la présente résolution :

- a) Par « contrôle », il faut entendre le contrôle *ex post facto* d'une décision ou de tout autre acte juridictionnel dans le but de vérifier s'ils sont conformes au droit applicable.

Le contrôle peut être de nature différente. Il peut être juridictionnel, administratif ou interne.

- b) Par « décision du Conseil de sécurité », il faut entendre toute décision prise par le Conseil lui-même ou par un organe subsidiaire dûment habilité – tel un comité des sanctions – dont les décisions obligent tant les Etats, qu'ils en soient ou non membres, que tout autre entité ou particulier visé par le Conseil de sécurité.
- c) Par « sanctions ciblées », il faut entendre les décisions du Conseil de sécurité, des Comités de sanction ou de tout autre organe subsidiaire mandaté à cet effet qui obligent tout Etat à prendre les mesures requises pour donner effet aux sanctions adoptées à l'encontre de particuliers ou d'entités privées.
- d) Par « mesures d'exécution » il faut entendre les mesures qui sont prises par des Etats ou par des organisations régionales pour mettre en œuvre les sanctions décidées par le Conseil de sécurité.

Article 2

Portée

La présente résolution porte sur les mesures de mise en œuvre des décisions du Conseil de sécurité en matière de sanctions ciblées adoptées par les Etats ou les organisations régionales.

Article 3

Cadre juridique aux décisions du Conseil de sécurité

Le Conseil de sécurité est tenu d'agir conformément à la Charte des Nations Unies y inclus les dispositions protégeant les droits de l'homme.

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Considérant qu'il est de la plus haute importance pour le Conseil de sécurité d'établir des procédures d'inscription et de radiation qui remplissent les standards de la Charte des Nations Unies, y inclus les dispositions protégeant les droits de l'homme, le Conseil de sécurité devrait établir des procédures supplémentaires qui assurent une meilleure protection des individus ou entités ciblées.

Article 4

Les décisions du Conseil de sécurité et leur contrôle

La Charte des Nations Unies ne prévoit pas le contrôle des décisions du Conseil de sécurité par les juridictions nationales ou régionales.

Toutefois, les mesures de mise en œuvre des sanctions ciblées peuvent faire l'objet d'un contrôle par les juridictions nationales ou régionales. Elles peuvent, lors de ce contrôle, interpréter les décisions du Conseil de sécurité.

Chapitre II

Mesures de mise en œuvre des sanctions ciblées du Conseil de sécurité

Article 5

Décisions d'inscription ou de radiation adoptées par les comités des sanctions

- a) Les comités des sanctions se conformeront pleinement aux dispositions de la Charte des Nations Unies, y inclus les dispositions protégeant les droits de l'homme.
- b) La décision d'inscrire ou de ne pas radier un particulier ou une entité privée d'une liste de sanctions, adoptée par un comité des sanctions, ne peut faire l'objet d'un contrôle direct par des juridictions régionales ou nationales.
- c) L'interdiction de soumettre à un tribunal les décisions d'un comité des sanctions, visée ci-dessus (b), ne préjuge pas du réexamen de mesures prises pour mettre en œuvre les dispositions adoptées par des Etats ou des organisations régionales afin de donner effet à ces décisions.

Chapitre III

Inscription et radiation

Article 6

Les procédures d'inscription et de radiation et les juridictions nationales ou régionales

Une amélioration de la procédure d'inscription ou de radiation par le Conseil de Sécurité serait conforme aux principes généraux de droit et pourrait réduire la nécessité éprouvée par des particuliers ou des entités privées d'avoir recours à des juridictions nationales ou régionales.

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Article 7

Amélioration de la procédure du médiateur selon les résolutions 1267 (1999) et 1989 (2011)

- a) La procédure applicable pour la radiation et en particulier celle du recours à un médiateur améliorent de manière significative la possibilité pour les requérants d'y apporter des corrections. On sait qu'elle fut originellement conçue comme un mécanisme d'assistance au comité des sanctions, lorsque celui-ci était appelé moins à décider d'une radiation que d'en réviser les termes.
- b) La procédure n'est applicable qu'à certains régimes de sanctions. Elle ne l'est pas s'agissant des autres régimes, lesquels néanmoins visent également des particuliers ou des entités privées ; dans l'une et l'autre hypothèses, les conséquences peuvent néanmoins être comparables, sinon identiques, à tout le moins pour ce qui concerne les droits de l'homme.
- c) L'Institut recommande dès lors que le recours à un médiateur soit organisé dans tout autre régime d'une telle nature, présent ou futur, qui organise des sanctions ciblées et que cette procédure soit plus transparente.
- d) Si besoin est, l'Institut recommande que le médiateur soit pleinement indépendant et que cette indépendance soit assurée par la mise en place d'une institution appropriée.

Article 8

Autres améliorations des procédures d'inscription et de radiation organisées par le Conseil de sécurité

- a) Conformément à l'article 3 ci-dessus, le Conseil de sécurité devrait améliorer les procédures d'inscription et de radiation. Ces améliorations peuvent inclure par exemple :
 - renforcer la procédure interne de révision qui est propre au Conseil de sécurité ;
 - organiser une révision périodique de manière à vérifier si les sanctions ciblées contre des particuliers ou d'autres entités quelconques demeurent pertinentes ; et
 - laisser aux Etats et aux organisations régionales un certain pouvoir discrétionnaire dans la mise en œuvre des mesures prises à cet effet, en prenant en considération les circonstances propres à chaque cas particulier.
- b) Une autre possibilité d'améliorer la procédure d'inscription serait d'impliquer l'Etat de la nationalité et l'Etat de résidence dans la procédure dont un Etat tiers aurait pris l'initiative.

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Chapitre IV

Contrôle

Article 9

Identification des particuliers ou des entités pour l'inscription et la radiation dans la liste

Sachant que l'identification des individus ou autres entités visés par une inscription tire son origine des Etats qui en prennent l'initiative, il est à souligner que :

- a) la technique qui conduit à une inscription devrait être d'une parfaite transparence pour celui qui en est le destinataire, que ce soit un particulier ou toute autre entité privée ;
- b) tenant compte des conséquences possibles que l'inscription peut avoir sur les droits de l'homme, une telle procédure doit respecter les standards internationaux, régionaux et nationaux en matière des droits de l'homme ;
- c) tout particulier ou entité privée doit se voir reconnaître la possibilité de mettre en cause devant un tribunal la décision nationale concernant son inscription sur la liste conformément aux dispositions pertinentes du droit national

Ces principes doivent être suivis par les autorités de l'Etat ayant pris l'initiative de l'inscription, celles de l'Etat de nationalité et celles de l'Etat de résidence, selon les particularités de l'espèce, lorsqu'elles envisagent de demander ou de soutenir la radiation du particulier ou de l'entité concerné.

Tant les autorités nationales que les entités impliquées dans ce processus d'inscription et de radiation doivent prendre en considération l'objet et la raison d'être des sanctions ciblées.

Article 10

Mise en œuvre des sanctions ciblées

Lorsqu'ils mettent en œuvre des sanctions ciblées, les Etats ou les organisations régionales doivent agir conformément à leurs obligations découlant de la Charte des Nations Unies en ce qui concerne les décisions du Conseil de sécurité.

Ceci n'exclut pas que les mesures prises à cet effet par des Etats ou par des organisations régionales puissent être contrôlées conformément à l'article 3.

Article 11

Contrôle par les tribunaux nationaux ou régionaux

- a) Tout contrôle juridictionnel des mesures de mise en œuvre des sanctions ciblées doit tenir pleinement compte de l'objet et du but des sanctions. Une attention particulière doit être réservée en pareil contexte à l'article 103 de la Charte des Nations Unies.

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- b) Il convient de tenir compte de tout contrôle juridictionnel, national ou régional, qui aurait été exercé à ce propos, de manière à vérifier si le demandeur a sollicité ou non une radiation conformément à la procédure adoptée à cet effet. Toute recommandation éventuelle du médiateur doit surtout être dûment prise en considération à cet égard.
- c) Le contrôle des mesures de mise en œuvre des décisions du Conseil de sécurité doit être conforme aux dispositions pertinentes de la Charte des Nations Unies, et en particulier des articles 24, 25 et 103.
- d) Si la mise en œuvre des sanctions est déclarée non conforme aux standards pertinents en matière de protection des droits de l'homme, les cours et tribunaux, qu'ils soient nationaux ou régionaux, devraient tenir compte de ce que leur décision ne dispense pas l'Etat ou les organisations régionales de s'acquitter de leurs obligations envers les Nations Unies, sachant que ces obligations demeurent pleinement en vigueur.

Mr *Francioni* observed that the word “*facto*” in draft Article 1(a), was superfluous and “*ex post*” would have been enough.

The *President* confirmed that the draft Resolution under consideration had been drafted in English and that the French version was a translation. He invited Members to confine their comments to points of substance only, and to address issues concerning drafting or translation in writing to the Drafting Committee. The *President* gave the floor to the *Rapporteur* to read each Article, paragraph by paragraph.

The *Rapporteur*, for the sake of completeness, started by reading the revised title of the Resolution, which had already been adopted as amended, and proceeded to the reading of Article 1.

The *President* called for a vote by show of hands after the reading of each paragraph, and announced the following results:

Article 1(a): 44 votes in favour, 2 votes against, 2 abstentions.

Article 1(b): 39 votes in favour, 3 votes against, 5 abstentions.

The *Rapporteur* read Article 1(c).

Mrs *Xue* raised a question of substance in respect of the phrase, “such measures as provided for in the Security Council resolution concerned” in Article 1(c). It was not clear whether or not the phrase “such measures” in this part had the same connotation as the “measures” in the title of the Resolution or in Article 1(d). This was more than a drafting or linguistic question, since it affected the substance of the provision, and as such it would have a bearing on her vote.

The *President* considered that this point of substance could be taken into consideration in voting. He called for a vote by show of hands on Article 1(c), and announced the following results:

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Article 1(c): 37 votes in favour, 2 votes against, 4 abstentions.

The *Rapporteur* proceeded with the reading of Article 1(d).

The *President* called for a vote by show of hands and announced the following results:

Article 1(d): 44 in favour, 2 votes against, 2 abstentions.

The *Rapporteur* proceeded with the reading of Articles 2 and 3.

The *President* called for a vote by show of hands and announced the following results:

Article 2: 44 in favour, 2 against, 3 abstentions.

Article 3, first paragraph: 42 in favour, 0 votes against, 5 abstentions.

Mr *Pellet* said that he had thought the agreement was that Members could state their positions after the vote on each paragraph.

Mr *Koroma* supported the intervention of Mr *Pellet*.

The *President* affirmed that the session would continue on the basis that those who wished to make a statement after voting on each paragraph would be afforded the opportunity to do so, and gave the floor to Mr *Pellet*.

M. *Pellet* explique que son abstention sur les projets d'articles 3 et 4 n'est pas le fruit d'une opposition de principe au contenu de ces articles, qui lui paraît tout à fait acceptable. Ce que M. *Pellet* regrette vivement est ce qui manque et considère que parfois les silences sont plus éloquents. Il explique s'être inscrit dans une commission qui devait se pencher sur la question du contrôle juridictionnel des résolutions du Conseil de sécurité. Les rapports du Rapporteur traitaient d'ailleurs en profondeur de cette thématique, qui correspondait au mandat décidé par l'Institut tel qu'il est reflété dans le titre de la Commission : « Le contrôle juridictionnel des décisions du Conseil de Sécurité (ONU) ». En outre, les rapports traitaient à la fois du contrôle direct des résolutions et du contrôle indirect, à l'occasion de leur mise en œuvre, une approche qui lui paraissait tout à fait raisonnable.

Selon M. *Pellet*, le mandat donné a été modifié, et la commission détournée de sa mission initiale, suite à une offensive imprévue et imprévisible menée par certains membres durant la réunion tenue par la 12^{ème} commission le 5 septembre 2017. Par conséquent, l'objet de la résolution ne porte plus sur le contrôle juridictionnel, mais sur le contrôle tout court, et il ne concerne plus les résolutions du Conseil de sécurité, mais les mesures de mise en œuvre de ces résolutions. M. *Pellet* exprime son vif désaccord avec cette modification impromptue de l'objet des travaux en cours, qui conduit à vider complètement l'article 4 de sa substance. Cette disposition devait couvrir trois aspects : premièrement, le fait que les juridictions nationales et régionales ne pouvaient procéder directement au contrôle des résolutions du Conseil de sécurité ; deuxièmement, qu'elles pouvaient néanmoins contrôler la validité des mesures de mise en œuvre de ces résolutions, qu'elles pouvaient par ailleurs interpréter à cette occasion ; et troisièmement, que la

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Cour internationale de justice et d'autres juridictions universelles pouvaient contrôler directement les résolutions du Conseil de sécurité. Même si la dernière proposition n'était pas susceptible de recueillir un vaste consensus, les deux premières l'étaient. M. Pellet exprime dès lors son regret que ces aspects, en entière harmonie avec le mandat de la 12^{ème} commission, ne se retrouvent pas dans le texte de la résolution.

Mr *Ronzitti* stated that he had voted against Article 1(b) because the revised draft did not include any clarifications regarding recommendations of the Security Council and thus did not take into account the question he had raised earlier.

The *President* called for a vote on the second paragraph of Article 3 and announced the following results:

Article 3, second paragraph : 48 in favour, 0 votes against, 2 abstentions.

M. *Mahiou* explique que les raisons de son abstention se recoupent très largement avec celles évoquées par M. Pellet.

Mme *Stern* partage l'avis de M. Pellet quant au fait que l'article 4 a été vidé de sa substance. Celui-ci lui apparaît en outre comme incohérent et la résolution déséquilibrée et dépourvue de son sens initial.

Mrs *Xue* stated that she had intended to limit her remarks at the end of the voting, but felt very strongly about certain paragraphs. In Article 1(c), there was an inherent contradiction in the definition. In the definition of targeted sanctions, reference was made to "measures" found in the Security Council decision itself, whereas, in the rest of the Resolution, the distinction was made between Security Council decisions, on the one hand, and measures of implementation, on the other.

The *Rapporteur* read Article 4.

M. *Mahiou* demande la parole en expliquant que lorsqu'un article est mis oralement au vote, les membres de l'assemblée devraient avoir le droit de proposer des amendements. Il souhaite ainsi soumettre à l'attention des membres un amendement à l'article 4, qui vise uniquement à remplacer le verbe « ne permet pas » par le verbe « ne prévoit pas », qui lui paraît non seulement refléter plus fidèlement la situation juridique, mais qui, en outre, pourrait permettre de réunir une plus large majorité. M. *Mahiou* explique que s'agissant du changement d'un seul mot, il considère possible de proposer cet amendement oralement.

The *President* stated that amendments would lead to long discussions and would make the adoption of the Resolution impossible. His proposition was that any comments from the Members of the *Institut* be put on the record after the vote.

M. *Pellet* considère qu'il peut paraître raisonnable, pour des raisons d'efficacité, de ne pas permettre aux membres de la commission de proposer des amendements en plénière, car ils en avaient eu la possibilité durant les

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réunions de la commission, mais qu'en revanche l'argument ne lui paraît pas applicable aux autres membres de l'Institut qui n'ont pas eu l'occasion de faire de telles propositions. Il soutient ainsi la suggestion de M. Mahiou.

The *Rapporteur* agreed that members of the Commission should not introduce drafting amendments, as they had already had the full opportunity to do so prior to the session. However, other Members should be permitted to propose drafting amendments in the plenary. These amendments should be voted on, followed by a vote on the text as amended.

Mr *Kazazi* voiced support for the position set forth by Mr Pellet. Since the plenary would further proceed to a vote on the Resolution by roll call, it was necessary to have the opportunity to make comments on the text that would be voted upon. He objected to the idea of drafting changes being made after the plenary had voted on the text.

The *President* confirmed that members of the 12th Commission should not propose amendments and that other Members were permitted to propose amendments in writing, with the exception of small amendments of one word.

M. *Ranjeva* considère que, dans sa rédaction actuelle, l'article 4 ne pourrait recueillir son adhésion. En revanche, la modification proposée par M. Mahiou le rendrait acceptable à ses yeux, car le premier paragraphe deviendrait un simple constat qui laisse la porte ouverte aux évolutions futures et non pas une conclusion à portée normative. Il propose dès lors que l'assemblée vote d'abord sur l'amendement de M. Mahiou.

Mr *Nolte* underlined however that, in the Commission's version, there was a balance between the two sentences of Article 4 and the amendment proposed by Mr Mahiou distorted this holistic approach. He noted that some votes could be gained, but some others could be lost.

The *Rapporteur* confirmed indeed that the two sentences were considered as a unit.

The *President* indicated that the amendment was a substantial one, and that he would put it to a vote.

M. *Verhoeven* demande que le texte sur lequel les membres sont appelés à voter soit clairement énoncé.

Mr *Tyagi* considered that the correct English translation of the French "ne prévoit pas" was not "does not foresee", as proposed by the *Rapporteur*, but "does not provide for". He considered that that was the text which should be put to the vote.

The *Rapporteur* agreed. He read out Article 4, with the amendment proposed by Mr Mahiou: "The Charter of the United Nations does not provide for the review of decisions of the Security Council by national or regional courts." Continuant en français, il lit la proposition d'amendement :

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« La Charte des Nations Unies ne prévoit pas le contrôle des décisions du Conseil de sécurité par les juridictions nationales ou régionales. »

The *President* called for a vote by show of hands to amend the first paragraph of Article 4 as proposed by Mr Mahiou, and announced the following results:

Amendment to Article 4, first paragraph: 36 votes in favour, 9 votes against, 5 abstentions.

Mr *Reisman* explained why he had voted against the amendment to the first paragraph of Article 4. It was not correct to say that the Charter of the United Nations “does not provide for” review of decisions of the Security Council by national or regional courts, because such language implied that the possibility of such review had not been considered. In fact, as Mrs Arsanjani had mentioned earlier, there had been two Belgian amendments to the Charter of the United Nations, proposed at the 1945 San Francisco Conference on International Organization. The first Belgian amendment had recommended the possibility of recourse by States to the Permanent Court of International Justice for judicial review of decisions or recommendations of the Security Council under Chapter VI. The second amendment had recommended establishing a proper interpretative organ, possibly the Court, for certain parts of the Charter. The Belgian recommendations were both voted down. The original version of Article 4 was therefore more accurate.

The *President* called for a vote by show of hands on Article 4 and announced the following results:

Article 4, first paragraph: 35 votes in favour, 3 votes against, 10 abstentions.

Article 4, second paragraph: 42 votes in favour, 1 vote against, 6 abstentions.

The *Secretary-General*, intervening in his personal capacity, explained why he could not vote in favour of Article 4. He found it astonishing to say that the Charter “does not foresee” or “does not permit” review by national courts, when it was not for the Charter to foresee such matters. The same was true of the second paragraph, which also related to matters not intended to be regulated by the Charter. A distinction could have been made between national and international courts. He agreed that there was controversy over whether review was limited to scrutiny of a decision for conformity with the Charter, or could go further and assess conformity with international law. But, in any case, an international court could carry out such review, whereas a national court’s decision might trigger consequences for the State, since the judicial decision could amount to a violation of the international obligations of that State. In his view, Article 4 should have made this distinction.

The *Rapporteur* read Article 5(a).

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Mr *Tyagi* voiced concern as to whether the term “Charter of the United Nations, including provisions protecting human rights” was to be understood as not including peremptory norms of international law. In his view, any decision of the Security Council and the Sanctions Committee had to be in conformity not only with the Charter but also with peremptory norms of international law.

The *President* called for a vote by show of hands on Article 5 and announced the following results:

Article 5(a): 42 votes in favour, 1 vote against, 6 abstentions.

Article 5(b): 40 votes in favour, 1 vote against, 9 abstentions.

Article 5(c): 39 votes in favour, 0 votes against, 8 abstentions.

Mr *Tyagi* explained that his abstention on Article 5(c) was due to the absence from that provision of any mention of international organisations. He noted that implementing measures could also be adopted by them.

The *Rapporteur* proceeded to the reading of Article 6.

The *President* called for a vote on Article 6 and announced the following results:

Article 6: 45 votes in favour, 0 votes against, 3 abstentions.

The *President*, after a reading of each letter of Article 7, announced the following results:

Article 7(a): 46 votes in favour, 0 votes against, 2 abstentions.

Article 7(b): 41 votes in favour, 0 votes against, 4 abstentions.

Article 7(c): 48 votes in favour, 0 votes against, 3 abstentions.

Article 7(d): 46 votes in favour, 0 votes against, 4 abstentions.

Mrs *Damrosch* wished to explain her abstention on Article 7(b) and (d). She considered them to be factually incorrect, because they did not take into account the latest resolutions adopted by the Security Council in 2017, specifically resolution S/RES/2368 of 20 July 2017. In the relevant provisions of that latest resolution, it was made clear that the targeted sanctions regime to which the Ombudsperson procedure applied, included not only the 1267(1999)/1989(2011) Al Qaida regime but also the ISIS regime as provided under S/RES/2253(2015).

Mrs *Damrosch* proposed that Article 7(b) be amended to read: “This procedure applies to certain sanctions regimes, in particular the S/RES 1267 (1999)/1989(2011)/2253(2015) sanctions regime, but not to others which likewise target individuals and private entities with similar possible consequences for the enjoyment of human rights.”

Mrs *Damrosch* proposed that Article 7(d) be amended to read: “The Institute further recommends that the Ombudsperson be fully independent and that such independence be secured by strengthening institutional support for the Office of the Ombudsperson.” The reason for this change was that the

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report of the 12th Commission, which had thoroughly taken account of developments up to a certain point, did not consider the Office of the Ombudsperson in its most recent form, as reflected in the provisions devoted to that Office in S/RES/2368 (20 July 2017).

Sir Christopher *Greenwood* voiced support for Mrs Damrosch's proposals for the reasons explained by her and added further suggestions of amendment to Article 7(b) to delete the words: "This procedure applies only to the S/RES/1267 (1999)/1989 (2011) sanctions regime but not to others which equally" and replaced them by "At present, this procedure is not applicable to all sanctions regimes which target individuals and private entities with possible consequences for the enjoyment of human rights."

In addition, Sir Christopher Greenwood proposed that, in letter (d), the words "establishing an appropriate institution" be amended to provide: "the establishment of the Office of the Ombudsperson as an independent institution with proper resources and support". This formulation seemed to him to be more accurate and to provide for a better protection of the individual rights.

M. *Pellet* abonde dans le sens des propositions faites par Mme Damrosch et Sir Christopher Greenwood. Même si elles sont faites à l'adresse du comité de rédaction, elles portent des changements substantiels qui doivent être soumis au vote en tant qu'amendements.

The *President* considered that the proposed amendments to Article 7(b) and (d) were long and should be put in writing. He therefore proposed to suspend the discussion and to continue with the consideration of the other provisions, before resuming the debate on those paragraphs and putting them to a further vote.

The *Rapporteur* proceeded to the reading of Article 8.

The *President* called for a vote on Article 8 and announced the following results:

Article 8(a): 44 votes in favour, 0 votes against, 3 abstentions.

Article 8(b): 45 votes in favour, 0 votes against, 4 abstentions.

The *President*, after reading the first paragraph of Article 9, letter by letter, called for a vote by show of hands on this Article, and announced the following results:

Article 9(1)(a): 42 votes in favour, 0 votes against, 4 abstentions.

Article 9(1)(b): 46 votes in favour, 0 votes against, 1 abstention.

Article 9(1)(c): 46 votes in favour, 0 votes against, 2 abstentions.

Mr *Nolte* explained that his abstention on letter (c) was due to the absence of any reference, alongside national decisions, to regional decisions, which should be amenable to judicial review.

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The *Rapporteur* considered this not to be a substantial amendment, but a question of consistency, to be dealt with in drafting.

Mr *Lowe* requested that the *Rapporteur* identify the principle to which the term “this principle” in the second paragraph of Article 9 was intended to refer.

The *Rapporteur* explained that the term “this principle” referred to the principles enunciated in letters (a) and (b) of the same Article, and acknowledged that the plural should therefore be used in the English text. He confirmed that the Drafting Committee would make this correction.

The *President*, after the reading of the second paragraph of Article 9 by the *Rapporteur*, called for a vote by show of hands and announced the following results:

Article 9, second paragraph: 46 votes in favour, 0 votes against, 2 abstentions.

The *President*, after the reading of the third paragraph of Article 9 by the *Rapporteur*, called for a vote by show of hands on this Article, and announced the following results:

Article 9, third paragraph: 49 votes in favour, 0 votes against, 1 abstention.

Mr *Oxman* observed, in relation to Article 10, that the Drafting Committee should update the reference to Article 3 by replacing it with Article 4.

Mr *Tyagi* considered that, in Article 10, but also in some other provisions of the draft Resolution, references should be made to international organisations rather than only to regional organisations. He considered that the former could also be involved in the implementation of Security Council resolutions.

The *Rapporteur* observed that the Commission had not considered the situation of the implementation by international organisations, and that it appeared too late to include any amendment for that purpose.

The *President* suggested that Mr *Tyagi* either put forward a formal amendment or make a statement of disapproval on the record.

Mrs *Stern*, like Mr *Tyagi*, was surprised by the absence of a reference to international organisations in Article 10.

Mr *Oxman*, by contrast, was of the view that the mention of international organisations would lead to intractable discussions on the respective role of regional and international organisations, and would affect the rest of the Resolution, including those paragraphs already adopted by vote.

The *President* announced that the discussion on Article 10 would be suspended pending the formal amendments to be proposed in writing by Mr *Tyagi*.

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The *Rapporteur* then proceeded to the reading of Article 11.

The *President*, after the reading of the first three letters of Article 11 by the *Rapporteur*, called for a vote by show of hands on Article 11(a), (b) and (c), and announced the following results:

Article 11(a): 38 votes in favour, 0 votes against, 5 abstentions.

Article 11(b): 44 votes in favour, 0 votes against, 4 abstentions.

Article 11(c): 47 votes in favour, 0 votes against, 2 abstentions.

The *Rapporteur* proceeded to read Article 11(d).

Mr *Nolte* considered that Article 11(d) lacked legal precision and should be amended. He proposed that the words “commitment towards” be replaced by “obligations under”. In the last sentence, the word “commitment” should be replaced by “obligations”.

Mr *Ronzitti* considered this paragraph to state the obvious and proposed its deletion.

The *President* noted that there were two proposals for amendment: one from Mr *Nolte* and one from Mr *Ronzitti*. He considered it logical to start by voting on the latter, this being the further in substance from the original text. He called for a vote by show of hands on the amendment proposed by Mr *Ronzitti* concerning the deletion of Article 11(d), and announced the following results: 8 votes in favour, 25 votes against, 3 abstentions.

The *Rapporteur* read Article 11(d) as amended by Mr. *Nolte*.

The *President* called for a vote by show of hands on Article 11(d), as amended by Mr *Nolte*, and announced the following results:

Article 11(d): 38 votes in favour, 2 votes against, 6 abstentions.

The *President* reverted to those Articles on which the discussion had been suspended, beginning with Article 7(b) and (d).

Mrs *Damrosch* repeated the reading of her proposal for the amendment of Article 7(b), as follows: “This procedure applies to certain sanctions regimes, in particular the S/RES 1267(1999)/1989(2011)/2253(2015) sanctions regime, but not to others which likewise target individuals and private entities with similar possible consequences for the enjoyment of human rights.”

Sir Christopher *Greenwood* reported his proposal, by way of alternative, that Article 7(b) be amended to read as follows: “At present, this procedure is not applicable to all sanctions regimes which target individuals and private entities with possible consequences for the enjoyment of human rights.” He added that in his view, in letter (d), the words “establishing an appropriate institution” might be deleted and replaced with a reference to the establishment of the Office of the Ombudsperson as an independent institution with proper resources and support.

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Mr *Nolte*, in relation to the proposed amendment to Article 7(d), was in favour of maintaining the proposal to establish a new institution. The proposed amendment took for granted the Office of the Ombudsman as the “appropriate institution”, whereas a more holistic change, in the form of the abstract language in the original letter (d), might help to guide more ambitious thinking that was destined to push forward the development of the law in this area.

Mrs *Damrosch* was of the view that a reference to strengthening support for the Office of the Ombudsperson was more accurate, given that there already was an “appropriate institution”.

The *Rapporteur* reminded the plenary of the background underlying the proposed Article 7(d). It was true that there was an Office, but this was not permanent, nor was it fully independent, since the staff were selected by the Secretary-General of the United Nations. He considered that, by definition, an “institution” was self-standing. The Office of the Ombudsperson did not meet this criterion, being internal to the United Nations. This lack of independence gave rise to problems of perception, which the Article was designed to address.

Sir Christopher *Greenwood*, acknowledging the explanations offered by Mrs *Damrosch* and the *Rapporteur*, proposed amending the relevant part of letter (d) to read: “establishing the Office of the Ombudsperson as an independent, properly resourced institution”.

The *Rapporteur* considered that this amendment would have the same effect intended by letter (d), and he was therefore in favour of it.

The *President* called for a vote by show of hands on Article 7(d), as amended, and announced the following results:

Article 7(d): 40 votes in favour, 1 vote against, 2 abstentions.

The *Rapporteur* turned to the amendment proposed by Mr *Tyagi* to Article 10, and explained that according to Mr *Tyagi*'s proposal, whenever the term “regional organisation” occurred in the Resolution, the text should be amended to include “international organisations”.

Mr *Tyagi* considered that the proposed amendment was consistent with Chapter VII of the Charter. Measures to implement sanctions could be taken by international organisations as well as by regional ones.

The *President* recalled that the *Rapporteur*'s response to this point was that it had not been considered by the 12th Commission.

Mr *Oxman* called for clarity as to the content of the text under discussion. If it was proposed to replace the word “regional” with “international” throughout the text, including Articles which had already been voted upon, it was necessary to identify precisely the Articles to be so amended.

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The *President* called for a vote by show of hands on the proposed amendment to Article 10, and announced the following results: 3 votes in favour, 32 votes against, 8 abstentions.

Mr *Nolte* proposed the amendment of Article 10 by the separation of the two sentences into two paragraphs.

The *President* called for a vote on the amendment proposed by Mr *Nolte* and announced the following results: 36 votes in favour, 0 votes against, 7 abstentions.

The *President* called for a vote on the two paragraphs of Article 10, and announced the following results:

Article 10, first paragraph: 38 votes in favour, 0 votes against, 7 abstentions.

Article 10, second paragraph: 33 votes in favour, 2 votes against, 12 abstentions.

The *President* thanked the Members for their close attention, and announced that the vote on the preambular paragraphs would continue in the following session.

La séance est levée à 17 h 50.

Jeudi 7 septembre 2017 (matin)

La séance est ouverte à 9 h 35 sous la présidence de M. *Sreenivasa Rao*.

Le *Secrétaire général* informe la plénière du déroulement de la journée et souligne que l'Institut accuse un retard dans ses travaux. Il propose que la plénière finalise d'abord l'adoption du projet de résolution concernant le Conseil de sécurité pour ensuite se pencher sur le projet de révision du Règlement. A ce titre, il rappelle qu'une nouvelle version du projet a été préparée par la Commission *ad hoc* sur le règlement de l'Institut de Droit international. Cette version a été distribuée aux membres. Il conclut en donnant le programme des travaux de l'Institut pour le reste de la session.

The *President* congratulated Members on the work that had already been done on the draft Resolution concerning the "Review of Measures Implementing Decisions of the Security Council in the Field of Targeted Sanctions" prepared by the 12th Commission. He stated that a vote would take place on the preambular paragraphs, and that Members would have an opportunity to make brief comments if they so wished, before proceeding to a vote on the draft Resolution as a whole.

The *President* called for a vote by show of hands after the reading of each preambular paragraph, and announced the following results:

First preambular paragraph: 38 votes in favour, 0 votes against, 0 abstentions.

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Second preambular paragraph: 37 votes in favour, 0 votes against, 0 abstentions.

Third preambular paragraph: 40 votes in favour, 0 votes against, 0 abstentions.

Fourth preambular paragraph: 41 votes in favour, 0 votes against, 0 abstentions.

Fifth preambular paragraph: 39 votes in favour, 0 votes against, 0 abstentions.

Sixth preambular paragraph: 40 votes in favour, 0 votes against, 0 abstentions.

Seventh preambular paragraph: 39 votes in favour, 0 votes against, 0 abstentions.

Eighth preambular paragraph: 40 votes in favour, 0 votes against, 1 abstention.

Ninth preambular paragraph: 42 votes in favour, 0 votes against, 0 abstentions.

Mr *Koroma* wished to clarify that the adoption of the draft Resolution was made on the basis of the paragraphs as they were currently drafted, and that drafting suggestions could still be made.

The *President* confirmed that this was the case. He called for a vote on the draft Resolution as a whole. The Resolution was adopted: 42 votes in favour, 0 against, 1 abstention.

The *President* congratulated the Rapporteur. He requested Members to send any explanations of vote to the Secretary-General.

The *Secretary-General* noted that it is not possible to collect written comments or explanations of vote to be published in the *Annuaire*. Only the explanations made during the sessions are published. He invited Members to intervene immediately with any comments they might have on the Resolution, in the context of the plenary session, rather than commenting later in writing.

Mr *Nolte* noted that the President had stated on many occasions that there would be the opportunity to submit any written comments on the draft Resolution. He objected to the suggestion that comments submitted at a later stage would not be taken into account.

The *President* asked Members to give consideration to any comments which they might formulate in the course of the day, and to submit any comments in writing by the following day.

The *Secretary-General* intervened in order to recall that there was a procedure that had been consistently followed over the course of many years at the *Institut*. Members had extensively debated the draft Resolution under consideration. They had had the opportunity to share their comments during

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the plenary sessions. Time could perhaps be found in the context of another plenary session for Members who required further time to formulate their views about the draft Resolution that had already been adopted, to provide further comments. He proposed this could take place during a plenary session on Saturday morning.

The *President* agreed with the suggestion made by the Secretary-General. He asked for a show of hands from Members who wished to make a statement on the draft Resolution at a later stage. Messrs Ranjeva, Nolte and Schrijver indicated that they wished to make comments. He invited those Members to make their comments to the plenary session immediately, if possible.

M. *Ranjeva* explique son vote. Il indique qu'au vote final, il s'est abstenu dans la mesure où la modification du titre de la Résolution en « Contrôle des mesures de mise en œuvre des décisions du Conseil de sécurité en matière de sanctions ciblées » a eu pour conséquence le bouleversement radical de l'économie du projet présenté par la Commission. Il fait valoir que l'Institut avait à faire face au problème du caractère justiciable des décisions du Conseil de sécurité, notamment dans le cadre du Chapitre VII. Il rappelle que la question fut laissée pendante lors de l'affaire *Lockerbie*, et resta non tranchée au fond. Il estime que l'occasion était unique pour l'Institut d'apporter sa contribution au développement progressif du droit international. Le rapport avait avancé des pistes d'ouverture qu'il était utile d'approfondir. Il conclut en soulignant que cette observation ne remet pas en cause le mérite de la Résolution dans le cadre de l'option retenue.

M. *Torres Bernárdez* souligne que l'adoption formelle d'une résolution doit se faire par appel nominal. Il interroge le Secrétaire général au sujet de l'heure et de la date auxquelles il sera procédé à cet appel nominal. Il se soucie du fait que les membres présents seront peut-être moins nombreux si ce vote est prévu pour le dernier jour de la session.

Le *Secrétaire général* rappelle que le comité de rédaction doit s'employer à produire et présenter une version finale de la Résolution à destination de la plénière. C'est uniquement lorsque cette version finale est présentée à la plénière qu'il est procédé au vote par appel nominal. En tous les cas, il précise que cet appel nominal ne peut se faire aujourd'hui parce que la plénière ne dispose pas de la version finale de la Résolution.

The *President* stated there would be a nominal vote at a later stage. The three pending comments by Members on the draft Resolution would be made during the context of a subsequent plenary session. The item on the agenda was now concluded.

La séance est levée à 10 h 05.

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Vendredi 8 septembre 2017 (après-midi)

La séance est ouverte à 16 h 30 sous la présidence de M. *Kazazi*, troisième Vice-président.

The *President* gave the floor to the Secretary-General.

The *Secretary-General* stated that Members had received the definitive text of the draft Resolution from the 12th Commission, led by Rapporteur Mr Wolfrum. He thanked the Rapporteur and the Commission for their work. He called for a nominal vote on the Resolution in order to register whether Members were in agreement with the adoption of the Resolution.

The Members and Associates who voted in favour were Mrs Bastid-Burdeau, MM. Bogdan, Cafilisch, Lord Collins of Mapesbury, Mrs Damrosch, MM. Kamto, Kazazi, Sir Kenneth Keith, MM. Kirsch, Ko, Kohen, Mahiou, Orrego Vicuña, Pinto, Ranjeva, Ronzitti, Schrijver, van Loon, Verhoeven, Vinuesa, Wolfrum, Basedow, Benvenisti, Mrs Boisson de Chazournes, MM. Fernández Arroyo, Francioni, Mme Gannagé, Sir Christopher Greenwood, MM. Mälksoo, McLachlan, Murase, Oxman, Soons, Symeonides, and van Houtte.

The Resolution was adopted: 35 in favour; 0 against; 0 abstentions.

The President, the Secretary-General and Members extended their thanks to the Rapporteur and the 12th Commission for their work.

La séance est levée à 16 h 40.

Douzième commission

**LE CONTROLE JURIDICTIONNEL DES DECISIONS DU CONSEIL
DE SECURITE**

Rapporteur : M. *Rüdiger Wolfrum*

RESOLUTION FINALE

**Contrôle des mesures de mise en œuvre des décisions du Conseil de
sécurité en matière de sanctions ciblées**

L'Institut de Droit international,

Prenant en considération l'article 24 paragraphe 2 de la Charte des Nations Unies selon lequel le Conseil de sécurité « agit conformément aux buts et principes des Nations Unies » et qui prévoit que « les pouvoirs spécifiques accordés au Conseil de sécurité pour lui permettre d'accomplir lesdits devoirs sont définis aux Chapitres VI, VII, VIII et XII »,

Prenant en considération la Déclaration adoptée le 24 septembre 2012 par l'Assemblée générale lors de la réunion de haut niveau sur les exigences l'état de droit aux niveaux national et international (A/RES/67/1*), dont le paragraphe 2 affirme que « l'état de droit vaut aussi bien pour tous les États que pour les organisations internationales, y compris l'Organisation des Nations Unies et ses organes principaux, et

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que le respect et la promotion de l'état de droit et de la justice devraient guider toutes leurs activités » et dont le paragraphe 29 souligne que « nous encourageons le Conseil de sécurité à continuer de veiller à mettre les sanctions ciblées avec soin au service d'objectifs clairs et à en limiter les éventuels contrecoups, et à continuer également à suivre des procédures équitables et claires et à les préciser »,

Rappelant la résolution 2178 (2014) du Conseil de sécurité réaffirmant que les Etats membres doivent veiller « à ce que les mesures qu'ils prennent pour combattre le terrorisme soient conformes à toutes les obligations que leur fait le droit international, en particulier le droit international des droits de l'homme, le droit international des réfugiés et le droit international humanitaire »,

Gardant à l'esprit que, de manière générale, l'état de droit participe d'un principe aux termes duquel toutes personnes, privées ou publiques, y compris l'Etat lui-même, répondent de toute loi dûment adoptée, publiée et mise en œuvre en toute indépendance¹,

Rappelant que, dès 1957, l'Institut a adopté à Amsterdam une résolution sur le « Recours judiciaire à instituer contre les décisions d'organes internationaux » (*Annuaire*, vol. 47-I), dans laquelle il est souligné qu'il est du devoir de « toute organisation internationale de respecter le Droit et de le faire respecter par ses agents et fonctionnaires [et] que le même devoir incombe aux Etats membres en cette qualité »,

Conscient que l'objectif de l'Institut doit être de promouvoir l'état de droit en tant que principe fondamental pour les Etats et les organisations internationales, y compris les Nations Unies et leurs principaux organes,

Constatant que l'existence d'un état de droit, y compris la protection des droits de l'homme, dépend elle-même du maintien de la paix et de la sécurité internationales,

Prenant note également du fait que plusieurs décisions prises par des juridictions nationales autant que régionales ont déclaré que certaines mesures adoptées par des autorités nationales ou l'Union européenne pour mettre en œuvre des sanctions ciblées contre des particuliers ou autres entités sont incompatibles avec les droits fondamentaux de la personne humaine, y compris le droit à un procès équitable,

Notant enfin que, lors de l'adoption des mesures destinées à mettre en œuvre des sanctions ciblées, il importe de veiller à ce que la protection des droits et libertés fondamentaux soit assurée, car ces droits et libertés représentent des valeurs internationales communes,

Adopte les principes directeurs suivants :

¹ Voir le Rapport du Secrétaire général sur le Rétablissement de l'état de droit et l'administration de la justice pendant la période de transition dans les sociétés en proie à un conflit ou sortant d'un conflit (S/2004/616*), paragraphe 6.

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**CHAPITRE I
DISPOSITIONS GÉNÉRALES**

**Article 1
Expressions employées**

Aux fins de la présente résolution :

- a) Par « contrôle », on entend le contrôle ex post d'une décision ou d'un acte dans le but de vérifier s'ils sont conformes au droit applicable.
Le contrôle peut prendre différentes formes. Il peut être juridictionnel, administratif ou interne ; et il peut être direct ou indirect.
- b) Par « décision du Conseil de sécurité », on entend toute décision prise par le Conseil lui-même ou par un organe subsidiaire, tel un comité des sanctions, qui oblige les Etats membres ou non des Nations Unies ainsi que toute autre entité ou tout particulier visé par le Conseil de sécurité et qui doit être appliquée.
- c) Par « sanctions ciblées », on entend les décisions du Conseil de sécurité, des comités des sanctions ou de tout autre organe subsidiaire qui obligent les Etats à prendre les mesures prévues par la résolution du Conseil de sécurité pour donner effet aux sanctions prononcées à l'encontre de particuliers ou d'entités privées par le comité des sanctions compétent.
- d) Par « mesures d'exécution » on entend les mesures prises par des Etats ou par des organisations régionales pour mettre en œuvre les sanctions décidées par le Conseil de sécurité.

**Article 2
Champ d'application**

La présente résolution porte sur le contrôle des mesures de mise en œuvre des décisions du Conseil de sécurité en matière de sanctions ciblées adoptées par des Etats ou des organisations régionales.

**Article 3
Cadre juridique des décisions du Conseil de sécurité**

1. Le Conseil de sécurité agit conformément à la Charte des Nations Unies, y compris les dispositions protégeant les droits de l'homme.
2. Considérant qu'il appartient principalement au Conseil de sécurité d'établir des procédures d'inscription et de radiation conformes aux normes de la Charte des Nations Unies, y compris les dispositions protégeant les droits de l'homme, le Conseil de sécurité devrait établir des procédures supplémentaires ayant pour but d'assurer une meilleure protection des droits des particuliers ou entités ciblées.

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Article 4

Contrôle des décisions du Conseil de sécurité

1. La Charte des Nations Unies ne prévoit pas de contrôle des décisions du Conseil de sécurité par des juridictions nationales ou régionales.
2. Toutefois, les mesures de mise en œuvre des sanctions ciblées peuvent faire l'objet d'un contrôle par les juridictions nationales ou régionales. Celles-ci peuvent, lors de ce contrôle, interpréter les décisions du Conseil de sécurité.

CHAPITRE II

**MESURES DE MISE EN ŒUVRE DES SANCTIONS CIBLÉES DU
CONSEIL DE SÉCURITÉ**

Article 5

**Décisions d'inscription et de radiation adoptées par les comités des
sanctions**

1. Les comités des sanctions se conforment pleinement aux dispositions de la Charte des Nations Unies, y compris celles qui protègent les droits de l'homme.
2. La décision d'inscrire ou de ne pas radier un particulier ou une entité privée d'une liste de sanctions, adoptée par un comité des sanctions, ne peut faire l'objet d'un contrôle direct par des juridictions régionales ou nationales.
3. L'interdiction de soumettre à un tribunal les décisions d'un comité des sanctions, visée au paragraphe 2, ne fait pas d'obstacle à un réexamen des mesures de mise en œuvre des dispositions prises par des Etats ou des organisations régionales pour donner effet à ces décisions.

CHAPITRE III

INSCRIPTION ET RADIATION

Article 6

Amélioration des procédures d'inscription et de radiation

Une amélioration de la procédure d'inscription ou de radiation par le Conseil de sécurité serait conforme aux principes généraux de droit et pourrait en outre réduire la nécessité, ressentie par des particuliers ou des entités, de recourir à des juridictions nationales ou régionales.

Article 7

Recours au médiateur

1. La procédure applicable à la radiation, en particulier celle du recours au médiateur, introduit un nouveau mécanisme procédural de radiation qui améliore de manière significative la possibilité pour les requérants de faire valoir leurs droits. Elle est principalement conçue en tant que mécanisme d'assistance au comité des sanctions lorsque celui-ci est appelé à décider d'une radiation plutôt qu'à en réviser les termes.

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2. La présente procédure n'est applicable qu'à certains régimes de sanctions. Toutefois, elle ne s'applique pas à d'autres régimes, qui visent eux aussi des particuliers ou des entités privées dont les conséquences peuvent être semblables dans le domaine des droits de l'homme.

3. Il est dès lors recommandé que la procédure de recours au médiateur soit étendue à tout autre régime de cette nature, présent ou futur, qui prévoit des sanctions ciblées. Il est en outre recommandé que cette procédure soit rendue plus transparente.

4. Il est également recommandé que le bureau du médiateur devienne une institution indépendante dotée de ressources appropriées.

Article 8

Autres améliorations des procédures d'inscription et de radiation

Conformément à l'article 3, le Conseil de sécurité devrait améliorer les procédures d'inscription et de radiation. Ces améliorations pourraient comprendre les éléments suivants :

- a) le renforcement de la procédure interne de révision du Conseil de sécurité ;
- b) l'introduction d'un examen périodique permettant de vérifier si les conditions ayant permis de prononcer des sanctions ciblées contre des particuliers ou d'autres entités sont toujours réunies ;
- c) l'attribution aux Etats et aux organisations régionales d'un certain pouvoir discrétionnaire dans la mise en œuvre des mesures requises, en tenant compte des circonstances propres à chaque cas particulier ; et
- d) l'amélioration de la procédure d'inscription en impliquant l'Etat de la nationalité et l'Etat de résidence dans la procédure dont un Etat tiers aurait pris l'initiative.

**CHAPITRE IV
CONTRÔLE**

Article 9

Identification des particuliers ou des entités pour l'inscription et la radiation

1. Vu que l'identification des particuliers ou autres entités visés par une inscription tire son origine des Etats qui en prennent l'initiative, on relèvera que :

- a) le processus qui peut conduire à une inscription devrait être transparent pour le particulier ou l'entité qui en est le destinataire ;
- b) compte tenu des conséquences possibles que l'inscription peut avoir sur les droits de l'homme, une telle procédure doit respecter les normes internationales, régionales et nationales en matière de droits de l'homme ;

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- c) tout particulier ou toute entité devrait se voir accorder la possibilité d'un contrôle judiciaire conformément aux règles pertinentes du droit national de la décision nationale ou régionale d'inscription sur la liste.
2. Ces principes doivent être suivis par les autorités de l'Etat ayant pris l'initiative de l'inscription, celles de l'Etat de nationalité et celles de l'Etat de résidence, selon les circonstances, lorsqu'elles envisagent de demander ou d'appuyer la radiation du particulier ou de l'entité en cause.
3. Tant les autorités nationales que les entités impliquées dans ce processus d'inscription et de radiation prennent en considération l'objet et le but des sanctions ciblées.

Article 10

Mise en œuvre des sanctions ciblées

1. Lorsqu'ils mettent en œuvre des sanctions ciblées, les Etats ou les organisations régionales agissent conformément aux obligations découlant de la Charte des Nations Unies relatives aux décisions du Conseil de sécurité.
2. Cela n'exclut pas que les mesures prises à cet effet par des Etats ou par des organisations régionales puissent être contrôlées conformément à l'article 4.

Article 11

Contrôle par les tribunaux nationaux ou régionaux

1. Tout contrôle juridictionnel des mesures de mise en œuvre de sanctions ciblées tient compte de l'objet et du but des sanctions. Dans ce contexte, une attention particulière est accordée à l'article 103 de la Charte des Nations Unies.
2. Il conviendrait de tenir compte également de tout contrôle juridictionnel, national ou régional, qui aurait été exercé, de manière à vérifier si le demandeur a sollicité ou non une radiation conformément à la procédure applicable. En particulier, toute recommandation du médiateur devrait être prise en considération.
3. Le contrôle des mesures de mise en œuvre des décisions du Conseil de sécurité est conforme aux dispositions pertinentes de la Charte des Nations Unies, et en particulier aux articles 24, 25 et 103.
4. Si la mise en œuvre des sanctions est déclarée non conforme aux normes pertinentes relatives à la protection des droits de l'homme, les cours et tribunaux, nationaux ou régionaux, devraient prendre en compte que leur décision ne dispense pas l'Etat ou l'organisation régionale de s'acquitter de ses obligations en vertu de la Charte des Nations Unies, lesquelles conservent leur validité.

JUDICIAL REVIEW OF SECURITY COUNCIL DECISIONS

Twelfth Commission

JUDICIAL REVIEW OF SECURITY COUNCIL DECISIONS

Rapporteur: M. Rüdiger Wolfrum

FINAL RESOLUTION

**Review of Measures Implementing Decisions of the Security Council in
the Field of Targeted Sanctions**

The Institute of International Law,

Considering that according to Article 24, paragraph 2, of the Charter of the United Nations the Security Council shall “act in accordance with the Purposes and Principles of the United Nations” and that “the specific powers granted to the Security Council for the discharge of these duties are laid down in Chapters VI, VII, VIII, and XII”,

Considering the Declaration of the high-level meeting of the United Nations General Assembly on the rule of law at the national and international levels (A/RES/67/1* of 24 September 2012), paragraph 2 of which states 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 paragraph 29 of which emphasises 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”,

Recalling Security Council Resolution 2178 (2014) which reaffirms that Member States must ensure that “any measures 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”,

Bearing in mind that in general the rule of law includes a principle according to 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 adjudicated,¹

Noting that already at its Amsterdam Session (1957), the Institute adopted a Resolution entitled “Judicial Redress Against the Decisions of International Organs” (*Annuaire*, Vol. 47-I), emphasising that “every international organization has the duty to respect the law and to ensure that the law be respected by its agents and officials [and] that the same duty is incumbent on States as members of such organs or organizations”,

¹ See the 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.

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

Recognising that the realisation of the rule of law, including the protection of human rights, is itself dependent on the maintenance of international peace and security,

Noting also that in several cases, judgments of national as well as regional courts having declared that national or European Union measures implementing targeted sanctions against individuals or entities 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 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**

For the purposes of this Resolution:

- (a) “Review” means an *ex post* examination of a decision or an act with a view to establishing whether this decision or act is in conformity with applicable law.
Review may take various forms. It may be judicial, administrative or internal, and may be direct or indirect.
- (b) “Security Council decisions” means 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 or individuals as the case may be, and which are to be implemented.
- (c) “Targeted sanctions” means those decisions adopted by the Security Council, sanctions committees, or any other subsidiary organ 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” means measures taken by States or regional organisations to implement the sanctions as prescribed by the relevant Security Council decisions.

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Article 2
Scope

This Resolution is concerned with the review of measures implementing decisions of the Security Council in the field of targeted sanctions taken by States or regional organisations.

Article 3
Legal framework for Security Council decisions

1. The Security Council shall act in conformity with the Charter of the United Nations including provisions protecting human rights.
2. Considering that it is first and foremost for the Security Council to establish a procedure for listing and delisting which meets the standards of the Charter of the United Nations, including provisions protecting human rights, the Security Council should develop further procedures with a view to ensuring better protection of the rights of targeted individuals or entities.

Article 4
Review of Security Council decisions

1. The Charter of the United Nations does not provide for review of decisions of the Security Council by national or regional courts.
2. However, measures implementing targeted sanctions may be reviewed by national or regional courts. In the course of such review, those courts may interpret Security Council decisions.

CHAPTER II
MEASURES IMPLEMENTING TARGETED SANCTIONS OF THE
SECURITY COUNCIL

Article 5
Decision of sanctions committees to list and delist

1. Sanctions committees shall fully respect the Charter of the United Nations including the provisions protecting human rights.
2. The decision of a sanctions committee to list or not to delist an individual or a private entity may not be reviewed directly by regional or national courts.
3. The bar to reviewing decisions of a sanctions committee as referred to in paragraph 2 does not preclude a review of implementation measures taken by States or regional organisations with a view to implementing such decisions.

CHAPTER III
LISTING AND DELISTING

Article 6
Improvement of listing and delisting procedures

Improvements in the listing or delisting procedure by the Security Council would be consistent with general principles of law and could, moreover,

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reduce the necessity felt by targeted individuals or entities to have recourse to national or regional courts.

Article 7
Ombudsperson procedure

1. The procedure, in particular the Ombudsperson procedure, established for delisting 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 sanctions committees in their decisions on delisting rather than to review the original decision on listing.
2. This procedure applies only to certain sanctions regimes but not to others which likewise target individuals and private entities with similar possible consequences for the enjoyment of human rights.
3. Accordingly, it is recommended that the Ombudsperson procedure be applied to all such regimes, present and future, when providing for the prescription of targeted sanctions, and that its procedure be rendered more transparent.
4. It is further recommended that the Office of the Ombudsperson be established as an independent, properly resourced institution.

Article 8
Further improvement of listing and delisting procedures

In accordance with Article 3, the Security Council should improve listing and delisting procedures. Such improvements may include for example:

- (a) strengthening of the internal review procedure by the Security Council;
- (b) establishment of a periodic review as to whether the conditions of the targeted sanctions on a particular individual or entity are still met;
- (c) leaving the implementing States or regional organisations some discretionary power concerning the implementation of the measures requested, by taking into consideration the circumstances of a particular case; and
- (d) improving the listing process involving the State of nationality and the State of residence in the process of a listing initiative by a third State.

CHAPTER IV
REVIEW

Article 9
Identifying individuals or entities for listing and delisting

1. Taking into account that the identification of individuals and entities for listing originates with the States taking such initiative, it will be noted that:
 - (a) such process possibly leading to a listing should be transparent for the targeted individual or entity;

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- (b) considering the possible human rights consequences of listing, such process shall respect international, regional and national human rights standards; and
 - (c) the individual or entity should be provided with an opportunity to have the national or regional decision on their listing judicially reviewed according to the relevant national legal system.
2. These principles shall guide the authorities of the designating State, of the State of nationality or of the State of residence, as the case may be, if they are considering initiating or supporting the delisting of the individual or entity concerned.
3. The national authorities as well as the entities engaged in this process of listing and delisting shall take into account the object and purpose of targeted sanctions.

Article 10

Implementing targeted sanctions

- 1. In implementing targeted sanctions, States or regional organisations shall act in the fulfilment of their obligations under the Charter of the United Nations in respect of decisions of the Security Council.
- 2. This does not exclude that implementation measures undertaken by States or regional organisations may be reviewed as set forth in Article 4.

Article 11

Review by regional or national courts

- 1. Any judicial review of measures implementing targeted sanctions shall take into account the object and purpose of such sanctions. In this context, particular attention shall be paid to Article 103 of the Charter of the United Nations.
 - 2. 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.
 - 3. Review of measures implementing Security Council decisions shall be consistent with all relevant provisions of the Charter of the United Nations, including in particular Articles 24, 25 and 103.
 - 4. In reviewing implementation measures and declaring them not to be in conformity with relevant human rights standards, the regional or national courts should take into account that their decision does not exempt the implementing State or regional organisation from its duty to meet its international obligations under the Charter of the United Nations. Such obligations remain valid.
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