

First draft

Judicial Control of Security Council Decisions

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I. Introduction

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

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

This Declaration confirms that decisions of the Security Council also must respect the rule of law.¹ However, the Declaration does not indicate whether and how this limitation to the Security Council decision-making power is to be implemented. One such implementation mechanism could be judicial control, but there may be other options – not discussed in this paper – which deserve consideration.

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

Theoretically one may also envisage a pre-emptive judicial control as originally suggested by the delegation of Belgium at the San Francisco Conference. According to the two proposals submitted² – the first one dealing with Security Council competences under Chapter VI was withdrawn – any State would have had the possibility of requesting an advisory opinion from the International Court of Justice for the purpose of

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

² See Ken Roberts, *Second Guessing the Security Council: The International Court of Justice and its Powers of Judicial Review*, *Pace International Law Review* 7 (1995), 281 at 291.

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reviewing the legality of proposed Security Council decisions.³ The United States, the United Kingdom, the USSR and China spoke against these proposals.⁴ The Belgian amendment was not accepted by the Legal Committee.

Two different forms of judicial control are theoretically available: direct and indirect. A direct judicial control would assess the decision of the Security Council as such, whereas an indirect control would scrutinise the measures undertaken to implement such a decision.

A direct control of Security Council resolutions has been attempted, so far, only rarely. It has been rejected or avoided by the International Court of Justice early on⁵ and in the Lockerbie cases⁶ as well as in the case concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (*Bosnia-Herzegovina v. Serbia and Montenegro*). However the International Criminal Tribunal for the Former Yugoslavia was required to assess the Security Council decision that established the Tribunal.⁷

Most of the “judicial control” of Security Council decisions exercised until now have been of an indirect nature and undertaken by national courts, the European Court of Justice, regional international human rights courts and international criminal courts.⁸ As will be demonstrated, this control also

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

⁴ See statement of the USSR, in United Nations Conference on International Organization, vol. 12 (1945), 49; United Kingdom, *ibid.*, at 49 and France, *ibid.*, at 50. The arguments voiced against the proposals advanced several reasons, namely that the adoption of the Belgian proposal would weaken the security structures or that it would give the aggressor additional time or that the inherent limits of the Charter were sufficient. United Nations Conference on International Organization, vol. 3 (1945), 336; see also vol. 13 (1945), 653/4. See on that: Erika de Wet, The Chapter VII Powers of the United Nations Security Council, 2004 at 75 et seq.; see also Roberts, *supra* note 2, at 292.

⁵ Advisory Opinion in the Case Concerning Certain Expenses of the United Nations, ICJ Reports 1962, 168.

⁶ See below, p. 44.

⁷ Prosecutor v. Tadic (Jurisdiction), ILM 35 (1996), 35 (at 39 et seq.); for further details see below, pp. 45 et seq.

⁸ As to this jurisprudence see below, pp. 40 et seq.

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includes an interpretation or even an assessment of the Security Council decision which is being implemented, although some national or regional courts avoid addressing the Security Council decision in question. Such interpretation and assessment of implementing measures unavoidably will shed some light on the interpretation of a Security Council decision.

It is a fact that the number of cases where some form of judicial control has been exercised over Security Council decisions is growing. Such cases are either triggered by individuals, groups or entities and are directed against the implementation of sanctions issued by the Security Council under Chapter VII of the UN Charter specifically targeting them. Apart from that, there are further cases where individuals brought actions against acts or omissions of subsidiary bodies of the Security Council.⁹ So far, no cases seem to have been brought by those forced to implement sanctions and thereby claiming an infringement of their rights.

In assessing Security Council decisions, national courts, the European Court of Justice and international human rights courts mostly deal with the alleged violations of human rights by the implementation of Security Council sanctions issued under Chapter VII of the UN Charter.

Whereas in the period 1945-1990 there were only a total of two sanctions,¹⁰ thereafter several sanctions regimes have been adopted.¹¹ Most of the sanctions regimes since 1990 have been established with the explicit purpose, *inter alia*, of designating individuals, groups or entities as targets of

⁹ See below, p. 48.

¹⁰ S/RES 232 (1966) of 16 December 1966 against Southern Rhodesia and S/RES 418 (1977) of 4 November 1977 against South Africa.

¹¹ Al Qaida and the Taliban (S/RES 1267 (1999) of 15 October 1999, as supplemented by subsequent resolutions S/RES 1989 (2011) of 17 June 2011), Bosnia and Herzegovina (S/RES 713 (1991) of 25 September 1991, 1031 (1995)), Democratic Republic of the Congo (S/RES 1857 (2008) of 22 December 2008, paras. 4, 5), Côte D'Ivoire (S/RES 1572 (2004) of 15 November 2004), Haiti (S/RES 1542 (2004) of 30 April 2004), Iran (S/RES 1737 (2006) of 23 December 2006), Iraq (S/RES 1518 (2003) of 24 November 2003), Democratic People's Republic of Korea (S/RES 1718 (2006) of 14 October 2006, reconfirmed and supplemented in S/RES 2094 (2013) of 7 March 2013), Liberia (S/RES 1521 (2003) of 22 December 2003), Libya (S/RES 1970 (2011) of 26 February 2011), Rwanda (S/RES 918 (1994) of 17 May 1994), Serbia and Montenegro (S/RES 757 (1992) of 26 May 1992, 1022 (1995) of 22 November 1995), Sierra Leone (S/RES 1132 (1997) of 8 October 1997), Somalia (S/RES 751 (1992) of 24 April 1992), Sudan, (S/RES 1591 (2005) of 29 March 2005 and 1556 (2004) of 30 July 2004), Syria (S/RES 1636 (2005) of 31 October 2005), Djibouti and Eritrea (S/RES 1862 (2009) of 14 January 2009), Somalia (S/RES 1853 (2008) of 19 December 2008).

sanctions under Chapter VII of the UN Charter (so-called targeted sanctions). The names of the individuals, groups and entities targeted are either set out in lists administered by a sanctions committee or the identification of the addressees is left to the implementing States concerned.¹² As far as lists¹³ of targeted persons and entities are concerned, these are administered by sanctions committees and a procedure has been established for updating those lists, which means adding and deleting persons as well as groups and entities to and from such lists. Also over the years a rich jurisprudence of national and regional courts, as well as international criminal courts, has developed on the procedure identifying addressees for targeted sanctions.

The renewed discussion of judicial control of Security Council decisions originates from the fact that targeted sanctions, as well as acts or omissions of subsidiary organs of the Security Council, have a direct effect on the legal position of individuals and thus may directly infringe upon their human rights.¹⁴ This was not the case when sanctions under Chapter VII of the UN

¹² The following sanctions committees exist at the moment: S/RES 751 (1992) of 24 April 1992 and 1907 (2009) of 23 December 2009 concerning Somalia and Eritrea; S/RES 1267 (1999) of 15 October 1999 and S/RES 1989 (2011) of 17 June 2011 concerning Al Qaida and associated individuals and entities; S/RES 1518 (2003) of 24 November 2003, S/RES 1521 (2003) of 22 December 2003 concerning the Democratic Republic of the Congo; S/RES 1572 (2004) of 15 November 2004 concerning Côte d'Ivoire; S/RES 1591 (2005) of 29 March 2005 concerning Sudan; S/RES 1636 (2005) of 31 October 2005 concerning Lebanon; S/RES 1718 (2006) of 14 October 2006 concerning People's Republic of Korea; S/RES 1737 (2006) of 23 December 2006 concerning Iran; S/RES 1970 (2011) of 26 February 2011 concerning Libya.

¹³ The lists are made available under

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

¹⁴ On this aspect see in particular, Bardo Fassbender, Targeted Sanctions and Due Process: The Responsibility of the UN Security Council to ensure that fair and clear procedures are made available to individuals and entities targeted with sanctions under Chapter VII of the UN Charter, Study commissioned by the United Nations, Office of Legal Affairs – Office of the Legal Counsel – 2006; Iain Cameron, The ECHR, Due Process and the UN Security Council Counter-Terrorism Sanctions, Report prepared for the Council of Europe, 2006; Vera Gowlland-Debbas (ed.), United Nations Sanctions and International Law, 2001; August Reinisch, Developing Human Rights and Humanitarian Law Accountability of the Security Council for the Imposition of Economic Sanctions, *AJIL*, vol. 95 (2001), at 851-872; Eric Rosand, The Security Council's Efforts to Monitor the Implementation of AlQaeda/Taliban Sanctions, *AJIL*, vol. 98 (2004), at 745-763; Karel Wellens, Remedies against international organisations, 2002.

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Charter were only directed against States. Another reason is the increasing recognition of the relevance of the principle of the rule of law not only in the context of national law but also in international law as indicated in the Declaration of the High-level meeting of the General Assembly. A further element fuelling the demand for judicial control is the recognition that the exercise of public authority, including not only the national but also the international level, is limited by human rights considerations. In the long run, judicial control of Security Council decisions may lead to a different understanding of the powers and functions of the latter as compared to the original understanding at the San Francisco Conference.

It is one objective of this report to take stock of and analyse any form of judicial control over Security Council decisions which has been undertaken so far by international, national and regional courts. A further objective of this report is to contemplate whether judicial control of Security Council decisions – whether directly by the International Court of Justice or indirectly by other international or national courts or tribunals – is appropriate, taking into account the development of the Security Council's functions.

In this context it will be necessary to contemplate whether – as far as judicial control is concerned – all Security Council decisions are to be treated alike or whether the question of judicial control is only of relevance for targeted sanctions. In respect of the latter it will be necessary to assess the relationship between the Security Council issuing targeted sanctions and the States or entities implementing them.

Finally the report must necessarily assess to what extent the Security Council has established an adequate procedure to scrutinise its decisions on targeted sanctions. The practice of the Security Council in this respect has undergone significant development. It is to be considered whether this practice renders judicial control unnecessary or limits its scope.

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

Question:

Is there agreement concerning content and organisation of the report as indicated in the previous paragraphs?

II. Security Council Decisions

1. Terminology

There are several options¹⁵ for interpreting the term “decision”; it may mean single case related acts as opposed to norms of a general nature. Or one may perceive ‘decisions’ as binding acts (of a general or specific nature) as compared to recommendations, which are of a hortatory nature.

Acts of the Security Council in general are adopted as resolutions without specifying whether the resolution in question is to be considered a decision or a recommendation. According to the generally held legal opinion, confirmed by the International Court of Justice in the Namibia case, the meaning must be decided on the basis of the text of the measure in question and whether it is meant to be binding.¹⁶ The key to the understanding of the term “decision” lies in how the term “decision” and the complimentary term “recommendation” are used in the UN Charter. As is evident from the ordinary meaning of the term “recommendation”, it refers to non-binding pronouncements of the Security Council. Considering that the term “decision” is complimentary to “recommendation”, this indicates that the term “decision” embraces all pronouncements of the Security Council which have a binding effect.¹⁷ This is how the term will be used in this report. This means that the judicial control of recommendations will not be considered, unless these have been transformed into decisions.

As far as pronouncements of the Security Council under Chapter VII are concerned, there is a presumption that they are meant to be binding. This follows from the mandate of the Security Council in respect of the preservation of international peace and security. According to Article 24 (1) of the UN Charter, Member States have conferred on the Security Council the primary responsibility for the maintenance of international peace and

¹⁵ Anne Peters, on Art. 25, MN 8, in: B. Simma et al. (eds.), *The Charter of the United Nations: A Commentary*, 3rd ed., 2012.

¹⁶ The language of a resolution of the Security Council should be carefully analysed before a conclusion can be made as to its binding effect. In view of the nature of the powers under Article 25, the question whether they have in fact been exercised is to be determined in each case, having regard to the terms of the resolution to be interpreted, the discussion leading to it, the Charter provisions invoked and, in general, all circumstances that might assist in determining the legal consequences of the resolution of the Security Council (Legal consequences for States of the Continued Presence of South Africa in Namibia (South-West Africa) notwithstanding Security Council Resolution 276 (1970) Advisory Opinion ICJ Reports 1971, 16, at para. 114).

¹⁷ Peters, *supra* note 15, at MN 8.

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security and have agreed that in carrying out its duties under this responsibility the Security Council acts on their behalf. And, according to Article 25 of the UN Charter, Member States have further agreed to accept and to carry out the decisions of the Security Council in accordance with the Charter.¹⁸

Whether a Security Council action is binding does not depend only on the Chapter of the UN Charter under which it was taken, but also on whether it was intended to be mandatory as indicated by mandatory language. Occasionally, the Security Council includes mandatory and non-mandatory elements in one and the same pronouncement adopted under Chapter VII of the UN Charter. In such a case, only the mandatory elements are binding and only those qualify as a decision, properly speaking.

Decisions also may be taken by the Security Council under Chapter VI UN Charter as far as the settlement of disputes is concerned.¹⁹ The basis for this is the interpretation of Article 25 of the UN Charter as developed by the ICJ in its Advisory Opinion on Namibia. The Court pointed out that Article 25 of the UN Charter is not confined to Chapter VII since the binding nature of decisions under that Chapter is already dealt with in Articles 48 and 49 of the UN Charter, but may also extend to decisions under Chapter VI.²⁰

The UN Charter provides for several decisions of the Security Council related to the International Court of Justice. The relevant articles are Article 94(2) concerning the enforcement of ICJ judgments and Article 96(1) on requests for Advisory Opinions. The questions as to whether Security Council decisions taken in such matters may be amenable to judicial control by the International Court of Justice will be dealt with below.²¹

It is of particular relevance in the context of this report whether omissions of the Security Council may be controlled judicially. As a matter of logic omissions of the Security Council may only be treated equally as undertakings if there is an obligation on its part to act. This is in line with the approach taken in the ILC Articles on the International Responsibility of States. As an example it may be sufficient to point to the *Behrami case*, a

¹⁸ Jochen A. Frowein, Implementation of Security Council Resolutions taken under Chapter VII in Germany, in Gowlland-Debbas (ed.) *United Nations Sanctions and International Law*, 2001, 253-265 (253).

¹⁹ Peters, *supra* note 15, at MN 11.

²⁰ As to the controversy concerning investigations ordered by the Security Council under Article 34 (2) of the Charter, see in detail, Peters, *supra* note 15, at MN 14.

²¹ See below at p. 45 et seq.

case which will be analyzed in some detail later.²² The European Court of Human Rights found in this case that an omission of UNMIK, a subsidiary organ of the United Nations, was to be considered as attributable to the latter.²³

Particularly since the establishment of sanctions committees, it is an open question whether subsidiary organs of the Security Council set up in accordance with Article 29 of the UN Charter or other entities established under Article 28 of the Provisional Rules of Procedure of the Security Council have the mandate to take binding decisions on behalf of the latter. The Security Council enjoys a general competence to establish subsidiary organs and other subsidiary entities and the UN Charter does not contain restrictions as far as entrusting such organs or entities with the Council's competence to take binding decisions. However, the power to delegate is not unlimited. Due to the fact that the Security Council itself derives its legitimacy from the Member States it cannot, by delegating its powers to make binding decisions to a subsidiary organ or to another entity, increase or alter its mandate, change the balance of its composition, or change the decision-making procedure which applies to it. The Security Council must keep the overall control over the subsidiary body or entity and the decisions in question taken by it.²⁴ This also means that the Security Council cannot delegate its powers and functions and powers altogether. It seems to be beyond doubt, though, that in establishing its sanctions committees the Security Council has kept well within this framework. They have the power to take binding decisions, if so mandated.

To summarise, decisions of the Security Council are those measures which are binding upon Member States, non-Member States and other entities as the case may be, and which are to be implemented.²⁵ In contrast thereto

²² *Behrami and Behrami v. France*, Appl. No. 71412/01; *Saramati v. France, Germany and Norway*, Appl. No. 78166/01, Grand Chamber Decision As to Admissibility (2 May 2007).

²³ The Court reached this conclusion by referring to the mandate of UNMIK under Security Council Resolution 1244. Kosovo (S/RES1244 (1999) of 10 June 1999).

²⁴ See also, Peters, *supra* note 15, at MN 21 for more details.

²⁵ In the case *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)*, vol. I; *Namibia case* (Advisory Opinion), ICJ Reports 1971, 16, para. 116 the ICJ concluded the UN Security Council Resolution 276 (30 January 1970) was binding upon South Africa and, accordingly, the latter was obliged to withdraw its administration from Namibia immediately and to put an end to its occupation of its territory.

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Security Council recommendations are not binding, which says nothing about their political relevance, which may be significant.²⁶

Question:

Does the Commission XII endorse the definition of the term 'decision' as outlined? Does the Commission also want the Report to deal with omissions?

2. Potential Scope of Security Council Decisions

Based upon the experience of the League of Nations, the drafters of the UN Charter opted for a strong Security Council whose powers under Chapter VII of the UN Charter are far reaching and subject to very few express limitations.²⁷

The situation is different in respect of other decisions taken by the Security Council, in particular those under Chapter VI and VIII of the UN Charter, since Article 1(1) UN Charter requires observance of international law only from Security Council actions in the area of dispute settlement but not for measures of collective security under Chapter VII.²⁸

It has been argued that Security Council decisions, including the ones under Chapter VII of the UN Charter, are normative rather than operational.²⁹ This does not, in this generality, embrace the Security Council practice fully as it has developed over the years. Security Council decisions mostly combine operational and normative aspects.³⁰ The Security Council may make legal determinations, such as what is necessary to restore international peace and security,³¹ what constitutes a threat to international peace and security – a decision which is predominantly normative,³² as to the validity of an international treaty,³³ on the legality of the creation of a State under

²⁶ See Frowein, *supra* note 18, at 263.

²⁷ Robert Kolb, *An Introduction to the Law of the United Nations*, 2010, at 79.

²⁸ Rüdiger Wolfrum on Art 1, at MN 21/2, in: B. Simma et al. (eds), *The Charter of the United Nations: A Commentary*, 3rd ed. 2012; Gérard Cahin, *La notion du pouvoir discrétionnaire appliquée aux organisations internationales*, RGDIP vol.107 (2003), at 567.

²⁹ Benedetto Conforti, (1996) 43 RYDI 123 seq.

³⁰ On this see the comprehensive analysis of Antonios Tzanakopoulos, *Disobeying the Security Council: Countermeasures against wrongful sanctions*, 2011, at p. 22.

³¹ See for example Security Council Resolution 687 (1991) of 3 April 1991.

³² This is particularly true for many decisions of the Security Council against terrorism and against the proliferation of weapons of mass destruction.

³³ Dan Sarooshi, *BYIL*, vol. 67 (1966), 466-468; Tzanakopoulos, *supra* note 30, at p. 22.

international law,³⁴ or on the legality of certain actions under international law.³⁵ The Security Council may further impose binding non-military measures under Article 41,³⁶ delegate some of its power under Chapter VII to one or more States or international organisations (in particular regional organisations under Chapter VIII of the UN Charter),³⁷ or may entrust them with implementation or enforcement functions.³⁸ The Security Council may establish subsidiary organs or other entities in particular with the view to maintain or restore international peace and security. Another situation of interest in this context, for it may be dealt with from the point of view of authorisation and omission, is the decision of the Security Council to transfer Iraqi Oil for Food-Funds³⁹ to the Coalition Provisional Authority (CPA) in the Iraq under Security Council Resolution 1483 (2003).⁴⁰ Finally, the Security Council may refer situations to the International Criminal Court in accordance with Article 13 lit.b of the ICC Statute. As far as targeted sanctions are concerned, operational aspects prevail.

Of particular interest in the context of this report is the delegation of a discretionary authority to Member States to designate persons to be included in the list as provided for in Security Council Resolution 1373 (2001)⁴¹ in comparison to the regime established under Security Council Resolution 1267 (1999), according to which the relevant Sanctions Committee is competent to set up the list of persons and entities to be subjected to individual sanctions.⁴²

³⁴ Stefan Talmon, *Kollektive Nichtanerkennung illegaler Staaten*, 2006, at pp. 308-315, 320-325.

³⁵ Catherine Denis, *La pouvoir normatif du Conseil de sécurité*, 2004, at pp. 53/4.

³⁶ There are a number of decisions, which have been qualified as decisions under Article 41 of the UN Charter. See the reference to and analysis of Security Council actions taken under Article 41 of the UN Charter, de Wet *supra* note 4, at 251 et seq.

³⁷ See below at p. 22.

³⁸ See below at p. 32.

³⁹ S/RES/1483 (2003) of 22 May 2003, at para. 17.

⁴⁰ The Security Council provided for the transfer of these funds to the CPA without any conditions and without retaining certain rights for oversight or control. These funds were administered to up to that point by the UN itself. The funds in any case were the property of the Iraqi people if not of the Iraqi State.

⁴¹ Of 28 September 2001 which speaks in paragraph 2(a) of 'entities or persons involved in terrorist acts'.

⁴² For details see below (pp. 29 et seq.).

3. Decisions attributable to the Security Council

In literature⁴³ the question has been raised as to which decisions are, or may be, attributed to the Security Council. This is unproblematic in respect of all decisions by the Security Council taken under Chapters VII, VI and VIII as well as in accordance with Article 13 lit. b ICC Statute. This is equally true for decisions the subsidiary organs or bodies of the Security Council, such as UNMIK (although it may be disputed whether a particular action is to be attributed to UNMIK or the States having contributed contingents) or the sanctions committees.⁴⁴ Sanctions Committees are established in accordance with Rule 28 of the Provisional Rules of Procedure⁴⁵ but not on the basis of Article 29 of the UN Charter which refers to subsidiary organs. The decisions of the latter, too, are attributable to the Security Council.

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

However, it will be necessary for the report to consider whether measures taken by entities implementing Security Council decisions are to be attributed to the latter. These are, in particular, States, with respect to targeted sanctions. Article 6(1) Draft Articles on the Responsibility of International Organizations⁴⁶ has been referred to in this context, assuming that it reflects customary international law. The essential question is whether the conduct of States implementing Security Council decisions is to be seen as the conduct of agents and is to be attributed to the Security Council as principal. It is a fact that the Security Council will, necessarily, act through States or State organs due to a lack of operational capacity of its own. In the *Behrami case*,⁴⁷ the European Court of Human Rights found that the conduct

⁴³ Peters, *supra* note 15.

⁴⁴ See the guidelines of the Committee.

⁴⁵ See, for example, Afghanistan (S/RES 1267(1999) of 15 October 1999), para. 6.

⁴⁶ Adopted by the International Law Commission at its sixty-third session, in 2011, and submitted to the General Assembly as part of the Commission's report covering the work of that session (A/66/10, para. 87). Article 6 (1) reads:
Article 6 – Conduct of organs or agents of an international organization1. The conduct of an organ or agent of an international organization in the performance of functions of that organ or agent shall be considered an act of that organization under international law, whatever position the organ or agent holds in respect of the organization.

⁴⁷ *Behrami and Behrami v. France*, Appl. No. 71412/01; *Saramati v. France, Germany and Norway*, Appl. No. 78166/01, Grand Chamber Decision As to Admissibility (2 May 2007); this approach has been followed in general by the

(in this case an omission) of national military personnel assigned to UNMIK was attributable to the United Nations and not to the States concerned. It held that “in the present cases, the impugned acts cannot be attributed to the respondent States”.⁴⁸ In this context, amongst others, the statement of the Appeals Chamber in the *Tadic case*⁴⁹ has to be taken into consideration.

Questions:

1. *Is Article 6(1) of the Draft Articles on the Responsibility of International Organizations directly applicable or applicable by analogy to States implementing a Security Council decision under Article 41 of the UN Charter if States have no discretionary power in implementing such decisions?*
2. *Is Article 6(1) of the Draft Articles on the Responsibility of International Organizations applicable to States implementing Security Council decisions under Article 41 of the UN Charter if States have some discretionary power in implementing such decisions?*
3. *What would attributability mean in this context?*

Another approach advocated frequently and referred to in the already existing jurisprudence of national courts, the European Court of Human Rights and the European Court of Justice⁵⁰ is to use, directly or indirectly, Article 7 of the Draft Articles on the Responsibility of International Organizations⁵¹ dealing with the attributability of the conduct of State organs placed at the disposal of an international organisation.

European Court of Human Rights in several subsequent cases such as Nos. 31446/02; 363507; 6974/05; critical Marko Milanović and Tatjana Papić, As bad as it gets: The European Court of Human Rights’s Behrami and Saramati decision and general international law, ICLQ vol. 58 (2009), 267 et seq. For details see below (pp. 23,46). Similarly the Hague District Court attributed the conduct of Dutchbat (UNPROFOR) in Srebrenica to the United Nation alone.

⁴⁸ It is not fully clear on what basis the European Court of Human Rights came to the conclusion that the omission was only attributable to the United Nations.

⁴⁹ The Appeals Chamber characterizes the action by Member States on behalf of the Organisation as a ‘poor substitute faute de mieux, or a “second best” for want of the first’.

⁵⁰ See the analysis of Antonio Tzanakopoulos, *Disobeying the Security Council: Countermeasures against Wrongful Sanctions*, 2011, 33 et seq.

⁵¹ See *supra* note 46; Article 7 of the Draft Articles reads:

Article 7 – Conduct of organs of a State or organs or agents of an international organization placed at the disposal of another international organization

The conduct of an organ of a State or an organ or agent of an international organization that is placed at the disposal of another international organization

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In practice this provision seems to be used in dealing with the acts of national military contingents put at the disposal of the United Nations for peacekeeping operations as well as to similar arrangements. The Security Council and the International Law Commission support this approach.⁵² There is a wealth of material pertaining to acts of UN forces and the relevant responsibility of the United Nations itself.⁵³ The litmus test for attributability is whether the United Nations exercised effective control over the specific conduct, or in other words, whether the implementing State had some discretionary power in giving effect to the decision of the Security Council. The jurisprudence in this respect is not fully coherent.⁵⁴ It is evident that the question of attributability is of relevance for judicial review.

4. Binding and Self-executing effect of Security Council Decisions

It is acknowledged that Security Council decisions adopted under Chapter VI or VII of the UN Charter are binding upon those to which they are addressed. Article 25 of the UN Charter establishes an anticipatory consent to future Security Council decisions. From the perspective of international law, the obligations to carry out Security Council decisions prevail over possibly contradictory domestic law and according to Article 103 UN Charter prevail over other public international law as well.⁵⁵

The question of the binding effect of Security Council decisions is to be distinguished from the question whether Security Council decisions enjoy a self-executing effect.⁵⁶ Self-executing effect is to be understood in this context such that the Security Council decision would, at the national level, provide the direct legal basis for any national judicial or administrative action.

This question of self-executing effect has been raised with respect to international treaties before national judicial and administrative fora.⁵⁷ The

shall be considered under international law an act of the latter organization if the organization exercises effective control over that conduct.

⁵² UN Doc. A/59/10 (2004); Gaja, 15-23. different Gaja 9, 25.

⁵³ Tzanakopoulos (note 50), at 41 et seq.

⁵⁴ A legal opinion of the Secretariat states that: "The responsibility for carrying out embargoes imposed by the Security Council rests was the Member States, which are accordingly responsible for meeting the costs of any particular action they deem necessary for ensuring compliance with the embargo."

⁵⁵ Rudolf, Bernhardt on Art. 103, MN 10 et seq., in: B. Simma et al. (eds), *The Charter of the United Nations: A Commentary*, 3rd ed., 2012.

⁵⁶ See on this quite in detail Peters, *supra* note 15, at MN 45.

⁵⁷ On that see Thomas Buergenthal, *Self-Executing and Non-Self-Executing Treaties in National and International Law*, RdC vol. 235 (1992), 307; André Nollkaemper,

litmus test for the self-executing effect of international treaties is whether supplementary national legislation or administrative decisions are necessary to provide for the applicability of the norm concerned by the judicial or administrative body.⁵⁸

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

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

Almost all provisions of the UN Charter are not self-executing; this is clear from their wording. The Charter refers to the obligation of States *vis-à-vis* the United Nations or establishes competences of a United Nations organ.⁵⁹ This is particularly evident for the Security Council. Articles 39, 41, and 48 of the Charter, for example, deal with the competences of this organ, thus referring to decisions which may be taken on this basis. Considering the language of provisions which mandate Security Council decisions, one can hardly argue that the UN Charter entrusts the Security Council with the function of issuing self-executing decisions on the national level.

As far as the wording of targeted sanctions is concerned, Security Council decisions addressing individuals or groups would certainly meet this litmus test developed for the self-executing effect of international treaties. The targeted persons or entities are either named in a list or they are described with sufficient clarity in the decision itself. The measures to be taken are equally precisely defined as far as scope and content is concerned. But this is not decisive. Targeted sanctions explicitly rely on the implementation and enforcement power of the States they are addressing,⁶⁰ reflecting a multilayered approach⁶¹ according to which normative acts undertaken on the international level are to be implemented and enforced through national

EJIL vol.20 (2009), 853, 864; Vera Gowlland-Debbas, *The Domestic Implementation of UN Sanctions*, in: Erika de Wet and André Nollkaemper, (eds.) *Review of the Security Council by Member States*, 2003, at 63, 70.

⁵⁸ Pierre-Marie Dupuy, *Encyclopaedia of Public International Law, International Law and Domestic (Municipal) Law*, MN 53 et. seq.

⁵⁹ Frowein, *supra* note 18, at 256.

⁶⁰ Alain Pellet / Alina Miron, *Max Planck Encyclopaedia of Public International Law, Sanctions*, at MN 39 et seq.

⁶¹ Alain Pellet / Alina Miron, *supra* note 60, at MN 9 and 15.

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mechanisms.⁶² Although targeted sanctions may meet the criteria of self-execution, they lack enforceability. In that respect, the entire discussion as to the possible self-executing effect of Security Council resolutions is of more theoretical interest than practical relevance. It is telling that the judgments of national and regional courts to be considered below⁶³ have not contemplated whether the sanctions addressed to individuals were directly applicable.

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

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

Question:

Does the Commission XII agree that Security Council decisions have no self-executing effect?

5. Systemising Security Council Decisions

5.1 Security Council decisions of an internal nature

The Security Council is called upon to take decisions which are of an internal nature with respect to the United Nations organisation. These are decisions on – amongst others – the establishment of subsidiary organs (Article 29 of the UN Charter), the participation in the elections of judges of the ICJ (Article 4 ICJ – Statute) or on access to the ICJ (Article 35 ICJ – Statute).⁶⁴ Such decisions by their very nature cannot be challenged from the “outside”, and accordingly will not be considered further in this report.

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

⁶² See S/RES. 1267 (1999) of 15 October 1999 (Afghanistan), paras. 3 et seq.

⁶³ See below at pp. 45 et seq.

⁶⁴ See also Article 93 (2) UN Charter.

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

Question:

Does the Commission XII agree that decisions of the Security Council on internal matters are – by their very nature – not open for any form of judicial control?

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

Decisions of the Security Council under Chapter VI relate to disputes under Article 33 of the UN Charter and/or situations under Article 34 of the UN Charter. All provisions in Chapter VI of the UN Charter provide for the taking of decisions of the Security Council under this Chapter, however, only a few of these are binding and accordingly qualify as decisions in the meaning of this report.

Under Article 34 of the UN Charter, the Security Council “may investigate any dispute” in order to determine whether it is likely to endanger peace. It is a matter of discussion whether such a decision to investigate⁶⁵ could be initiated against the will of one of the parties and whether such a party would be obliged to co-operate with the Security Council.⁶⁶

The other provisions of Chapter VI of the UN Charter either empower the Security Council to call upon the parties (Article 33(2)) or to make recommendations (Articles 36, 37(2) and 38 of the UN Charter). These measures, therefore, are not to be considered as decisions in the meaning of this report.

5.3 Security Council decisions on the basis of Chapter VIII

The authorisation of a regional organisation by the Security Council under Article 53(1) serves the function of legitimising actions of the regional organisation concerned which would otherwise violate international law.⁶⁷ It is also a decision taken by the Security Council to the detriment of an

⁶⁵ According to the San Francisco Declaration of 7 June 1945 the decision of the Security Council to make an investigation under Article 34 is regarded as a possible start of a ‘chain of events’ which ‘may well have major political consequences’.

⁶⁶ Negative Benedetto Conforti and Carlo Focarelli, *The Law and Practice of the United Nations*, 4th ed., 2010, 187 et seq.; affirmative Hans Kelsen, *The Law of the United Nations: A Critical Analysis of its Fundamental Problems*, 1950, 445; Theodor Schweissfurth, on Art. 34, MN 42 et seq., in: B. Simma et al. (eds), *The Charter of the United Nations: A Commentary*, 3rd ed., 2012.

⁶⁷ Christian Walter, on Article 53, MN 15/16, in: B. Simma et al. (eds), *The Charter of the United Nations, A Commentary*, 3rd ed., 2012.

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addressee against whom the enforcement action is to be directed. The taking of enforcement action under Chapter VIII was considered by the OAS against the Dominican Republic in 1960. Article 53(1) only became operative after the end of the Cold War. According to the developed practice, non-military measures of a regional organisation do not require authorisation of the Security Council.

Legally speaking the situation in respect of military measures is indistinguishable from those where the Security Council calls upon particular States to take actions under Chapter VII of the UN Charter.⁶⁸ Accordingly, the question concerning judicial review should be treated alike.

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

According to Article 94(2) UN Charter, the Security Council has the competence to take measures it considers necessary to give effect to a judgment of the International Court of Justice if a party fails to perform the obligations incumbent upon it under the dispute and the other party has had recourse to the Security Council. The wording of this provision clearly indicates the Security Council is not under an obligation to act and it has wide discretion as to how to act. The Security Council, however, has no competence to scrutinise or review the judgment in question; it merely acts as an enforcement power. Where the Security Council resolves to take mandatory measures, which it may, even if it does not invoke Chapter VII, the respective measures would constitute a decision in the meaning of this report.

The Security Council may, in accordance with Article 96(1) UN Charter, request an advisory opinion from the ICJ. It is a matter of dispute whether such a request by the Security Council qualifies as a procedural decision or a decision of substance, which is of relevance for the voting procedure under Article 27(3) of the UN Charter, but not for this report.

According to Article 65(1) ICJ Statute, the ICJ may give advisory opinions as requested. Although the ICJ has underlined that it is not obliged to render an advisory opinion, it has, so far, not declined a request for that reason.⁶⁹ In delivering an advisory opinion, the International Court of Justice may engage in interpretation and may answer only part of the question. However, this should not be considered as “judicial review”, since advisory opinions are not binding. Apart from that, the relationship between the Security

⁶⁸ See below at p. 22.

⁶⁹ Karin Oellers-Frahm, on Art. 96, MN, in: B. Simma et al. (eds.), *The Charter of the United Nations: A Commentary*, 3rd ed., (2012).

Council and the International Court of Justice is of a particular nature which leaves no room for judicial control.

Question:

Does the Commission XII agree the decisions taken by the Security Council under Chapter XIV are not open for any judicial review?

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

According to Article 13 lit. b of the ICC Statute, the Security Council may submit to the International Criminal Court, acting under Chapter VII of the UN Charter, “a situation in which one or more of such crimes appear to have been committed ...”.⁷⁰

It is a matter of dispute whether Article 13 lit. b, ICC Statute establishes a competence for the Security Council or whether it only provides a means for the latter to make use of its competences in accordance with Chapter VII of the UN Charter.⁷¹ This issue is not of direct relevance here. What is of relevance, though, is the legal consequences of such a decision. In this respect, a distinction must be made between Member States and non-Member States of the ICC Statute, since in respect of the former the jurisdiction of the International Criminal Court is already established. In taking such a decision in respect of Member States to the ICC Statute, the Security Council opens the possibility of the International Criminal Court to act in accordance with its jurisdiction. In the case of non-Member States of the ICC Statute, such a decision of the Security Council establishes the jurisdiction of the International Criminal Court and allows the latter to act in accordance with this now established jurisdiction.⁷²

⁷⁰ As to the legislative history of this provision see Jakob Pichon, *Internationaler Strafgerichtshof und Sicherheitsrat der Vereinten Nationen*, 2010, p.8; Mahnouch H. Arsanjani, *The Rome Statute of the International criminal Court of Justice*, AJIL Vol. 93, No. 1 (Jan. 1999), p. 22; Sharon A. Williams and William A. Schabas, Article 13, in: O. Triffterer (ed.), *Commentary on the Rome Statute of the International Criminal Court: Observers' Notes, Article by Article*, 2008, 563; Luigi Condorelli and Santiago Villalpando, *Referral and Deferral by the Security Council*, in: Antonio Cassese, Paola Gaeta, and John R. W. D. Jones (eds.), *The Rome Statute of the International Criminal Court: A Commentary*, vol. I, 2002, 627.

⁷¹ On this controversy see Hans-Peter Kaul, *Max Planck Encyclopaedia of Public International Law*, ICC, MN 57,59,74,102; Sharon A. Williams / William A. Schabas, in *Otto Triffterer, Commentary on the Rome Statute of the international Criminal Court*, 2008, Art. 13 MN 16.

⁷² Kaul, *supra* note 71, MN 59.

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It is discussed controversially whether the Security Council's ability to take a decision as referred to in Article 13 lit. b, ICC Statute is subject to legal limits, whether the same or equivalent limits exist for the International Criminal Court to make use of the decision of the Security Council and, finally, whether the International Criminal Court may scrutinise and eventually challenge the legality of such a decision of the Security Council.⁷³

According to Article 16 of the ICC Statute, "No investigation or prosecution may be commenced or proceeded with under this Statute for a period of twelve months after the Security Council, in a resolution adopted under Chapter VII of the Charter of the United Nations, has requested the Court to that effect; that request may be renewed by the Council under the same conditions." Such a decision of the Security Council is binding for the ICC.

Considering the consequences of decisions of the Security Council under Articles 13 lit. b and 16 of the ICC Statute, and that in both cases the authority of the Security Council is limited, it is a valid question whether the ICC has the right of judicial control.⁷⁴ As far as decisions under Article 13 lit. b of the ICC Statute are concerned, one may consider having recourse to Article 19 of the ICC Statute. Under this provision the ICC must satisfy itself that it has jurisdiction in any case brought before it. It is an open question whether this presents the possibility for judicial control by the ICC on decisions of the Security Council under Articles 16 and 19 of the ICC Statute.

The members of Commission XII are asked:

Whether the ICC has the competence to judicially control Security Council decisions made under Article 16 or 19 of the ICC Statute?

Whether the ICC may base its consideration and control on:

- 1) the ICC Statute and/or*
- 2) the UN Charter and/or*
- 3) international law in general?*

If the competence of the ICC to judicially control decisions of the Security Council under Articles 16 and 19 of the ICC Statute is denied, does the ICC have the right to reject those Security Council decisions under Articles 16 and 19 of the ICC Statute which evidently constitute an "excès de pouvoir"?

⁷³ Kaul, *supra* note 71, MN 121-124.

⁷⁴ This issue was not discussed at the Rome Conference.

5.6. Security Council sanctions based on Chapter VII UN Charter

5.6.1 In general

As already indicated, Security Council sanctions encompass two elements. They first establish that a particular activity constitutes a threat to international peace or security, a breach of peace or an act of aggression which is of a normative character. Second, they then decide what measures shall be taken in accordance with Articles 41 or 42 of the UN Charter which is dominantly operational. In general the objective of Security Council decisions is to maintain or restore international peace and security as defined by it.⁷⁵ Due to the Cold War, only a few such sanctions were adopted prior to 1990.⁷⁶ Thereafter the number of non-military sanctions increased and in this process the sanctions system has undergone significant changes and refinement, which finally led to targeted sanctions instead of comprehensive ones.⁷⁷

From the point of view of potential judicial control it is relevant to note that the powers of the Security Council under Chapter VII of the UN Charter are far reaching but they are, at the same time, subject to limitations whose scope is disputed.⁷⁸ Further it is to be noted that the Charter does not provide for any explicit judicial mechanism of review.⁷⁹ It is commonly agreed that the Security Council is conceived as a strong “executive”.⁸⁰

It is further relevant to note that the Council’s decision that a threat to international peace or security, breach of the peace or act of aggression exists, and the taking of non-military or military enforcement measures meeting the demands of the particular situation,⁸¹ are the outcome of

⁷⁵ Alain Pellet / Alina Miron, Max Planck Encyclopaedia of Public International Law, Sanctions, MN 9 and 15.

⁷⁶ Until then the Security Council had adopted 11 resolutions with express reference to Chapter VII.

⁷⁷ David Cortright, *Security: Challenges to UN Action*, 2002; David Cortright, and George Lopez, (eds.), *Smart Sanctions. Towards Effective and Humane Sanctions Reform*, 2002; David Cortright, *Responses to the Global Terrorist Threat*, 2007; Gary C. Hufbauer, Jeffrey Schott, Kimberley Elliott, and Barbara Oegg, *Economic Sanctions Reconsidered*, 3rd expanded edition, 2007; Andrea Charon, *UN Sanctions and Conflict: Responding to Peace and Security threats*, 2010.

⁷⁸ On that see below (pp. 39 et seq.).

⁷⁹ Jeremy M. Farral, *United Nations Sanctions and the Rule of Law*, 2007, at 73 et seq.

⁸⁰ Nico Krisch, on Art. 39, MN 12, in: B. Simma et al. (eds.), *The Charter of the United Nations: A Commentary*, 3rd ed., 2012; Kolb, *supra* note 27, at 79.

⁸¹ Simon Chesterman, MPEPIL MN 29 distinguishes between discretionary powers granted to the Security Council by the UN Charter and ‘arbitrary’ execution of the relevant decisions.

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political deliberations within the Council. They are not based upon juridical considerations. This lack of a precise definition is intentional and is meant to give the Security Council considerable flexibility in deciding whether it was necessary to respond to a particular situation.⁸² In practice, the Security Council mostly resorted to “threat to international peace” as the relevant threshold to issue measures under Chapter VII of the UN Charter. It, however, referred to a “breach of peace” in the case of the invasion by Iraq into Kuwait.⁸³

Traditionally, non-military as well as military sanctions were directed against a State concerned. This has been changed, as will be seen, in targeted sanctions. The Security Council resolutions are implemented by the State or States to whom they are addressed. These may be one State (as in the case of Southern Rhodesia⁸⁴), a group of States, Member States (only in the case of Southern Rhodesia and North Korea⁸⁵) or all States. Also in this respect there seems to be a tendency for modification.⁸⁶

Sanctions issued by the Security Council are, according to Articles 25, 48 and 103 of the UN Charter, legally binding on all to whom they are addressed. In accordance with Article 2(6) of the UN Charter, this also includes non-Member States.⁸⁷ The Trial Chamber of the ICTY pointed out that the extension of sanctions to non-Member States did not constitute an *excès de pouvoir* if it was necessary for the maintenance of international peace and security.⁸⁸

5.6.2 Military measures

Although the system envisaged by Article 43 of the UN Charter for military actions has not been established, the Security Council is not barred from taking military action. As the International Court of Justice has stated in its Advisory Opinion in the *Certain Expenses Case*, the Charter could not be read as leaving the Security Council “impotent in the face of an emergency situation when agreements under Article 43 have not been concluded”.⁸⁹ It is

⁸² Robert C. Hildebrand, *Dumbarton Oaks: The Origins of the United Nations and the Search for Post-war Security*, 1990, 138; Farral, *supra* note 79, at 64.

⁸³ S/RES 660 (1990) of 2 August 1990.

⁸⁴ S/RES 232 (1966) of 16 December 1966, at paras. 2,7.

⁸⁵ S/RES 1708 (2006) of 14 October 2006, at paras. 8-10.

⁸⁶ See below p. 28.

⁸⁷ Hans Kelsen, *The Law of the United Nations*, 1951, 85/86.

⁸⁸ *Prosecutor v. Milan and others*, Case IT-99-37-PT, Trial Chamber on Jurisdiction (6 May 2003), paras. 51-57.

⁸⁹ *Certain Expenses (Advisory Opinion)*, ICJ Report 1962, 167.

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

There seems to be a prevailing view that the authorisation of the Security Council has become an established practice⁹¹ in spite of the criticism that, through this practice, the Security Council loses control over the enforcement actions undertaken by the States concerned.

The first such authorisation took place in 1966 when the Security Council called upon the UK to prevent “by the use of force if necessary” the shipment of oil to Southern Rhodesia.⁹² In response to the invasion of Kuwait by Iraq, the Security Council called upon Member States to enforce the trade embargo, then to free Kuwait.⁹³ The formula used in the Security Council resolutions later became the standard model for action. It is, however, discussed controversially whether these resolutions concerning Iraq constituted an authorisation under Article 42 of the UN Charter or an endorsement of collective self-defence.⁹⁴

Thereafter the Security Council authorised the use of force in the cases of Somalia,⁹⁵ Rwanda,⁹⁶ Haiti,⁹⁷ and Libya.⁹⁸ Further cases are Liberia⁹⁹ and

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

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

⁹² S/RES 221 (1966), 9 April 1966.

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

⁹⁴ In favor of the latter Y. Dinstein, *supra* note 90, at 273-277; J. Verhoeven, *Etats allies ou Nations Unies? L'O.N.U. face un conflit entre l'Irak et le Koweït*, AFDI 36 (1990), 185-189. In favor of ‘the former Christopher Greenwood, *New World Order or Old? The Invasion of Kuwait and the Rule of Law*, MLR, 55 (1992), 169; de Wet, *supra* note 4, at 281; Dan Sarooshi, *The United Nations and the Development of Collective Security*, 1999, 174 et seq.

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

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

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Côte d'Ivoire.¹⁰⁰ It should have become evident from the foregoing that the authorisation of Member States or regional organisations to take forcible measures under Chapter VII can be divided into several decisions, namely, that there is a threat to international peace or security, a breach of peace or aggression, that measures under Article 41 of the UN Charter are not adequate and that a particular State, or groups of States or regional organisation should take action.

Questions:

Does the Commission agree with this analysis?

Are these elements of a decision of the Security Council in toto or individually open for judicial review?

If the answer is negative, it would be recommendable for the report to provide for a substantive reasoning.

Consequential questions are whether limits exist on delegating forcible actions, and to whom such actions are attributable under the regime of State responsibility.

It is generally accepted that limits for the delegation of forcible actions exist. Such limits are not specified in the UN Charter; they evolve from general considerations on the delegation of powers. Such limits include a precise definition of the scope of the delegated power and the effective supervision of the functions exercised by the mandated entity.¹⁰¹ Although the Security Council exercises control over peace keeping missions, it has not done so in respect of cases of authorised use of force.¹⁰² Another issue discussed in this respect is the procedure through which the Security Council may revoke such authorisation and whether an authorisation should have a time limit.

As far as attributability of measures undertaken by States on behalf of the United Nations is concerned, this is discussed controversially. In its judgments *Behrami and Behrami v. France, Saramati v. France, Germany*

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

⁹⁸ S/RES/748 (1992) of 31 March 1992.

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

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

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

¹⁰² Critical in this respect, de Wet, *supra* note 4, at 280-283.

and Norway¹⁰³ and *Berić and Others v. Bosnia Herzegovina*,¹⁰⁴ the European Court of Human Rights has ruled that Member State actions under NATO command were attributable to the United Nations by virtue of the fact that these actions had their ultimate basis in Chapter VII and in the ensuing authority and control by the Security Council. Later judgments of the European Court of Human Rights take a somewhat differentiated position.¹⁰⁵

Questions:

1. *What are the limits, if any, for a delegation of forcible actions by the Security Council to States, groups of States or regional organisations?*
2. *To whom are the mandated activities to be attributed?*
3. *Should one contemplate that the mandated measures should be attributed to the mandated State as well as the mandating authority?*

5.6.3 Non-military measures addressing States only

Non-military sanctions have been issued for a range of specific objectives such as compelling an occupying State to withdraw its troops,¹⁰⁶ preventing a State from developing weapons of mass destruction,¹⁰⁷ countering international terrorism,¹⁰⁸ protecting against human rights violations¹⁰⁹ and implementing the program for a peace process.¹¹⁰ In all these cases the Security Council has decreed that there was a threat to international peace and security.

¹⁰³ *Behrami and Behrami v. France*, Appl. No. 71412/01, *Saramati v. France, Germany and Norway*, Appl. No. 78166/01, ECtHR, 2. May 2007, paras. 132-141.

¹⁰⁴ *Berić and Others v. Bosnia Herzegovina*, Appl. No. 36357/04, ECtHR 16 October 2007, paras. 28.

¹⁰⁵ *R (on the application of Al-Jedda) v. Secretary of State for Defence*, 2007, UKHL 58, paras. 5-25, *Al-Jedda v. UK*, Appl. No. 55721/07, ECtHR, 7 July 2011, paras. 74-86; the jurisprudence will be dealt with below at pp. 49-51.

¹⁰⁶ Iraq/Kuwait (S/RES 661 (1990) of 6 August 1990).

¹⁰⁷ South Africa (S/RES 418(1977) of 4 November 1977); North Korea (S/RES 1718 (2006) of 14 October 2006); Iran (S/RES 1737 (2006) of 23 December 2006).

¹⁰⁸ Afghanistan (S/RES 1267 (1999) of 15 October 1999).

¹⁰⁹ South Africa (S/RES 418 (1977) of 4 November 1977); Haiti (S/RES 841 (1993) of 16 June 1993); Sudan (S/RES 1556 (2004) of 30 July 2004).

¹¹⁰ Liberia (S/RES 788 (1992) of 19 November 1992); Liberia (S/RES 1521 (2003) of 22 December 2003); Angola (S/RES 864 (1993) of 15 September 1993); Rwanda (S/RES 918 (1994) of 17 May 1994); Sierra Leone (S/RES 1132 (1997) of 8 October 1997); Democratic Republic of the Congo (S/RES 1493 (2003) of 28 July 2003); Ivory Coast (S/RES 1572 (2004) of 15 November 2004).

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Non-military sanctions mostly consist of, apart from diplomatic measures, embargoes against the import and export of weapons as well as other goods, and the limitation of cross-border travel.¹¹¹ In 1966 sanctions were imposed against Southern Rhodesia¹¹² and in 1977 against South Africa.¹¹³ By S/RES 232 (1966) all Member States were obliged to implement an export and import ban on certain products or commodities to or from Southern Rhodesia, equally they had to impose a traffic ban. S/RES 418 (1977) of 4 November 1977 against South Africa followed in principle the same pattern although concentrating on an arms embargo. In both cases a sanction committee was established which possessed different functions from the ones established after 1991. They were merely to gather information and to monitor the situation.¹¹⁴

After 1991 the restrictions on import and export imposed by non-military sanctions were broadened¹¹⁵ and tightened at the same time over the years. In particular the sanctions against Iraq have come under criticism for their negative social consequences on the population at large while the political elite of the targeted country, including its military, had means to avoid such negative effects. This latter aspect was referred to by those who questioned the efficiency of comprehensive sanctions.¹¹⁶

Having taken note of the effect economic sanctions against Iraq have had on the population at large¹¹⁷ the Security Council modified its sanctions system in general by designing “smart sanctions” through which particular individuals or groups were targeted rather than the whole population.¹¹⁸ Two

¹¹¹ There exists an extensive literature on how to define economic sanctions; see for example Johan Galtung, *The Effects of International Economic Sanctions: With Examples from the Case of Haiti*, *World Politics*, vol. 19 (1967), 378 - 416 who takes a critical view; equally so Arne Torsten and Beate Bull, *Are Smart Sanctions Feasible?*, *World Politics*, vol. 54 (2002), 373 - 403; David A. Baldwin, *Economic Statecraft*, 1985, 35-36.

¹¹² S/RES 232 (1966) of 16 December 1966.

¹¹³ S/RES 418 (1977) of 4 November 1977.

¹¹⁴ See S/RES 253 (1968) of 29 May 1968 and S/RES 421 (1977) of 9 December 1977, para. 1.

¹¹⁵ See the sanctions imposed upon Haiti (1993-1994), Yugoslavia (1992-1995) and, in particular, on Iraq.

¹¹⁶ There is a vast literature dealing with the efficiency of sanctions. See, for example Galtung, *supra* note 110; Torsten and Bull, *supra* note 110; Baldwin, *supra* note 110.

¹¹⁷ See the report on the consequences of such economic sanctions.

¹¹⁸ Farral, *supra* note 79, at 131; Clemens A. Feinäugle, *Hoheitsgewalt im Völkerrecht*, 2011, 8; Nico Krisch, *Introduction to Article 41*, in: Simma et al (eds.), *The Charter of the United Nations: A Commentary*, 3rd ed., 2012.

considerations – namely the wish to reduce unintended consequences on the situation of nutrition and health care for the population and to enhance political effectiveness – were the basis of this policy shift.¹¹⁹

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

5.6.4.1 In general

In this report, targeted sanctions are considered to be those which prescribe sanctions against individuals, groups, or individuals associated with particular groups or activities. The identification rests either with a sanctions committee¹²⁰ or the States to which the decision is addressed.¹²¹ Apart from identifying the individuals or groups against whom the sanctions are directed, listing sanctions committees may further have a role in respect of specifying the sanctions and, finally, they have an important role concerning exceptions.¹²² In the course of the development of the sanctions regime they are mandated to remove targeted individuals, groups or entities from the lists (delisting).

Targeted sanctions may involve measures such as financial sanctions, in particular the freezing of financial assets,¹²³ restrictions on travelling, arms embargoes as well as other measures tailored to the particular situation. Their objective is – so it is said – to focus the pressure on specific decision-making elites and the groups supporting them without affecting the population at large.¹²⁴ In that respect they are selective in the meaning that

¹¹⁹ David Cortright and George A. Lopez, Introduction: Assessing Smart Sanctions: Lessons from the 1990s, in: *Smart Sanctions: Targeting Economic Statecraft*, David Cortright and George A. Lopez, eds., 2002, at 1 et seq.

¹²⁰ See below at p. 35.

¹²¹ See below at p. 38.

¹²² See below at p. 35.

¹²³ On the development of financial sanctions see: Cortright, Lopez, and Rogers, *supra* note 77, at 23 et seq.

¹²⁴ Jain Cameron, *Respecting Human Rights and Fundamental Freedoms and EU/UN Sanctions: State of Play*, Report commissioned by the European Parliament, 2008; Mikael Eriksson, *Targeting Peace: Understanding UN and EU Targeted Sanctions*, 2011, 2; Darren Hawkins and Joshua Lloyds, *Questioning Comprehensive Sanctions: The Birth of a Norm*, *Journal of Human Rights*, vol.2 (2003) 441- 451 (at 443). Anthony Arnove, *Iraq under Siege: The Deadly Impact of Sanctions and War*, 2003; Kofi Annan, *Annual Report on the Work of the Organization*, 1998, 4.

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pressure is exercised upon those who are in control of, or responsible for, the activity which is considered a threat to international peace or security.

The terminology used to qualify sanctions which request particular measures being taken against identified or identifiable individuals and groups is not fully coherent. Occasionally sanctions are referred to as being “selective” (sometimes this term is used parallel or instead of the term “targeted”). This can mean various things. It can mean that only those elites or political leaders are targeted (for example Osama bin Laden), but it can also mean selectively sanctioning specific products or activities that are either vital to the conduct of the objectionable policy or are of particular value for the targeted political leader (for example, rough diamonds).¹²⁵ Finally, selective sanctions may be directed against certain regions of a country, such as the arms embargo against groups active in the eastern part of the Democratic Republic of Congo.¹²⁶

The report should use the term “targeted sanctions” if, as indicated above, they require particular measures being taken against an identified or identifiable individual, groups or entities. If the sanctions are limited in respect of the measures to be taken, one may entertain the term “selective sanctions”.

The first resolution to introduce targeted sanctions focussing explicitly on particular individuals and groups¹²⁷ was S/RES 1267 (1999) of 19 October

¹²⁵ Cortright and Lopez, *supra* note 77, at 2.

¹²⁶ Eriksson, *supra* note 123, at 3.

¹²⁷ The relevant part in the resolution reads: “*Determining* that the failure of the Taliban authorities to respond to the demands in paragraph 13 of resolution 1214 (1998) constitutes a threat to international peace and security, *Stressing* its determination to ensure respect for its resolutions, *Acting* under Chapter VII of the Charter of the United Nations,

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

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

Others consider S/RES 1127 (2006) of 14 October 2000 as the first targeted sanction since it provided for the imposing of a travel ban against senior officials

1999.¹²⁸ In previous resolutions – not issued under Chapter VII – the Security Council had already called upon the Taliban to end the fighting.¹²⁹ Although the S/RES 1267 sanctions system has by now become the one mostly referred to when targeted sanctions are discussed, the policy shift from comprehensive to targeted sanctions was in effect only manifested in S/RES 1483 (2003) of 22 May 2003. This resolution changed the sanctions system providing for a freezing of assets of a group of individuals to be defined by the Sanctions Committee. It has become the model of subsequent targeted sanctions. The relevant part of S/RES 1483 (2003)¹³⁰ reads:

“*Decides* that all Member States in which there are:

- (a) funds or other financial assets or economic resources of the previous Government of Iraq or its state bodies, corporations, or agencies, located outside Iraq as of the date of this resolution, or
- (b) funds or other financial assets or economic resources that have been removed from Iraq, or acquired, by Saddam Hussein or other senior officials of the former Iraqi regime and their immediate family members, including entities owned or controlled, directly or indirectly, by them or by persons acting on their behalf or at their direction,

shall freeze without delay those funds or other financial assets or economic resources and, unless these funds or other financial assets or economic resources are themselves the subject of a prior judicial, administrative, or arbitral lien or judgment, immediately shall cause their transfer to the Development Fund for Iraq, it being understood that, unless otherwise addressed, claims made by private individuals or non-government entities on those transferred funds or other financial assets may be presented to the internationally recognized, representative government of Iraq; and *decides further* that all such funds or other financial assets or economic resources shall enjoy the same privileges, immunities, and protections as provided under paragraph 22;”

of UNITA and members of their immediate families, see Stephan J. Hollenberg, *Challenges and Opportunities for Judicial Protection of Human Rights against Decisions of the United Nations Security Council*, 2013 (imprint) at p.29.

¹²⁸ See on the legal regime established by this resolution C.A. Feinäugle, *supra* note 117, at 141 et seq.; Rosemary Foot, *The United Nations, Counter Terrorism and Human Rights: International Adaption and Embedded Ideas*, *Human Rights Quarterly* 29 (2007), 489, 504 et seq.

¹²⁹ S/RES 1193 (1998) of 28 August 1998; S/RES 1214 (1998) of 8 December 1998.

¹³⁰ S/RES 1483 (2003) of 22 May 2003, at para. 23.

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Targeted sanctions differ from the previous (comprehensive) sanctions in several respects: they extend the meaning of the notion “threat to international peace and security” so as to cover international terrorism; they impose precise obligations on their addressees, the implementing States; they are specific in respect of the measures to be taken; and, in particular, they establish a system for the management of sanctions.

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

Since targeted sanctions¹³¹ inevitably lead to an infringement of the rights of individuals or entities, they raise the question whether and to what extent such individual rights are protected and whether the Security Council or the implementing State has to honour such protections. The measures to be taken under a targeted sanction and the rights of targeted individuals or entities may be in conflict. This leads to the further question of who is to decide in such a conflict and whether judicial control is appropriate and fits into the overarching system of the preservation of international peace and security which is at the heart of this report.

However targeted sanctions are not the only ones which may affect the rights of individuals. On several occasions subsidiary organs of the Security Council took binding measures in the context of the international administration of territories (Kosovo, Bosnia and Herzegovina, East Timor).¹³² As far as the situation of individuals is concerned, measures enacted in the context of territorial administration may create similar

¹³¹ Other types of Security Council pronouncements must be distinguished from targeted sanctions, namely those which have directed recommendations to the public and non-State actors. For example, in Sierra Leone the Council asked the diamond industry to collaborate with the official government. With regard to Liberia, the Council called upon the Liberian parties to cease hostilities. However, these pronouncements are recommendations, not decisions, and they do impose obligations upon neither the civil society nor upon any other group named in this context.

¹³² See de Wet, *supra* note 4, at 291, 315.

restrictions for individuals as those implementing targeted sanctions. One decisive difference exists, though. In respect of binding measures taken in the context of an international administration of a territory, the interference with the rights of individuals is the direct result of an action attributable to a subsidiary organ of the UN, whereas the effect of targeted sanctions on individuals and groups is mediated by the enforcement action undertaken by the State concerned.

Question:

Should measures taken by subsidiary organs of the Security Council be considered together with targeted sanctions from the point of view of judicial control?

5.6.4.2 Threat to international peace and security

As indicated earlier all sanctions – apart from the one on Iraq – establish that a “threat to international peace and security” justified the sanction’s decisions taken by the Security Council. Filling this term with substance, in respect of targeted sanctions, underwent considerable development. The S/RES 1267 (1999) sanctions system, at the beginning having targeted Al-Qaida and Osama bin Laden, in particular, may serve as an illustrative example since it has been supplemented by further Security Council resolutions.¹³³

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

¹³³ S/RES 1333 (2000) of 19 December 2000 (Afghanistan); S/RES 1363 (2001) of 30 July 2001 (Afghanistan); S/RES 1373 (2001) of 28 September 2001; S/RES 1390 (2002) of 16 January 2002 (Afghanistan); S/RES 1452 (2002) of 20 December 2002; S/RES 1455 (2003) of 17 January 2003; S/RES 1526 (2004) of 30 January 2004; S/RES 1566 (2004) of 8 October 2004; S/RES 1617 (2005) of 29 July 2005; S/RES 1624 (2005) of 14 September 2005; S/RES 1699 (2006) of 8 August 2006; S/RES 1730 (2006) of 19 December 2006; S/RES 1732 (2006) of 21 December 2006; S/RES 1735 (2006) of 22 December 2006; S/RES 1822 (2008) of 30 June 2006; S/RES 1904 (2009) of 17 December 2009; S/RES 1988 (2011) of 17 June 2011; S/RES 1989 (2011) of 17 June 2011; S/RES 2082 (2012) of 17 December 2012; S/RES 2083 (2012) of 17 December 2012. These resolutions have been analyzed by Feinäugle, *supra* note 117, at 141 et seq.

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violations. Later, the finding of the Security Council that there was a threat to international peace and security was based upon the ongoing terrorist attacks, the terrorist network, etc. Such terrorism was considered to exist worldwide; the previous territorial connection was abandoned. In the course of this development the objective of the sanctions regime was altered. Whereas S/RES 1267 (1999) referred to Afghanistan, the agenda item S/RES 1566 (2004) of 8 October 2004, although taking S/RES 1267 (1999) as a starting point, refers to “threats to international peace and security caused by terrorism”. The first Security Council resolution to qualify terrorism as a threat to international peace in this context was S/RES 1390 (2002), which thus adopted the approach of S/RES 1373 (2001) while generalising it. S/RES 1566 (2004) amalgamated the sanctions directed against Al-Qaida and the Taliban with the decisions of the Security Council against the financing of terrorism and terrorist attacks as referred to in S/RES 1373 (2001) of 28 September 2001. With S/RES 1390 (2002), the territorial nexus to Afghanistan was given up, rendering the S/RES 1267 sanctions regime into a general one against terrorism worldwide.¹³⁴

This development also had an influence on the scope of the system as far as targeted persons and entities were concerned.

5.6.4.3 Targeted individuals, groups and entities

S/RES 1267 (1999) was directed against all members and supporters of the Taliban, Al-Qaida and Osama bin Laden.¹³⁵

With Resolution 1333 (2000), adopted 19 December 2000, the Security Council extended the application of the sanctions provided for under Resolution 1267 (1999). The principle shift in the sanctions regime rests in the fact that, as far as financial sanctions were concerned, the territorial nexus was given up and the financial sanctions became individualised; they targeted Osama bin Laden and all individuals and entities associated with him.¹³⁶ The identification of these persons and entities rested with the

¹³⁴ The reasons for this development are given by the UN Secretary General in his report on the humanitarian implications of the measures imposed by Security Council Resolution 1287 (1999) and 1333 (2000) on the territory of Afghanistan under Taliban control, S/2001/1215, 1 December 2001 in stating: “With the collapse of the Taliban most sanction measures appear to have no focus.” (para. 3).

¹³⁵ Frequently Sanctions Committees are referred to as ‘subsidiary organs’ of the Security Council. It should be noted, though, that the relevant resolutions refer to Rule 28 of the Provisional Rules of Procedure of the Security Council rather than Article 29 of the UN Charter, which deals with subsidiary organs of the Provisional Rules of Procedure of the Security Council.

¹³⁶ S/RES 1333 (2000) of 19 December 2000, at para. 8.

Sanctions Committee which was entrusted with the establishment and administration of a list which named the targeted individuals and entities.¹³⁷ Whereas Security Council Resolution 1267 (1999) speaks of the “Afghan faction known as the Taliban”, Security Council Resolution 1373 (2001) of 28 September 2001 embraces a wider group, namely “persons who commit or attempt to commit terrorist acts or participate in or facilitate the commission of terrorist acts”. This changed the mandate of the Sanctions Committee considerably as well as the nature of the sanctions as such. From now on it was possible to target individuals worldwide. As far as the Sanctions Committee was concerned, it clearly exercised public authority by identifying individuals, groups or entities.

Security Council Resolution 1390 (2002), adopted in 16 January 2002, constituted a further step. Whereas so far the financial sanctions targeted Osama bin Laden and his followers, the sanctions on travel and transit only addressed high-ranking officials. All sanctions had the same target, namely Osama bin Laden, members of the Al-Qaida organisation and the Taliban and other individuals, groups, undertakings and entities associated with them, as referred to in the list created pursuant to Resolutions 1267 (1999) and 1333 (2000) to be updated regularly by the Committee. This constituted a consequential shift in the sanctions policy already anticipated in the loosening of the territorial nexus inherent in S/RES 1267 (1999). It further described the measures to be taken in greater precision. Through this, the sanctions system against terrorism also became quasi-permanent. The reason for this development was the collapse of the Taliban regime in Afghanistan in 2001, which made it obsolete to address this group in its territorial nexus with Afghanistan. Since the Security Council considered international terrorism a threat to peace¹³⁸ the policy shift as evidenced in this resolution was a matter of consequence.

Five years after having established that the sanctions should be directed against Osama bin Laden, and the Taliban and other individuals, groups or undertakings and entities associated with them, S/RES 1617 (2005) of 29 July 2005 made an attempt to identify what was meant by “associated with”.¹³⁹ This resulted in a further widening of the scope of potential targeted

¹³⁷ *Ibid.* para. 16.

¹³⁸ The UN Secretary-General addressed this point when he stated: “... with the collapse of the Taliban most sanctions measures appear to have no focus...” . Report of the Secretary-General on the humanitarian implications of the measures imposed by Security Council resolution 1267 (1999) and 1333 (2000) on the territory of Afghanistan under Taliban control, S/ 2001/ 1215, 18 December 2001, paragraph 3. See also Feinäugle, *supra* note 117, at 151/2.

¹³⁹ See S/RES 1617 (2005) 29 July 2005 at para. 2.

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persons or entities, since any supporting act or activity was considered sufficient. Apart from that, the resolution established a link to principles developed by the Financial Action Task Force, an entity created by the G7 in 1989. Under S/RES 2083 (2012) of 17 December 2012, all States are obliged to “take measures ... with respect to Al-Qaida and other individuals, groups, undertakings and entities associated with them.”¹⁴⁰

As already indicated the fact that Security Council resolutions target individuals but address States for implementation, reflects the enforceability of the measures taken, rather than the competence to issue such measures. The Security Council has made that clear. Security Council Resolution 1474 (2003), for example, stresses the obligations of all States “and other actors” to comply with the previous resolution which had imposed an arms embargo on Somalia.¹⁴¹ Private actors have been directly addressed in cases of civil war; for example, the Security Council has demanded political groups and individuals to immediately cease hostile activities and to comply with the previously agreed ceasefire, to disarm themselves and the like.

The particularity of this and the following decisions is not that individuals or groups are targeted directly, but that the discretion of the addressed State is minimised or even reduced to zero with respect to the identification of the target and the nature of the measures to be undertaken. Individuals are still mediated by States under whose jurisdiction they are, or in the case of Europe, they are mediated by the EU.¹⁴²

5.6.4.4 Measures to be taken

Article 41 contains a list of non-military measures which the Security Council may issue. In practice, the Security Council has employed a broad variation of sanctions ranging from comprehensive measures, which are meant to prevent the flow to and from a targeted country of all products or goods, to more specific sanctions targeting items such as arms, timber, rough diamonds or particular activities such as travelling. Depending upon the particular sanctions system established by the Security Council, States have no discretion which measures to take and against whom.¹⁴³ This changes the role of the States. In implementing targeted sanctions of the Security Council, States act like an executive of the former.

¹⁴⁰ S/RES 2083 (2012) of 17 December 2012, at para. 1; Para. 2 contains a definition on what is meant by “associated with Al-Qaida”.

¹⁴¹ S/RES 1474 (2003) of 8 April 2003.

¹⁴² Peters, *supra* note 15, at MN 36.

¹⁴³ See below p. 42.

One of the most common measures of targeted sanctions is a freezing of financial assets. Although financial sanctions were previously common, the freezing of financial assets was adopted the first time in S/RES 841 (1993) of 16 June 1993.¹⁴⁴ Since then, the freezing of financial assets has become quite common, in particular, as a measure to fight terrorism.¹⁴⁵ The freezing of targeted assets is decreed and implemented with a view to denying or depriving particular entities (individuals, groups, companies or institutions) of their assets or property so as to render their activities impossible or at least more difficult or ineffective. This freezing of assets in the fight against terrorism does not distinguish between assets held privately or in an official capacity.¹⁴⁶

In addition, travel bans are a common measure for targeted sanctions. Travel bans or restrictions have been decreed, for example, by UN sanctions against the military junta in Haiti¹⁴⁷ and specifically listed Iranian individuals involved in the nuclear activities of Iran.¹⁴⁸ Travel bans are applied to individuals who are either part of a regime (for example Syria) or they are applied more independently. They mean to restrict the efficiency of networks, in particular, terrorist networks.

Sanctions issued by the Security Council and the European Union have also targeted particular commodities such as rough diamonds (as in the case of Angola, Sierra Leone, Liberia and Ivory Coast). The aim of such measures was to block the finances of certain groups who were responsible for the civil wars in question. The implementation of these sanctions led to the Kimberley Process, according to which the origin of diamonds has to be certified.

Another example for targeting particular goods are the arms embargoes adopted in most targeted sanctions.¹⁴⁹ The main purpose of an arms embargo is to deny or to reduce access to weapons for either everyone or only a particular party to the conflict.

¹⁴⁴ S/RES 841 (1993) of 16 June 1999, at para. 8.

¹⁴⁵ For details see Thomas Biersteker and Sue Eckert, *Countering the Financing of Terrorism*, 2008.

¹⁴⁶ See for example S/RES/1373 (2001) of 28 September 2001. In other cases such as in the case of sanctions against the Iraq only assets held in an official capacity or governmental assets were frozen.

¹⁴⁷ S/RES 914 (1994) of 27 April 1994.

¹⁴⁸ S/RES 1737 (2006) of 23 December 2006.

¹⁴⁹ See the report *United Nations Arms Embargoes: Their Impact on Arms Flows and Target Behaviour*, ed. by Damien Fruchart et al., 2007.

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Occasionally a ban on the import of luxury goods has been issued.¹⁵⁰ Such a ban is meant to target the political elite.

Question:

Should the measures taken be subject to judicial review? Would it be appropriate to distinguish between the various measures?

5.6.4.5 Management of the sanctions regimes

The Security Council has delegated a number of responsibilities concerning the implementation of sanctions to sanctions committees.

Generally speaking, sanctions committees oversee the implementation of sanctions by States and eventually their effect on third States.¹⁵¹ Each sanctions committee is tailored to a particular sanctions regime.¹⁵² This practice was established with the first sanctions regime,¹⁵³ concerning Southern Rhodesia and maintained, with one exception,¹⁵⁴ to date. Other sanctions committees were established to undertake responsibilities concerning sanctions regimes which were already in existence. In spite of the proliferation of sanctions committees, they have several elements in common. They are composed of representatives of the Member States of the Security Council, they meet in closed session and they take decisions by consensus.

Most committees are required to examine the reports of the Secretary General on the implementation of the sanctions, they seek information from Member States and they examine how to render sanctions more effectively. Some committees have the responsibility of considering applications for exemptions from a sanctions regime and requests for special assistance

¹⁵⁰ Democratic People's Republic of Korea S/RES 1718 (2006) of 14 October 2006, para. 8 a) (iii).

¹⁵¹ See Andreas Paulus, on Art. 29, MN 35, in: B. Simma et al. (eds.), *The Charter of the United Nations: A Commentary*, 3rd ed., 2012.

¹⁵² S/RES 661 (1990) of 6 August 1990 (Iraq / Kuwait), 748 (1992) of 31 March 1992 (Libya); 841 (1993) of 16 June 1993 (Haiti), 864 (1993) of 15 September 1993 (Angola), 918 (1994) of 17 May 1994 (Rwanda); 1132 (1997) of 8 October 1997 (Sierra Leone), 1160 (1998) of 31 March 1998 (Federal Republic of Yugoslavia), 1267 (1999) of 15 October 1999 (Afghanistan, Taliban, Al Qaida), 1298 (2000) of 17 May 2000 (Eritrea / Ethiopia), 1343 (2001) of 7 March 2001 (Liberia); 1521 (2003) of 22 December 2003 (Liberia); 1572 (2004) of 15 November 2004 (Côte d'Ivoire), 1636 (2005) of 31 October 2005 (Middle East); 1718 (2006) of 14 October 2006 (Democratic People's Republic of Korea); 1737 (2006) of 23 December 2006 (Iran).

¹⁵³ S/RES 253 of 29 May 1968 (Southern Rhodesia).

¹⁵⁴ The exception is the Sudan, see S/RES 1070 (1996) of 16 August 1996.

under Article 50 of the Charter. The most important task of sanctions committees is to administer the list of targeted individuals and entities. In particular this latter responsibility has undergone a significant evolution under S/RES 1267 (1999) and the subsequent Security Council resolutions. The mandate of sanctions committees differs; but they all exercise their power on behalf of the Security Council.¹⁵⁵

The development of the system of sanctions committees can be exemplified by assessing the development of the sanctions system under S/RES 1267 (1999).

S/RES 1267 established a Sanctions Committee¹⁵⁶ and set out its mandate. Its membership reflects the membership of the Security Council. The Sanctions Committee is entrusted with the task of requesting all States to keep it informed of the steps taken to ensure the effective implementation of the measures required under the resolution. Specifically, States are required to deny permission for aircraft associated with the Taliban to use their territory for takeoff or landing unless the Sanctions Committee has approved the flight in advance for humanitarian reasons, as well as to freeze the Taliban's funds and other financial resources.

The most important function of the Sanctions Committee is:

“To designate the aircraft and funds or other financial resources referred to in paragraph 4 above in order to facilitate the implementation of the measures imposed by that paragraph.”

The targeted individuals or entities are listed by the Sanctions Committee established by S/RES 1267. States are obliged to implement the sanctions. This sanction system has been modified significantly, mostly with the view to develop its procedure so as to render it more transparent.¹⁵⁷

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

¹⁵⁵ See the detailed list on the established sanctions committees, Paulus, *supra* note 151, at pp. 1000-1003.

¹⁵⁶ S/RES 1267 (1999) of 15 October 1999, at para. 6.

¹⁵⁷ See below at pp. 138 et seq.

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S/RES 1452 (2002) of 20 December 2002 had a different focus.¹⁵⁸ It was the first to concentrate on exemptions from financial sanctions, thus ameliorating some of the economic consequences of the targeted sanctions. It thus acknowledged that the implementation of these sanctions resulted in the infringement of the rights of individuals and that such sanctions, although justified, must not have a totally disproportionate effect. On 8 November 2002, the Sanctions Committee published procedural rules which, amongst others, established a procedure for the delisting of individuals and entities.

Generally speaking, this sanctions system – originally established by S/RES 1267 (1999) – works in three stages: namely, the decision of the Security Council to set up such a system in S/RES 1267 (1999) and in subsequent Security Council resolutions; the identification by the Sanctions Committee of particular individuals or groups by listing or delisting them; and, finally, the implementation of the decision on the national level. Whereas the decisions of the Security Council taken at the first stage are of a normative nature, the actions undertaken on the second and the third are more of an executive nature. This may be of relevance for any judicial control.

The particularity of S/RES 1267 (1999) that distinguishes it from subsequent sanctions is that it does address a group, namely the Taliban, but without giving up the territorial nexus by referring to the Taliban as “the Afghan faction known as the Taliban”.¹⁵⁹ This had an impact on the mandate of the Sanctions Committee. It only had to identify the objects which were covered by the sanctions regime, not the relevant persons as was the case later.

5.6.4.6 Internal control

The decision to use targeted sanctions raised questions in judicial pronouncements¹⁶⁰ as well as in the academic literature.¹⁶¹ Targeted sanctions have been criticised for the manner in which individuals are listed and have their assets frozen without either transparency or the possibility of formal review. This has prompted the Security Council to establish a system which provides for a review of the listing of individuals and entities. This system has been refined over the years.

¹⁵⁸ Feinäugle, *supra* note 117, at 152 et seq., S/RES 1267 (1999) para. 1.

¹⁵⁹ S/RES 1267 (1999), at para. 1.

¹⁶⁰ See below at pp. 47/48.

¹⁶¹ M. Norrin Ripsman, *The Challenge of Targeting Economic Sanctions*, *The [reviews] International Journal*, Vol. 57, Issue 4 (Autumn 2002), pp. 647-651; E. Rosand, *Security Council's Efforts to Monitor the Implementation of Al Qaeda/Taliban Sanctions*, *The American Journal of International Law*, Vol. 98, pp. 745-763.

In response to the criticism of the sanctions regime, the Security Council adopted detailed resolutions to develop a procedure concerning the sanctioning of individuals and entities. S/RES 1456 (2003)¹⁶² and 1526 (2004)¹⁶³ tried to make the system more transparent and effective by providing that the States concerned should be informed about the listing and calling upon them, when seeking to list a person or entity, to provide as much information as possible. S/RES 1456 (2003) emphasised that States were obliged to ensure that

“any measure taken to combat terrorism comply with all their obligations under international law, in particular international human rights.”¹⁶⁴

Security Council Resolution 1732 (2006) welcomed the report of an informal working group on sanctions¹⁶⁵ and adopted its recommendations. This working group had recommended that the Security Council should clearly define the scope of the sanctions as well as the criteria for their moderation and abolition.

S/RES 1730 (2006) of 16 December 2006¹⁶⁶ established the procedure for delisting. It set up a « Focal Point » as a contact possibility for listed individuals. A focal point in each sanctions committee is responsible for receiving requests for delisting from a petitioner. The request is forwarded to the designating government and the governments of citizenship and residence. The governments concerned are encouraged to consult with the designating government. If recommended by one of those governments, the delisting request is to be placed on the agenda of the sanctions committee, which would take a decision by consensus. Further procedural developments are enshrined in S/RES 1732 (2006) of 21 December 2006, and 1735 (2006) of 22 December 2006, all attempting to improve the transparency and the efficiency of the listing and the delisting procedure. This delisting procedure does not only apply to the Sanctions Committee established by S/RES 1267 (1999), but also to those sanctions committees set up by S/RES 1718 (2006), 1636 (2005), 1591 (2005), 1572 (2004), 1533 (2004), 1521 (2005), 1518 (2003), 1132 (1997), 918 (1994) and 751 (1992). Security Council Resolution 1735 (2006) of 22 December 2006 reiterated the sanctions

¹⁶² Of 20 January 2003 adopted at a Meeting of Ministers for Foreign Affairs.

¹⁶³ Adopted 30 January 2004, see Feinäugle, *supra* note 117, at pp. 155 et seq.

¹⁶⁴ S/RES 1456 (2003) of 20 January 2003, at Para. 6.

¹⁶⁵ Report of the Informal Working Group of the Security Council on General Issues of Sanctions, S/2006/997 of 22 December 2006.

¹⁶⁶ Contained in an annex to the Resolution; see also the Presidential statement S/PRST/2006/28 of 22 June 2006. This Presidential Statement followed a meeting of the Security Council on Strengthening international law, rule of law and maintenance of international peace and security.

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previously imposed and the requirements for the listing of individuals and entities, and provided for a procedure for notifying the individuals or entities concerned.¹⁶⁷

The procedure was subsequently reinforced with the adoption of Security Council Resolutions 1822 (2008) and 1904 (2009) of 17 December 2009. In the latter, the Security Council decided to create an office of the ombudsperson whose task is to receive requests from individuals targeted by the Security Council sanctions in the fight against terrorism.¹⁶⁸ Under that resolution, persons on the sanctions list are entitled to obtain information on the reasons for the measures taken against them and to file delisting petitions with the ombudsperson. It is the ombudsperson's function to examine each case impartially and independently and then to submit a report to the sanctions committee explaining the reason for or against delisting.

5.7 Legal Limitations to Security Council Decisions

5.7.1 UN Charter

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

Some writers conclude that the Security Council's function is to maintain international peace and security and that places it above the law.¹⁶⁹ Others insist, however, that the actions of the Security Council are subject to legal limitations which have their basis in the UN Charter as well as in international law.¹⁷⁰

It has been argued by some that the UN Charter indicates in Articles 24 and 25 that the power of the Security Council to issue sanctions is not

¹⁶⁷ S/RES 1735 (2006) of 22 December 2006 Paras. 10 and 11.

¹⁶⁸ On both resolutions see Feinäugle, *supra* note 117, at 169 et seq.

¹⁶⁹ Clyde Eagleton, *International Government*, 1952; Gabriël H. Oosthuizen, *Playing the Devil's Advocate: The Security Council is Unbound by Law*, LJIL 12 (1999), 549 et seq.; Hans Kelsen, *The Law of the United Nations*, 1951, 735; Hanspeter Neuhold, *Die Grundregeln der zwischenstaatlichen Beziehungen*, in: Neuhold/Hummer/Schreuer (eds.), *Österreichisches Handbuch des Völkerrechts*, 1997, 319, 326.

¹⁷⁰ Mohammed Bedjaoui, *The New World Order and the Security Council: Testing the Legality of its Acts*, 1994; George Nolte, *The Limits of the Security Council's Powers and its Functions in the International Legal System: Some Reflections*, in: Michael Byers (ed.), *The Role of Law in International Politics*, 2000, 315-326;

unlimited. According to Article 25 of the UN Charter, Member States agree to carry out the decisions of the Security Council in accordance with the UN Charter, although it has been equally argued by others that the words “in accordance with the present Charter” may apply to the actions of Member States or the decision of the Security Council, or both.¹⁷¹

Those who accept that the powers of the Security Council are limited, instead refer to the broad wording of Article 49 of the UN Charter and the discretionary powers of the Security Council which are beyond judicial control,¹⁷² or distinguish between the various elements of a Security Council decision under Chapter VII of the UN Charter. Others¹⁷³ point to the law-making function of the Security Council.

Finally, it has also been argued that according to Article 24(2) UN Charter, the Security Council is required to act in accordance with the purposes and principles of the United Nations. This constitutes a reference to Articles 1 and 2 of the UN Charter. Although Article 24(2) of the UN Charter clearly establishes that the Security Council is under legal restrictions when exercising its functions under Chapter VII of the UN Charter, these provisions are considered as being vague and too general to provide a meaningful limitation of the powers of the Security Council.¹⁷⁴

5.7.2 *Ius Cogens*

In the literature, peremptory rules of international law have been referred to as possible limits for Security Council sanctions. The proponents of this view argue that these norms are so important for the international community that Security Council decisions violating them are *ab initio* null and void.¹⁷⁵ The problem with this approach is that the peremptory norms have not been exhaustively defined, although the prohibition of the use of force, the right to self-determination, the prohibition of genocide, fundamental human rights and international humanitarian law are referred to

¹⁷¹ Bernd Martenczuk, *The Security Council, the International Court of Justice and Judicial Review*, 535.

¹⁷² M. Reisman, *The Constitutional Crisis in the United Nations*, AJIL 87 (1993), p. 83 (93); Krisch, *supra* note 80, at MN 5.6.

¹⁷³ A. Pellet, *Conclusions*, in: Stern (ed.): *Les aspects juridiques de la crise et de la guerre du Golfe, 1991*, p. 487, 490 : « Ce qu[e] le Conseil de sécurité] dit est le droit ».

¹⁷⁴ Martenczuk, *supra* note 171, at 542

¹⁷⁵ Alexander Orakhelashvili, *The Impact of Peremptory Norms on the Interpretation and Application of United Nations Security Council Resolutions*, at 62-63.

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in this context.¹⁷⁶ The Court of First Instance of the European Union has in the *Kadi* case supported this approach.¹⁷⁷

Question:

What is the view of the Commission concerning this approach?

5.7.3 Human Rights

Three approaches have been advocated in academic writings, as well as, in part, in the jurisprudence, to instrumentalise human rights as a limit for Security Council decisions under Chapter VII of the UN Charter. Each of these approaches involves attributing to human rights a hierarchy in the international legal system comparable to the UN Charter by “transcribing” human rights into the UN Charter, either via Articles 1(1), 1(3), 55, 56 of the UN Charter,¹⁷⁸ or referring to Article 2 (2) of the UN Charter and the promotion of human rights by the United Nations by arguing that the United Nations is bound by the existing human rights instruments under the principle of good faith,¹⁷⁹ or finally by considering international human rights to be part of customary international law which is binding upon the United Nations.¹⁸⁰ It has also been argued that human rights are binding upon the United Nations due to the fact that its members are committed.¹⁸¹

Some scholars have argued that almost every first-generation human right has attained the status of *ius cogens*.¹⁸² Such an approach faces the argument that several of these rights are derogable in times of emergency and it is to

¹⁷⁶ Orakhelashvili, *supra* note 175, at 63-67.

¹⁷⁷ Yassin Abdullah Kadi v. Council and Commission, Court of First Instance, Case T-315/01, 21 September 2005, ILM vol. 45, 81.

¹⁷⁸ Wolfrum, *supra* note 28, at 84/5.

¹⁷⁹ de Wet, *supra* note 4, at p. 195; Erika de Wet/A. Nollkaemper, Review of Security Council Decisions by National Courts, GYIL 45 (2002), 166, 173; Alexander Orakhelashvili, The Acts of the Security Council Meaning and Standards of Review, Max Planck UNYB 11 (2007), p. 143.

¹⁸⁰ M. Bothe, Security Council's Targeted Sanctions against Presumed Terrorists, The Need to Comply with Human Rights Standards, JICJ 6 (2008), 541 et seq.; Reinisch, *supra* note 14, at 858; Bardo Fassbender, Targeted Sanctions Imposed by the UN Security Council and Due Process Rights, IOLR 3 (2006), 437, Orakhelashvili, *supra* note 179, at 149; Rain Liivoja, The Scope of the Supremacy Clause of the United Nations Charter, ICLQ 57 (2008), 583, 598.

¹⁸¹ Bedjaoui, *supra* note 170, at 7; Reinisch, *supra* note 14, at 858.

¹⁸² Alexander Orakhelashvili, Preemptory Norms in International Law, 2006, pp. 53-60.

be assumed that the Security Council acts under Chapter VII in such times.¹⁸³

5.7.4 Inherent Limitations

It has been stated that the Security Council must not abuse its powers,¹⁸⁴ which would embrace using its powers for purposes not endorsed by the UN Charter, or to use them in an arbitrary manner. A somewhat similar approach is that the Security Council exercises public power and such an exercise must – as a matter of principle – adhere to the principles of the rule of law.¹⁸⁵

Questions:

- 1. Are the powers of the Security Council to issue decisions limited?*
- 2. Is it appropriate to distinguish between the different types of Security Council decisions? If so, which types?*
- 3. Which limits are to be considered?*
 - a) the UN Charter*
 - b) Ius cogens*
 - c) Human Rights*
 - d) Inherent Limitations*

5.8 National Implementation of Security Council decisions under Article 41 UN Charter

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

¹⁸³ Koji Teraya, *Emerging Hierarchy in International Human Rights and Beyond: From the Perspective of Non-derogable Rights*, EJIL 12 (2001), 917; Antonios Tzanakopoulos, *Collective Security and Human Rights*, in: *Hierarchy in International Law: The Place of Human Rights*, Erika de Wet and Jure Vidmar (eds.), 2012, 42 at 49.

¹⁸⁴ Peters, *supra* note 15, at MN 107; Vera Gowlland-Debbas, *The Relationship between the International Court of Justice and the Security Council in the light of the Lockerbie Case*, AJIL 88 (1994), 643-677, at 663.

¹⁸⁵ Franck, *supra* note 90, at 244; S. Chesterman, *The UN Security Council and the Rule of Law*, Final Report and Recommendations from the Austrian Initiative, 2004-2008; in detail Feinäugle, *supra* note 117, at 101 et seq.

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legislation as the basis for the required implementation measures. Such primary national legislation constitutes the necessary link between the international level on which the sanctions are being adopted and the national level necessary for execution.

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

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

The empowerment of the President of the United States of America is of a more general nature. It rests on the United Nations Participation Act,¹⁸⁶ which authorises the US President to implement UN Security Council resolutions, and the International Emergency Economic Powers Act,¹⁸⁷ which contains a wider mandate.¹⁸⁸

In implementing Security Council resolutions adopted under Article 41 of the UN Charter, whether directed against other States or individuals, the members of the European Union must take into account the competences of the European Union (EU). As for the implementation under national law, a normative act of the EU is required to authorise the implementation. The Maastricht Treaty adopted a two-step procedure to give effect to a Security Council decision. First, a common position under Article 29 of the Treaty on the European Union (TEU) (former Article 15 Treaty establishing the European Community (TEC)) will be adopted, which will then be implemented by the Council under Articles 75¹⁸⁹ and 215 Treaty on the

¹⁸⁶ United Nations Participation Act, SEC 5 (a).

¹⁸⁷ International Emergency Economic Powers Act, § 1701.

¹⁸⁸ Natalie Reid, Sue E. Eckert, Jarat Chopra, and Thomas J. Biersteker, Targeted Financial Sanctions: Harmonizing National Legislation and Regulatory Practices, in: Smart Sanctions: Targeting Economic Statecraft, *supra* note 144, at 65 et seq.

¹⁸⁹ Article 75 of the Treaty on the Functioning of the European Union reads: Where necessary to achieve the objectives set out in Article 67, as regards preventing and combating terrorism and related activities, the European Parliament and the Council, acting by means of regulations in accordance with the ordinary

Functioning of the European Union (TFEU) by adopting a regulation. For sanctions targeting individuals, recourse is also necessary to Article 352 TFEU (former Article 308 TEC).¹⁹⁰ This has been confirmed by the Court of First Instance in the *Kadi* judgment of 21 September 2005¹⁹¹ and upheld on appeal by the ECJ in its judgment of 3 September 2008.¹⁹² Such a regulation prohibits the trade which is outlawed by the decision of the Security Council, although it may be noted that in practice the Security Council decision and the corresponding EU regulation do not always correspond fully. According to the EU law, such a regulation is immediately effective within the legal system of the EU Member States, takes precedent over national law and creates a duty for all individuals under EU jurisdiction. Regulations of this nature have been adopted for comprehensive trade boycotts as well as for

legislative procedure, shall define a framework for administrative measures with regard to capital movements and payments, such as the freezing of funds, financial assets or economic gains belonging to, or owned or held by, natural or legal persons, groups or non-State entities.

The Council, on a proposal from the Commission, shall adopt measures to implement the framework referred to in the first paragraph.

The acts referred to in this Article shall include necessary provisions on legal safeguards.

¹⁹⁰ Article 352 (ex Article 308 TEC) reads:

1. If action by the Union should prove necessary, within the framework of the policies defined in the Treaties, to attain one of the objectives set out in the Treaties, and the Treaties have not provided the necessary powers, the Council, acting unanimously on a proposal from the Commission and after obtaining the consent of the European Parliament, shall adopt the appropriate measures. Where the measures in question are adopted by the Council in accordance with a special legislative procedure, it shall also act unanimously on a proposal from the Commission and after obtaining the consent of the European Parliament.
2. Using the procedure for monitoring the subsidiarity principle referred to in Article 5(3) of the Treaty on European Union, the Commission shall draw national Parliaments' attention to proposals based on this Article.
3. Measures based on this Article shall not entail harmonisation of Member States' laws or regulations in cases where the Treaties exclude such harmonisation.
4. This Article cannot serve as a basis for attaining objectives pertaining to the common foreign and security policy and any acts adopted pursuant to this Article shall respect the limits set out in Article 40, second paragraph, of the Treaty on European Union.

The Court of First Instance and the ECJ took different positions on article 352 TFEU although both agreed that recourse thereto was necessary.

¹⁹¹ On the judgment see below p. 55.

¹⁹² On the judgment see below p. 56.

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specific decisions, such as to block a bank account or to impose travel restrictions.¹⁹³

It may, however, be the case that the EU competences do not cover the content of the Security Council resolution fully. For example, the Security Council has in many cases imposed embargoes on all trade with weapons concerning specific countries. The first such decisions were in respect of Rhodesia and of South Africa and were followed by other decisions concerning Iraq, the former Yugoslavia, Libya, Somalia, Liberia, and Sierra Leone, among others. The implementation of these sanctions is also set in motion by the adoption of a joint position within the common foreign and security policy of the European Union. Not only has the Security Council imposed embargoes on weapons, several EU regulations have been adopted for the implementation of weapons embargoes.¹⁹⁴

Question:

Will it be necessary for the Report to deal with the national implementation systems in detail?

III. Judicial Control

1. Introduction

In the following section, the most relevant judgments having dealt with the legality/illegality of Security Council resolutions adopted under Chapter VII of the UN Charter will be reported. Those dealing with targeted sanctions mostly come to the conclusion that the procedure of listing and delisting lacks transparency and that the targeted individuals or groups did not have recourse to a fair trial. The judgments differ, though, whether they refer to the Security Council or only to the implementing national or European law, as the case may be. As can be seen from the judgment of the case of *Yassin Abdullah Kadi et al v. Council of the European Union*, the Court of First Instance (now the General Court) was not fully consistent in this respect.

¹⁹³ Frowein, *supra* note 18, at 260; see Anthonius W de Vries, European Sanctions against the Federal Republic of Yugoslavia from 1998 to 2000: A Special Experience in Targeting, in: Smart Sanctions: Targeting Economic Statecraft, *supra* note 77, at 87 at 88 et seq.; Andrea Gattini, Effects of Decisions of the UN Security Council in the EU Legal Order, *International Law as Law of the European Union*, Enzo Cannizzaro, Paolo Palchetti, and Ramses A. Wessel, 2012, 215 at 216 et seq.

¹⁹⁴ For this development see:
http://www.ausfuhrkontrolle.info/ausfuhrkontrolle/de/embargos/uebersicht/uebersicht_laender_bezogene_embargos.pdf.

It is of interest, too, whether and to what extent the courts took into consideration the procedure set up by the Security Council on listing and delisting.

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

2.1 Introduction

The question whether the International Court of Justice should exercise judicial review over Security Council measures has been discussed controversially¹⁹⁵ since the Conference of San Francisco. When deliberating on the Chapter relating to the peaceful settlement of disputes, the Belgian delegation submitted two proposals that would have granted individual States the possibility of requesting an advisory opinion from the International Court of Justice for the purpose of reviewing the legality of a proposed Security Council resolution.¹⁹⁶ However, these proposals were not accepted.

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

The opponents of judicial review in general argue that judicial control of Security Council measures would neither be commensurate with the status of the Security Council in the organisation of the United Nations nor the functions entrusted to it.¹⁹⁷ The arguments against the judicial control of decisions of the Security Council are summarised by Judge Schwebel in his dissenting opinion in the Lockerbie cases:¹⁹⁸

The texts of the Charter of the United Nations and of the Statute of the Court furnish no shred of support for a conclusion that the Court possesses a power of judicial review in general, or a power to supervene the decisions of the Security Council in particular. On the contrary, by the absence of any such provision, and by according the Security Council "primary responsibility for the maintenance of international peace and security", the

¹⁹⁵ On the various positions taken, see de Wet, *supra* note 4, at 74 et seq.

¹⁹⁶ United Nation Conference on International Organization vol. 3, 336 and vol.13 at 653/4; on this see de Wet, *supra* note 4, at 75.

¹⁹⁷ Michael Reisman, The Constitutional Crisis in the United Nations, *AJIL* vol. 87 (1993), 88.

¹⁹⁸ Dissenting Opinion of President Schwebel, in the case *Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v. United Kingdom) Libya v. United Kingdom Preliminary Objections*, at 162 et seq.; Scott S. Evans, The Lockerbie Incident Cases: Libyan-Sponsored terrorism, Judicial Review and the Political Question Doctrine, *Maryland Journal of International Law and Trade*, vol. 18 (1994).

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Charter and the Statute import the contrary. So extraordinary a power as that of judicial review is not ordinarily to be implied and never has been on the international plane. If the Court were to generate such a power, the Security Council would no longer be primary in its assigned responsibilities, because if the Court could overrule, negate, modify - or, as in this case, hold as proposed that decisions of the Security Council are not "opposable" to the principal object State of those decisions and to the object of its sanctions - it would be the Court and not the Council that would exercise, or purport to exercise, the dispositive and hence primary authority.¹⁹⁹

The supporters of judicial review of Security Council decisions by the International Court of Justice put forward several arguments. They argue that the International Court of Justice is perfectly capable of ensuring that its procedure is not misused for political reasons.²⁰⁰ It is even stated that judicial review of Security Council decisions might strengthen rather than weaken the powers of the Security Council. In particular, it is said, it would make sure that more powerful States would not have excessive influence on the Security Council decision concerned.²⁰¹

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

Therefore the issue of a judicial review of Security Council decisions should be re-considered in the light of the recent developments as far as the

¹⁹⁹ See also the Separate Opinion of Judge *at hoc* Jennings, *Libya v. United Kingdom* (Preliminary Objections); see also Marcella David, *Passport to Justice Internationalizing the Political Question Doctrine for Application in the World Court*, *Harvard International Law Journal*, vol. 40 (1999), 121.

²⁰⁰ Martenczuk, *supra* note 171, at 533; Bernd Malanczuk, *Reconsidering the Relationship between the ICJ and the Security Council*, in: *International Law and The Hague's 750th Anniversary* (Wybo P.Heere, ed.), 190, 90; Edward MacWhinney, *The Judicial Wisdom, and the World Court as Special Constitutional Court*, *Festschrift für Rudolf Bernhard*, 1995, 709.

²⁰¹ De Wet, *supra* note 4, at 77/8 with further references; John Dugard, *Judicial Review of Sanctions*, in: Vera Gowlland-Debbas(ed.), *United Nations Sanctions and International Law*, 2001, 85.

sanctions system under Chapter VII of the UN Charter is concerned, taking into account the role human rights are meant to play for the United Nations, including the Security Council.

2.2 Pronouncements of the ICJ

As indicated earlier the ICJ has had several occasions to pronounce itself on Security Council decisions but it, at the very end, has declined to do so. The ICJ, in its Advisory Opinion in the case Concerning Certain Expenses of the United Nations²⁰² emphasised:

“In the legal system of States, there is often some procedure for determining the validity of even a legislative or governmental act, but no analogous procedure is to be found in the structure of the United Nations. Proposals made during the drafting of the Charter to place the ultimate authority to interpret the Charter in the International Court of Justice were not accepted.”²⁰³

This dictum was reiterated in the Advisory Opinion of the ICJ on Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970).²⁰⁴

One further pronouncement arises from the much discussed *Lockerbie cases*. After the incident the United States and the United Kingdom jointly demanded the extradition of two Libyan citizens, an action complemented by the non-binding Security Council Resolution 731 (1992) requesting Libya to comply. Libya on the basis of the compromisary clause, filed a claim with the ICJ arguing that the United States and the United Kingdom had violated their obligations under the Montreal Convention by requesting the extradition. Libya also submitted a request for provisional measures. Briefly after the hearing on this request, the Security Council adopted Resolution 748 (1992) under Chapter VII of the UN Charter by which it was stated that Libya had not effectively implemented Resolution 731 (1992), which constituted a threat to international peace and security. It also decided that Libya was required to extradite the two Libyan citizens. The ICJ decided that under the prevailing circumstances it was not necessary to prescribe provisional measures. It did so while avoiding the legal issues raised by Security Council Resolution 748 (1992).²⁰⁵

²⁰² Art. 17, para. 2, of the Charter.

²⁰³ ICJ Reports 1962, 168.

²⁰⁴ ICJ Reports 1971, 45.

²⁰⁵ *Libya v United States*, *supra* note 198, at 127; *Libya v United Kingdom* (note 198) at para. 38; Judge Bedjaoni in his dissenting opinion stated that the Security Council should comply with the purposes and principles of the UN Charter and

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The preliminary objections were mostly dismissed for procedural reasons of no relevance in the context here. The Court, however, countered the objection advanced by the United States and the United Kingdom that Security Council Resolution 748 (1992) superseded the potential rights of Libya under the Montreal Convention (on which it had based its claim) by stating that the Security Council resolution was adopted only after the case had been submitted. The ICJ held that it had jurisdiction upon the filing date and that the coming into existence of Security Council resolutions could not affect jurisdiction once established.²⁰⁶ This was criticised in particular in the dissenting opinion of Judge Schwebel.²⁰⁷

In the case concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (*Bosnia-Herzegovina v Yugoslavia (Serbia und Montenegro)*),²⁰⁸ apart from pursuing its case concerning the responsibility for acts of genocide, Bosnia-Herzegovina wanted the ICJ also to consider the legal status and effects of the arms embargo imposed by Security Council Resolution 712 of 25 September 1991. The ICJ however declined to deal with this issue in its Order on Provisional Measures for procedural reasons.²⁰⁹

2.3 Pronouncements of the ICTY

The ICTY in its Decision on the Defence Motion for Interlocutory Appeal on Jurisprudence of 2 October 1995²¹⁰ dealt intensively with the question as to whether the Tribunal had been established by the Security Council in accordance with the UN Charter, whereas both the Trial Chamber and the Prosecutor were of the opinion that the Tribunal lacked the authority to review its establishment. The Appeals Chamber dealt with several specific arguments in this respect: namely that the issue was a political one and thus beyond judicial control; that the Tribunal was not a constitutional court; and

avoid undermining the ICJ's position as the principle judicial organ (ICJ Reports 1992 at 155-159); Judge Neeramantry argued that Chapter I of the Charter limits the Security Council's power because it has to "regard ... principles of international justice and international law (ICJ Reports 1992 at 175).

²⁰⁶ Case Concerning Questions of Interpretation and Application of the 1971 Montreal Convention Arising from the Aerial Incident at Lockerbie (*Libyan Arab Jamahiriya v United Kingdom*) Preliminary Objections, ICJ Reports 1998, 9; Case Concerning Questions of Interpretation and Application of the 1971 Montreal Convention Arising from the Aerial Incident at Lockerbie (*Libyan Arab Jamahiriya v United States*) Preliminary Objections, ICJ Reports 1998, 115.

²⁰⁷ ICJ Reports 1998, 73-74; as to the details of the dissenting opinion see above.

²⁰⁸ Provisional measures ICJ Reports 1993, 3.

²⁰⁹ Provisional measures ICJ Reports 1993, 3. Para. 2 (m),(o).

²¹⁰ ILM vol. 35 (1996), 35.

the issue of whether the establishment of the Tribunal was covered by Chapter VII of the UN Charter.

The Tribunal stated in respect of the first argument that the political question doctrine had gained no basis in international law and that, basically, all cases before international courts had a political background.²¹¹ Also the ICTY discarded the argument that it was not a constitutional court by indicating that it was merely exercising its incidental jurisdiction to establish its own jurisdiction over the case before it.

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

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

3. Indirect Judicial Control by National or Regional Courts

3.1 Courts declining judicial review of domestic implementation of Security Council decisions

On some occasions regional courts have declined to undertake a judicial review of the national measures to implement a Security Council decision under Article 41 of the UN Charter. Two different types of arguments have been used to decline review. The first holds that the implementation measure in question was attributable to the Security Council rather than the implementing State concerned – accordingly the Court denies jurisdiction over the matter. The second states that the national measure in question was attributable to the implementing State, but that Article 103 UN Charter excluded any judicial review on the basis of international law or national law.

The first type of argument was advanced by the European Court on Human Rights in the *Behrami*²¹² and the *Saramati case*.^{213/214} The complaints were ultimately directed against France and Norway as Member States of the

²¹¹ See also *Certain Expenses of the United Nations*, Advisory Opinion of 20 July 1962, ICJ Reports 1962, 151 at 153.

²¹² Mr Behrami invoked a violation of the right to life, which had been so he claimed violated by KFOR by not having de-mined an area.

²¹³ Mr Saramati complained about his arrest and detention by UNMIK by Order of the Commander of KFOR.

²¹⁴ *Behrami v. France/Saramati v. France, Germany and Norway* (Admissibility) [2007] (71412/01 and 78166/01).

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European Convention for the Protection of Human Rights and Fundamental Freedoms. The Court considered as a crucial issue whether acts or omissions of KFOR were attributable to the two States concerned, or to the United Nations. It considered whether the Security Council had lawfully delegated its powers to KFOR – not relying on general international law on the responsibility of international organisations but on the rules of delegation as part of the institutional law of international organisations.²¹⁵ In that context the Court considered “whether the Security Council retained ultimate authority and control so that operational command only was delegated”. The Court found that the Security Council retained ultimate authority and control and that, consequently, the impugned action was attributable to the United Nations.²¹⁶ Accordingly the Court held that it lacked jurisdiction *ratione personae*.²¹⁷

This jurisprudence was confirmed in the cases *Berić and Others*²¹⁸ as well as in *Kalinic Bilbija v. Bosnia and Herzegovina*.²¹⁹ The applicants complained with respect to decisions of the High Representative. His competences were confirmed by S/RES 1144 (1997) of 19 December 1997. Following the approach in the *Behrami* case, the Court declared the complaints inadmissible. The Court equally did not admit the application of *Galic and Blagojevic v. The Netherlands*,²²⁰ who were both sentenced by the ICTY and claimed a violation of their procedural rights.

The House of Lords in its judgment in the *Al-Jedda* case²²¹ followed a different approach, however, leading to the same result. Al-Jedda was interned in Iraq by UK forces acting as a Multi-National Force on the basis

²¹⁵ *Ibid.* paras. 132-141.

²¹⁶ *Ibid.* para. 141.

²¹⁷ *Ibid.* para. 153.

²¹⁸ See note 104

²¹⁹ Admissibility [2008] 45541/04 and 16587/07.

²²⁰ *Galic v. The Netherlands* [2009] 22617/07; *Blagojevic v. The Netherlands* [2009] 49032/07.

²²¹ *R (on the applications of Al-Jedda v. Secretary of State for Defence* [2007] UKHL 58, ILDC 832 (UK 2007) (Al-Jedda). In an earlier case concerning the individual accountability arising from the actions of UK forces operating within KFOR the UK government had not argued that the actions in question were attributable to the UN. In consequence a British court considered itself to have jurisdiction and to review the case on the merits (*Bici v. Ministry of Defense* [2004] EWHC 786 (QB), ILDC, 100; see also on this case Hollenberg, *supra* note 126, at 87; The House of Lords referred to this change of arguments and indicated that it was prompted by the judgment of the European Court of Human Rights in the *Behrami* case (see paras. 3 and 18).

of S/RES 1546 of 8 June 2004. The majority of the House of Lords held that the Security Council had, in contrast to the situation pertaining to KFOR, not delegated its powers, but rather had authorised the United Kingdom to carry out functions it could not perform itself.²²² Applying the standard of the ILC Draft Articles on the International Responsibility of International Organizations, the House of Lords concluded that the UK forces were not under the “effective command and control” of the Security Council and thus the House of Lords had jurisdiction. The House of Lords, however, decided that the Security Council resolution, due to Article 103 of the UN Charter, prevailed over the European Convention for the Protection of Human Rights and Fundamental Freedoms and, therefore, dismissed the complaint.²²³

Also in the *Ahmed case*²²⁴ the Supreme Court of the United Kingdom had preceded on the basis that international obligations prevail over human rights treaties. The Court, however, added that this did not affect domestic law and in consequence of this reviewed the implementing measures of the UK government from the point of view of national law only.²²⁵ Nevertheless, the Court also dealt with the procedure of listing and de-listing as to whether this was equivalent to judicial review.²²⁶

When the *Al-Jedda case* was brought before the European Court of Human Rights,²²⁷ the Court modified its previous position somewhat by declaring the case admissible. It applied its standard of “ultimate authority and control” parallel to the standard of “effective control”, ultimately concluding that the Security Council had neither. The Court on this basis reached the conclusion that it had jurisdiction.²²⁸

3.2 Control of the Implementing Measures without having recourse to the relevant Security Council Decision

In its judgment in the case *Ahmed and others v. HM Treasury*, the Supreme Court of the United Kingdom held that the government in freezing of the assets of the applicant, and thus implementing Security Council Resolutions 1267 (1999) and 1373 (2001), had acted *ultra vires* the powers conferred upon it by section 1 of the United Nations Act of 1946. The main reason to come to such a conclusion was that the appellants had been deprived of an

²²² Paras. 23-24.

²²³ Paras. 34-36.

²²⁴ *HM Treasury v. Mohammed Jahar Ahmed and others* [2010] UKSC2 & UKSC5; ILDC 1535 (UK 2010).

²²⁵ *Ibid.* at para. 75.

²²⁶ On that see below p. 51.

²²⁷ *Al-Jedda v. The United Kingdom* [2011], ECHR 1092.

²²⁸ *Ibid.* at para. 86.

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effective remedy against being listed. The judgment strictly deals with the implementing Order alone. The Order was annulled insofar as it did not provide for an effective remedy.

3.3 Control of Implementing Measures while having recourse to the relevant Security Council Decision

When assessing the national or European implementing measures, the courts concerned frequently interpreted the relevant Security Council resolutions. By way of generalisation – and thus simplification – one may say that two different approaches were applied. The courts in question either interpreted the relevant Security Council resolution from the point of view of its wording and its objective, or they presumed that the Security Council had no intention to limit international law conflicting with its resolution. Both approaches led to the same result, namely they limited the scope of the Security Council resolution in question. Reaching the conclusion that the scope of the Security Council resolution was more limited than the implementing measure, or that the implementing executive had not used its discretionary powers appropriately, the courts in question held that the national or European authorities had acted *ultra vires*.²²⁹ Other courts did not shy away from reviewing the relevant Security Council resolution with the view to establish whether it had violated international law, which was – in their view – limiting Security Council decisions.

Not using its discretionary power appropriately was the relevant issue in the case *A and Others v. Netherlands*, decided by a district court, the Court of Appeal and the Supreme Court.²³⁰ The Dutch Government, in implementing S/RES 1737 (2006) of 23 December 2006, had enacted a regulation prohibiting Iranian nationals access to certain security sensitive locations and databases; it also prohibited the provision of certain specialised education to Iranian nationals. Several Iranians claimed that the prohibition of discrimination had been violated. The provision upon which the Dutch regulation was based required all States to:

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

The District Court and the Appeal Court held that this provision left the implementing States some discretion and that the Dutch authorities had not

²²⁹ On that in some detail Hollenberg, *supra* note 126, at 172 et seq.

²³⁰ [2010] LJN : BL 1862/334949 ; ILDC 1463 (NL 2010) 03 February 2010 ; [2011] LJN : BQ 4781(Iranian Nationals).

sufficiently established that discrimination on the basis of nationality was the only means to achieve the objective of the Security Council Resolution.²³¹ The Supreme Court confirmed this finding and added that it was the obligation of the implementing authorities to harmonise diverging international obligations, i.e. those imposed by the Security Council and others such as the prohibition of discrimination under the European Convention on Human Rights and Fundamental Freedoms.

The Canadian Federal Court in the *Abdelrazik case*, in principle, followed the same approach. The case *Abdelrazik v. Canada (Minister of Foreign Affairs)* concerned a ban on the return of the applicant, being of Canadian and Sudanese citizenship, to Canada. The Federal of Court of Canada in its judgment of 4 June 2009 took the view that the listing procedure of the Al-Qaida and Taliban Sanctions Committee was incompatible with the right to an effective remedy.²³² Justice Zinn, who pronounced the judgment, criticised – in what technically constituted an obiter dictum – the sanctions system under S/RES 1267:

“I add my name to those who view the 1267 Committee regime as a denial of basic legal remedies and as untenable under the principles of international human rights. There is nothing in the listing or de-listing procedure that recognizes the principles of natural justice or that provides for the basic procedural fairness. The judge concluded that the applicant’s right to enter Canada had been breached.”²³³

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

In the case *(R)M v. HM Treasury*,²³⁴ the UK Court of Justice used the same technique. The case concerned measures against spouses of individuals targeted by the 1267 sanctions regime. The concrete issue was whether social benefits paid to them were covered by the prohibition to financially

²³¹ Although the Court of Appeal did not review the Security Council resolution, but rather interpreted it narrowly, it stated by way of an obiter dictum that even if the Security Council resolution had obliged the States concerned to distinguish between Iranians and non-Iranians, this would not have prohibited the Court from reviewing whether the domestic implementation of that resolution was in conformity with human rights as enshrined in the European Convention on Human Rights and Fundamental Freedoms (*Netherlands v. A and Others* [2011]LJN:BQ 4781 (Iranian Nationals)[5.5.].

²³² [2010] 1 F.C.R. 267, paras. 157 et seq.

²³³ *Ibid.* at para. 51.

²³⁴ [2008] UKHL 26, [2008] 2 All ER 1097.

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support terrorism. Emphasising the objectives of the sanctions regime and the objective of social benefits, the Court held that the benefits, being fixed at a level intended to meet only the strictly vital needs of the persons concerned, could not be diverted in order to support terrorist activities. Hence, the Court held that the 1267 sanctions regime did not prohibit the payment of social benefits to spouses of individuals listed as being associated with terrorism.

Another form of interpreting the relevant Security Council resolution is the presumption that obligations created by a Security Council resolution are not intended to be in conflict with other international law obligations, in particular fundamental principles of human rights.²³⁵ This approach was used by the Grand Chamber of the European Court of Human Rights in the *Al-Jedda case*.²³⁶ The relevant paragraph 102 reads:

“[T]he Court must have regard to the purposes for which the United Nations was created. As well as the purpose of maintaining international peace and security, set out in the first subparagraph of Article 1 of the United Nations Charter, the third subparagraph provides that the United Nations was established to “achieve international cooperation in ... promoting and encouraging respect for human rights and fundamental freedoms”. Article 24(2) of the Charter requires the Security Council, in discharging its duties with respect to its primary responsibility for the maintenance of international peace and security, to “act in accordance with the Purposes and Principles of the United Nations”. Against this background, the Court considers that, in interpreting its resolutions, there must be a presumption that the Security Council does not intend to impose any obligation on Member States to breach fundamental principles of human rights. In the event of any ambiguity in the terms of a Security Council Resolution, the Court must therefore choose the interpretation which is most in harmony with the requirements of the Convention and which avoids any conflict of obligations. In the light of the United Nations’ important role in promoting and encouraging respect for human rights, it is to be expected that clear and explicit language would be used were the Security Council to intend States to take particular measures which would conflict with their obligations under international human rights law.”

The European Court of Human Rights indicated that the presumption of compliance could be rebutted, which it did in the *Nada case*.²³⁷

In this context it is worth mentioning that the jurisprudence of the European Court of Human Rights on national measures implementing Security Council

²³⁵ Detailed on this, Hollenberg, *supra* note 126, at 181.

²³⁶ *Al-Jedda v. The United Kingdom*, Appl.No. 27021/08.

²³⁷ ECtHR, 195-196.

decisions differs from the jurisprudence pertaining to national implementation measures of decisions promulgated by an international organisation. Although the Court has no jurisdiction in respect of international organisations, it applies an “equivalent protection test”.²³⁸ This means that, when asked to review national conduct required by its membership in the organisation, the Court presumes that the State did not act contrary to its obligations under the European Convention for the Protection of Human Rights and Fundamental Freedoms if the international organisation in question protects human rights in a manner equivalent to the protection of the European Convention.²³⁹ So far the Court has not established such a violation.²⁴⁰ Nevertheless, from the point of view of human rights protection this approach has the advantage that the Court assumes its jurisdiction and offers some judicial review.

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

The approach taken by the judgment of the Bosnian Constitutional Court in the *Bilbija* case²⁴¹ reflects the particularities of the Constitution of Bosnia Herzegovina. The central issue of this case was whether decisions of the High Representative of Bosnia Herzegovina could be challenged. This was denied in view of Security Council Resolution 1144 (1997) of 19 December 1997. However, the Court, by referring to the Constitution of Bosnia Herzegovina, which incorporates the European Convention on Human

²³⁸ See Stephan J. Hollenberg, Challenges and Opportunities for Judicial Protection of Human Rights against Decisions of the United Nations Security Council, not yet published manuscript at p. 102 et seq.; Cedric Ryngaert, The European Court of Human Rights’ Approach to the Responsibility of Member States in Connection with Acts of International Organization, *International and Comparative Law Quarterly*, vol. 60 (2011), 997, 1012.

²³⁹ *Bosphorus Hava Yolları Turizm ve Ticaret Anonim Şirketi v. Ireland*, EHTT 42 (2005) I [155]; *M & Co. v Germany* (App. 13258/87) (1990) DR 64, 18.

The *Bosphorus* case concerned the impoundment by Irish authorities of an aircraft owned by a Yugoslav company on the basis of EU regulation 990/1993 implementing the Security Council sanctions against the former Yugoslavia. At that time the EU had not yet acceded to the European Convention for the Protection of Human Rights and Fundamental Freedoms.

²⁴⁰ Hollenberg, *supra* note 126, at 102.

²⁴¹ *Bilbija et al v. Bosnia Herzegovina* [2006] AP-953/05.

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Rights and Fundamental Freedoms, came to the conclusion that the measures in question violated the Convention as part of the Constitution. Due to the particularities of the Constitution of Bosnia and Herzegovina, this judgment cannot be generalised.

The case of *Yassin Abdullah Kadi and Al Barakaat International Foundation v. Council of the European Union*²⁴² and *Commission of the European Communities*,²⁴³ (later joined) (*Kadi*), decided by the Court of First Instance and the European Court of Justice was, and is still, controversial. Both courts took opposite views as to whether and how to review a Security Council resolution and thus demonstrated the uncertainties prevailing among courts and scholars on the review of targeted sanctions.²⁴⁴ The case concerned the freezing of the applicant's assets pursuant to European Community regulations adopted in connection with the implementation of Security Council Resolutions 1267 (1999), 1333 (2000) and 1390 (2002). The applicants had argued, amongst others, that the regulations had been adopted *ultra vires*. On 21 September 2005, the then Court of First Instance (General Court since 1 December 2009) rejected the arguments advanced by the applicants. It confirmed the lawfulness of the regulations. The General Court took the position – and this is of relevance here – that it was not entitled to exercise judicial review, that “the resolutions of the Security Council at issue fall, in principle, outside the ambit of the Court's judicial review and that the Court has no authority to call in question, even indirectly, their lawfulness in the light of community law”.²⁴⁵ The leading argument to this conclusion was that judicial review, in the light of European Union law, would be contrary to Article 103 of the UN Charter, which places the UN Charter and Security Council resolutions above all other international obligations.²⁴⁶ However, the Court established one exception to this general rule. It stated that it was

²⁴² C-402/05 P.

²⁴³ C-415/05 P.

²⁴⁴ Earlier cases emanating from Security Council targeted sanctions: Case T-362/04, *Minin v. Commission*, 2007 E.C.R. II-2003; Case T-253/02, *Ayadi v. Council* 2006 E.C.R. II-2139; Case T-49/04, *Hassan v. Council*, 2004 E.C.R. II-52.

²⁴⁵ Court of First Instance, Case T-315/01, *Yassin Abdullah Kadi v. Council and Commission* [2005] ECR II-3724.

²⁴⁶ This dictum was discussed controversially. See Christian Tomuschat, Case law - Court of Justice Case T-306/01, Ahmed Ali Yusuf and Al Barakaat International Foundation v. Council and Commission, in: *Common Market Law Review*, 2006, 537-551 (positively); N. Lavranos, UN Sanctions and Judicial Review, in: *Nordic Journal of International Law*, 2007, 1-17; A. Gianelli, Il rapporto tra diritto internazionale e diritto comunitario secondo il Tribunale di primo grado delle Comunità europee, in *Rivista di diritto internazionale*, 2006, 131-138 (negative).

empowered to check, indirectly, the lawfulness of the resolutions of the Security Council in question as to whether they violated *ius cogens*.²⁴⁷ The latter was understood as a body of higher rules of public international law binding on all subjects of international law, including the bodies of the United Nations, and from which no derogation was possible.²⁴⁸

²⁴⁷ The Court stated: “ The freezing of funds provided for by Regulation No 881/2002 imposing certain specific restrictive measures directed against certain persons and entities associated with Usama bin Laden, the Al-Qaeda network and the Taliban, as amended by Regulation No 561/2003, and, indirectly, by the resolutions of the Security Council put into effect by those regulations, does not infringe the fundamental rights of the person concerned, measured by the standard of universal protection of the fundamental rights of the human person covered by *ius cogens*.

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

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

In the first place, the freezing of their funds constitutes an aspect of the sanctions decided by the Security Council against Usama bin Laden, members of the Al-Qaeda network and the Taliban and other associated individuals, groups, undertakings and entities, having regard to the importance of the fight against international terrorism and the legitimacy of the protection of the United Nations against the actions of terrorist organisations. In the second place, freezing of funds is a precautionary measure which, unlike confiscation, does not affect the very substance of the right of the persons concerned to property in their financial assets but only the use thereof. In the third place, the resolutions of the Security Council provide for a means of reviewing, after certain periods, the overall system of sanctions. Finally, the legislation at issue settles a procedure enabling the persons concerned to present their case at any time to the Sanctions Committee for review, through the Member State of their nationality or that of their residence.

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

²⁴⁸ Court of First Instance, *supra* note 245, at para. 5.

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

The Court came to this conclusion on the basis of the consideration that “the Community judicature must, in accordance with the powers conferred on it by the European Community Treaty, ensure the review, in principle the full review, of the lawfulness of all Community acts in the light of the fundamental rights forming an integral part of the general principles of Community law, including the review of Community measures which, like the contested regulation, are designed to give effect to the resolutions adopted by the Security Council under Chapter VII of the Charter of the United Nations.”²⁴⁹

As far as a review of the Security Council resolution in question is concerned, the European Court of Justice took a diametrically opposite position to that taken by the Court of First Instance. It held that it was not “for the Community judicature, under the exclusive jurisdiction provided by Article 220 TEC, to review the lawfulness of such a resolution adopted by an international body, even if that review were to be limited to examination of the compatibility of that resolution with *ius cogens*”.²⁵⁰

Although the European Court of Justice held that it was not for the “European judicature” to examine the lawfulness of Security Council resolutions, it was entitled to review Community acts or acts of Member

²⁴⁹ European Court of Justice, Joined Cases C-402/05P and C-415/05, *P. Yassin Abdullah Kadi and Al Barakaat International Foundation v. Council of the European Union and Commission of the European Communities* [2008] ECR I-6351, para. 326. There is a vast literature on the judgment. See amongst others *P. Takis Tridimas and Jose A. Gutierrez-Fons, EU Law, International Law and Economic Sanctions against Terrorism: The Judiciary in Distress?* Fordham International Law Journal 32 (2009), 660; *Grainne de Burca, The European Court of Justice and the International Legal Order after Kadi*, Harvard International Law Journal 51 (2010), 1; *Katja S. Ziegler, Strengthening the Rule of Law, but Fragmenting International Law: The Kadi Decision of the ECJ from the Perspective of Human Rights*, Human Rights Law Review 9 (2009), 288; *Pasquale De Sena and Maria C. Vitucci, The European Courts and the Security Council: Between Dédoulement Fonctionnel and Balancing of Values*, EJIL 20 (2009), 193; *Daniel Halberstam and Eric Stein, The United Nations, the European Union, and the King of Sweden: Economic Sanctions and Individual Rights in a Plural World Order*, Common Market Law Review 46 (2009), 13.

²⁵⁰ *Ibid.* at para. 304.

States designed to implement such resolutions. It was stated that this “would not entail any challenge to the primacy of that resolution in international law.”²⁵¹

The Court concluded that the contested regulations, which did not provide for any remedy in respect of the freezing of assets, were in breach of fundamental rights and were to be annulled.

In the judgment of 14 November 2007 (which later was considered in the case *Nada v. Switzerland* before the European Court of Human Rights)²⁵² the Federal Court of Switzerland deduced from Articles 25 and 103 of the UN Charter that obligations arising from the UN Charter prevailed over domestic law as well as over obligations under other international agreements, whether of a bilateral or multilateral nature. The Federal Court further observed that while referring to Articles 24 (2) and 1 (3) of the UN Charter, the Security Council in exercising its functions was not absolutely free, but was required to act in accordance with the purposes and principles of the UN Charter, including the obligation to respect human rights and fundamental freedoms. Having stated that, the Federal Court pointed out that Member States were not permitted to avoid an imposed obligation on the grounds that a decision of the Security Council was substantively inconsistent with the Charter.²⁵³ As far as the Swiss Federation was concerned, the Federal Court pointed to Article 190 of the Swiss Constitution, which obliges the Swiss Federation to abide by international treaties ratified by the Swiss Federation, customary international law, general principles of law and decisions of international organisations which are binding upon Switzerland. The Court further pointed out that the Swiss legal system provided no rules on the settlement of possible conflicts between different norms of international law and – to this extent – referred to the relevant rules of international law. It emphasised that rules of *ius cogens* had to be respected and that it had jurisdiction to scrutinise implementing measures for a possible violation of *ius cogens*. In the case at hand, the Federal Court denied that *ius cogens* norms had been violated.

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

²⁵¹ *Ibid.* at para. 288.

²⁵² See below p. 58.

²⁵³ Case of *Nada v. Switzerland* (Application no. 10593/08) of 12 December 2012, at para. 170.

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Convention on Human Rights or the International Covenant on Civil and Political Rights were able to disregard those sanctions in order to protect fundamental rights of certain individuals or organisations.²⁵⁴

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

In the case *Nada v. Switzerland*, the European Court of Human Rights (Grand Chamber) held in its judgment of 12 September 2012²⁵⁵ that sanctions (restrictions of movement) imposed upon the applicant constituted a violation of the applicant's human rights as enshrined in the European Convention on Human Rights. In doing so it rejected the argument submitted by the responding government,²⁵⁶ the intervening Governments of France²⁵⁷ and of the United Kingdom,²⁵⁸ that the measures taken emanated from Security Council resolutions and thus fell outside the scope of the jurisdiction of the Court. The Court distinguished between the activities undertaken by KFOR²⁵⁹ and UNMIK, which were directly attributable to the United Nations and therefore fell outside the scope of the jurisdiction of the Court, and activities undertaken by Member States implementing the Security Council Resolutions 1267 (1999), 1333 (2000), 1373 (2001) and 1390 (2002).²⁶⁰ The national implementing measures were attributable to the implementing State, in this case Switzerland. As a matter of consequence the Court only scrutinised the implementation measures taken by the Swiss government and came to the conclusion that Articles 8 and 13 of the European Convention on Human Rights had been violated. In the A, K, M, Q and G case, a Court of Appeal held that it had jurisdiction to undertake a judicial review of measures taken by the executive in pursuance of obligations established in the context of the S/RES. 1267 regime. It relied in

²⁵⁴ *Ibid.* at para. 45.

²⁵⁵ *Ibid.* at para. 130.

²⁵⁶ *Ibid.* at para. 103.

²⁵⁷ *Ibid.* at para. 107.

²⁵⁸ *Ibid.* at para. 111.

²⁵⁹ See judgment of the European Court on Human Rights in the case *Behrami and Behrami v. France*, *supra* note 22.

²⁶⁰ Case of *Nada v. Switzerland* (Application no. 10593/08) of 12 December 2012, at para. 120/1.

that respect on the House of Lords Al-Jedda judgment. This case was later joined in appeal with the HAY case before the Supreme Court,²⁶¹ which held that obligations under the UN Charter prevail over obligations under other international agreements. In essence, the same approach was taken by the Dutch Supreme Court in the Mothers of Srebrenica case²⁶² as well as by the US District Court in the Sacks case.²⁶³ This judgment was confirmed by the Supreme Court which, however, did not undertake a detailed review of the international law issue.²⁶⁴

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

In the *Ahmed* case²⁶⁵ decided by the Supreme Court of the United Kingdom, which may serve as an illustration how the procedure is perceived by a domestic court, Lord Hope for the Supreme Court stated:

“78. Some further details can be obtained from the Guidelines of the Security Council Committee established pursuant to Resolution 1267(1999) concerning Al-Qaida and the Taliban and Associated Individuals and Entities of 9 December 2008. They state that the committee is comprised of all the members of the Security Council from time to time, that decisions of the committee are taken by consensus of its members and that a criminal charge or conviction is not necessary for a person’s inclusion in the consolidated list that the committee maintains, as the sanctions are intended to be preventative in nature. It would appear that listing may be made on the basis of a reasonable suspicion only. It is also clear that, as the committee works by consensus, the effect of the guidelines is that the United Kingdom is not able unilaterally to procure listing, but it is not able unilaterally to procure de-listing either under the “Focal Point” procedure established under SCR 1730(2006). Although the Security Council has implemented a number of procedural reforms in recent years and has sought improvement in the quality of information provided to the 1267 Committee for the making of listing decisions, the Treasury accepted in its response of 6 October 2009 (Cm 7718) to the

²⁶¹ *Hay v. HM Treasury and Secretary of State for Foreign and Commonwealth Affairs* [2009] EWHC 1677 (Admin.); ILDC 1367 (UK 2009).

²⁶² *Mothers of Srebrenica v. the State of the Netherlands and the United Nations*, Final appeal judgment [2012] LJN: BW 1999; ILDC 1760 (NL 2012).

²⁶³ *Bertram Sacks v. Office of Foreign Assets Control, US Department of Treasury* [2004] No. C04-108C, 4.

²⁶⁴ *Bertram Sacks v. Office of Foreign Assets Control, Department of the Treasury, et al.* [2007], US Supreme Court No. 06-948, 13.

²⁶⁵ *HM Treasury v. Mohammed Jahar Ahmed and others* [2010] UKSC2 & UKSC5; ILDC 1535 (UK 2010).

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

The same position was formulated previously by Advocate General Maduro in his opinion on the *Kadi* case.²⁶⁶ He held that there was no "genuine and effective mechanism of judicial control" at the UN level. He added if that was the case, the European courts might have been released from the obligation to judicially review the implementation of the relevant Security Council resolution.²⁶⁷ The European Court of Justice found that the S/RES 1267 procedure did not offer sufficient guarantees of judicial protection of fundamental rights.²⁶⁸ It qualified the delisting procedure as being essentially diplomatic and intergovernmental.²⁶⁹

This approach was followed by the General Court (which thereby changed its original position). It considered the Ombudsperson neither to be an impartial body nor capable of guaranteeing the individuals concerned a fair hearing.²⁷⁰ Apart from that, the Court criticised that the individuals were not provided with sufficient information in order to defend themselves effectively and that the sanctions committee decided by consensus on the delisting.²⁷¹

²⁶⁶ Case C-402/05 P Opinion of Advocate General Poirares Maduro [2008] ECR I-06351, 54.

²⁶⁷ *Ibid.* at para. 54.

²⁶⁸ Case C-402/05 P and C-415/05 P *Yassin Abdullah Kadi and Al Barakaat International Foundation v Council and Commission* (Kadi) [2008] ECR I-0635, 321/322.

²⁶⁹ *Ibid.* at 323 /324.

²⁷⁰ Case T/85/09 *Kadi v European Commission* (Kadi II) [2010] ECR II-05177, 149-150.

²⁷¹ *Ibid.* paras. 130, 132.

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RAPPORTEUR: RÜDIGER WOLFRUM

IV. Conclusions