XXXII
POLISH YEARBOOK OF INTERNATIONAL LAW

2012

A paper version of the Polish Yearbook of International Law shall be considered authentic.

POLISH ACADEMY OF SCIENCES

INSTITUTE OF LAW STUDIES
COMMITTEE ON LEGAL SCIENCES

XXXII
POLISH YEARBOOK OF INTERNATIONAL LAW

2012

Wydawnictwo Naukowe SCHOLAR
Warsaw 2013

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PL ISSN 0554-498X
DOI 10.7420/pyil2012

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www.scholar.com.pl

Printed in Poland

First edition, 250 copies

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XXXII POLISH YEARBOOK OF INTERNATIONAL LAW
2012
DOI 10.7420/pyil2012l
PL ISSN 0554-498X

*Dagmar Richter**

JUDICIAL REVIEW OF SECURITY COUNCIL DECISIONS – A MODERN VISION OF THE ADMINISTRATION OF JUSTICE?**

Abstract

The Security Council's new activism, particularly in the field of "individualized sanctions", gives impetus to the debate on whether, and to what extent, the most powerful organ of the UN should be subject to judicial review. This article analyses and categorizes the various strategies already employed in international courts, such as, e.g., "denial of justice", incidental control, full review of implementing acts, the "as-long-as" rule, and various instruments of judicial self-restraint. The author suggests that "jurisdiction", understood as encompassing the procedural aspects of the problem, should be regarded as a "door-opener" to judicial review. As regards its substantive dimension, the existence of primary responsibilities on both sides (the Security Council and the judiciary) should be taken into consideration. The author demonstrates that the principle of loyalty and cooperation means, on the one hand, respect by the Security Council for judicial review from inside of the UN system, and on the other hand, respect for Security Council prerogatives from external courts. Taking into account the evolution of a duty of loyal cooperation between different systems within the global legal order, and in expectation that the ICJ will defend the international rule of law, we may speak of a "modern vision of the administration of justice."

INTRODUCTION

The debate on whether Security Council ("SC") decisions[1] should be reviewable by courts involves fundamental aspects of adjudication in the global perspective: who is the "ultimate warrantor of legitimacy" in security matters; should it be a primarily "political" or rather a primarily "judicial" body? Is the SC part of a constitutional system

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** Written version of an oral presentation given at the Warsaw ILA Round Table on Limitation of the Powers of the United Nations Security Council on 11 January 2013.

[1] The term "decisions" relates to binding decisions in the sense of Articles 25 and 48 of the U.N. Charter, to be carried out by the Member States of the United Nations.

of checks and balances, or rather a hierarchical collective security scheme subject to "realpolitik"?[2]

It is common knowledge that SC decisions cannot be challenged directly (principally), but only in a "more subtle" manner.[3] At least, there is no procedure in United Nations law *aiming at* the delivery of a declaratory judgment on the legality, let alone the annulment, of SC resolutions. Proposals made during the drafting of the Charter to place the ultimate authority to interpret the Charter in the International Court of Justice ("ICJ") were clearly rebuffed.[4] Even today, the Member States of the United Nations do not show much enthusiasm concerning the empowerment of international jurisprudence and the implementation of the rule of law in the global legal sphere. This reluctance is based on the general demurrers used by states with regard to all matters of national security as well as "political questions" ("*actes de gouvernement*"),[5] matters which are typically affected by SC decisions. Whenever international jurisprudence has been established by international treaties, states have sought to insert exclusion clauses or to declare reservations in order to except matters of national security from judicial review. Additionally, the traditional concept of the prerogative of the executive in security matters, which is even more relevant in the international sphere than in the national one, has intensified that retentiveness.[6] All of these general caveats against judicial review have been relayed, to greater and lesser degrees, to the Security Council.

Whilst the issue of second-guessing the SC did not play an important role in the early years of the United Nations, since its decisions were effectively paralyzed by the veto right of its permanent members, the relevance of SC decisions, with respect to their number, intensity and concreteness, has dramatically increased since the overcoming of the East-West conflict. Since the SC has started to establish administrative post-war structures within the states and to individualize its sanction measures by resorting to "targeted" or "smart" sanctions, the question of judicial review has become ever more urgent.[7] What may be still acceptable in inter-state affairs can become intolerable in individual cases. Importantly, issues that are politically difficult if not impossible

[2] *See* J. E. Alvarez, *Judging the Security Council*, 90 American Journal of International Law 1 (1996), pp. 2 and 7.

[3] *See generally*, J. Herbst, *Rechtskontrolle des Sicherheitsrates*, Peter Lang, Frankfurt: 1999; B. Lorinser, *Bindende Resolutionen des Sicherheitsrates*, Nomos Verlagsgesellschaft, Baden-Baden: 1996; B. Martenczuk, *Rechtsbindung und Rechtskontrolle des Weltsicherheitsrates*, Duncker & Humblot, Berlin: 1996.

[4] *Certain Expenses of the United Nations*, ICJ Advisory Opinion of 20 July 1962, ICJ Rep. 1962, p. 168. *See also* Alvarez, *supra* note 2, pp. 14-15, with detailed references.

[5] *E.g.*, *Nixon v. United States*, U.S. Supreme Court, 13 January 1993, 506 U.S. 24 (1993).

[6] *Cf.*, H. Krieger, *Zur gerichtlichen Kontrolldichte bei sicherheitspolitischen Entscheidungen im Mehrebenensystem*, 124 Deutsches Verwaltungsblatt 1469 (2009), pp. 1469-1472, with further references.

[7] *Cf.*, B. Fassbender, *Review Essay: Quis judicabit? The Security Council, Its Powers and Its Legal Control*, 11 European Journal of International Law 219 (2000), p. 221; A. Reinisch, *Should Judges Second-Guess the UN Security Council?*, 6 International Organizations Law Review 257 (2009), pp. 261-263; F. Magnusson, *Targeted Sanctions and Accountability of the United Nations Security Council*, 13 Austrian Review of International and European Law 23 (2008).

to judicially review between states can be more readily subjected to judicial review when they touch upon individuals. Thus, in considering the expansion of potential applications, the term "judicial review" ought to be understood broadly in order to include the plenitude of methods by which SC decisions can be challenged in various judiciaries.[8]

Two aspects ought to be distinguished. The first is whether the ICJ is precluded from dealing with a case of which the SC is actively seized. This question has been answered in the affirmative by the ICJ in the *Tehran Hostages* and *Lockerbie* cases, where the ICJ acknowledged that the simultaneous exercise of their functions, by the SC on the one hand and itself on the other, was in conformance with both the UN Charter as well as the ICJ Statute.[9] There is no such applicable rule like Art. 12 of the UN Charter, which prohibits the General Assembly from dealing with a matter while the SC is seized with the same. Art. 103 of the UN Charter cannot be interpreted analogously, even though it may contribute to the issue. The second essential question, which remains unanswered, is whether the binding effect of SC decisions can be challenged in court if the SC exceeds the powers accorded to it by the UN Charter? And, if so, what would be the consequence of such a finding?[10]

It is widely acknowledged today that with regard to the procedural (Art. 27(3)) and substantive (Art. 24(2)) requirements of the UN Charter, the Security Council is not *legibus solutus* (above the law).[11] It is not so clear, however, what the exact range of any such legal constraints placed on it might be, how they can be demarcated, and by whom. And although the possibilities of international jurisprudence remain limited, international judicial bodies are not impotent *vis-à-vis* the Security Council. For example, although within the framework of contentious jurisdiction one state can bring before the ICJ a legal dispute only against another state, but not against the SC (Art. 34 of the ICJ Statute), such inter-states disputes may involve questions concerning the legality of a SC decision, which could then be addressed indirectly or incidentally. As concerns advisory jurisdiction, the Security Council itself, the General Assembly, or other organs of the UN or specialized agencies may request an advisory opinion on a legal question (Art. 65 ICJ Statute) which, again, could involve questions relating

[8] A more narrow understanding is advised by A. Tzanakopoulos, *Disobeying the Security Council, – Countermeasures against Wrongful Sanctions*, Oxford University Press, Oxford: 2011, p. 103: judicial review by a court must yield a binding result; and p. 107: as a "weapon of deterrence" its regular availability must be guaranteed.

[9] *See* A. Peters, in: B. Simma, D.-E. Khan, G. Nolte, A. Paulus (eds.), *The Charter of the United Nations, A Commentary*, (3rd ed.), vol. I, Oxford University Press, Oxford: 2012, *Article 24*, pp. 776-770 (MN 26-27), with references.

[10] *See* Reinisch, *supra* note 7, p. 259.

[11] Case IT-94-1-T, *Tadić*, ICTY, Appeals Chamber, Decision on the Defence Motion on Interlocutory Appeal on Jurisdiction of 2 October 1995, reprinted in I.L.M. 25 (1996), 35, para. 28. For a comprehensive view of the procedural and substantive "constitutional restraints" of the SC, see T. Giegerich, *"A Fork in the Road" – Constitutional Challenges, Chances and Lacunae of UN Reform*, 48 German Yearbook of International Law29 (2005), pp. 59 et seq.

to the legality of a SC decision. In this procedure the issue could even be addressed directly, notwithstanding the fact that an "advisory" opinion is not binding. This is why we cannot speak of judicial review in the narrow sense, although we should note at this point that the ICJ can be confronted with the question of the legality of SC resolutions in both types of procedures outlined above.

It remains to be clarified, however, whether and to what extent the ICJ may examine the legality of SC decisions that only contribute to the outcome of a certain procedure. Though a court cannot automatically claim authority to exercise *incidental control*, with all the attendant consequences, incidental control must be considered justified if the court cannot exercise its proper functions unless the respective issue – a *preliminary question* – be answered. In principle, a judicial organ must always have competence to determine whether or not its own jurisdiction is well-founded.[12] This authority can be considered a "natural" *implicit or inherent competence* emanating from the implied powers of the court.[13] The crucial question then will be whether the ICJ may, in an egregious case, deny an illegal SC decision applicability, or even validity.

Still another issue relates to the appropriate standard of judicial control applicable in such cases, particularly if it comes to an examination of the legality of SC decisions. Is there anything like a political question doctrine in international jurisprudence? The latter cannot be answered without taking into account the specific functions of the organs and the nature of the international organization(s) concerned. Whilst the SC bears "primary responsibility for the maintenance of international peace and security" (Art. 24(1) of the UN Charter), the ICJ shall be the "principal judicial organ of the United Nations" (Art. 92 of the UN Charter). Both spheres can overlap if a judicial finding touches upon the maintenance of international peace and security as interpreted by the SC. In such a case the relationship between both organs within the UN system is at stake. The matter becomes even more interesting if a judicial organ outside of the UN, e.g., the European Court of Justice, finds itself in a position to decide whether a SC decision underlying a certain European act conforms to the exigencies of international law.

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[12] *E.g.*, Art. 19(1) of the Rome Statute of the International Criminal Court. The ICTY speaks of "*competence-competence*" in this context: ICTY Appeals Chamber in *Tadić*, *supra* note 11 (and 30), para. 18. *See also* S. Zappalà, *Reviewing Security Council Measures in the Light of International Human Rights Principles*, in: B. Fassbender (ed.), *Securing Human Rights? Achievements and Challenges of the UN Security Council*, Oxford University Press, Oxford: 2011, p. 177, note 18.

[13] *Cf.*, Tzanakopoulos, *supra* note 8, 96: Internal review (by one organ over another within the same legal order) of compliance with a superior law (e.g., constitutional law) has been, since the U.S. Supreme Court Judgment in *Marbury v. Madison* (5 U.S. 137 [1803]), an inherent power of the Court. For the opposite position (that explicit authorization is needed), *see* Tzanakopoulos, p. 102, together with references. According to Alvarez (*supra* note 2), pp. 4 et seq., the *Marbury* analogy is misleading. The same author (at p. 34) mentions an "evolutionary potential inherent in the creation of an interpretative body in a constitutive charter".

1. JUDICIAL PRACTICE WITHIN THE U.N. AND RELATED SYSTEMS

1.1. Practice of the ICJ

1.1.1. Advisory Opinions

1.1.1.1. No Procedure – No Review: *Certain Expenses of the United Nations* (1962)

The ICJ, in its Advisory Opinion of 1962 on *Certain Expenses of the United Nations,* addressed for the very first time the issue of examining the legality of SC decisions. In this early opinion it argued mainly by using a comparison between the international and the national legal orders. In contrast to the legal systems of many states, the UN system was considered to lack a (specific) procedure which could have allowed for the determination of the validity of acts of the organs within the structure of the UN. The ICJ concluded that "each organ must, in the first place at least, determine its own jurisdiction."[14]

The ICJ, by mainly resorting to the lack of a procedure, can be criticized for having chosen a very formalistic procedural approach, thereby ignoring the potential range and substance of Art. 96(1) of the UN Charter. It could have argued instead that the validity of an act of an organ of the UN can be a "legal question" and, consequently, must be considered and decided – at least in the form of an advisory statement. Even less convincing is the Court's conclusion, according to which any organ, "in the first place at least" must delineate own jurisdiction. What would be the consequence if one organ of the UN would extend its own jurisdiction at the expense of another organ? And since it mentioned the "in the first place at least", what would the ICJ have suggested to apply in the second place, and under what circumstances would the 'second place option' be considered? As subsequent practice demonstrates, the pure doctrine of *Certain Expenses* was not upheld for long.

1.1.1.2. A Roadmap to Incidental Control: *Namibia* (1971)

A more courageous position was taken by the ICJ in its Advisory Opinion of 1971 relating to the *Legal Consequences of the Continued Presence of South Africa in Namibia*. The relevance of this case follows from the fact that the General Assembly, as well as the Security Council, had adopted several Resolutions declaring the continued presence of South Africa in Namibia illegal, and instructing it to withdraw. Consequently, the question came up whether these resolutions were in conformity with the UN Charter. It was contended in the proceedings that the ICJ should not assume the power of judicial review of an action taken by other principal organs of the UN without a specific request to that effect, nor should it act as a court of appeal from their decisions.

[14] *Certain Expenses of the United Nations*, International Court of Justice, Advisory Opinion of 20 July 1962, ICJ Rep. 1962, p. 151 (at p. 168).

The ICJ came to the conclusion that it would "consider these objections before determining any legal consequences arising from the resolutions."[15] Hence, it considered the validity of a SC resolution as a *preliminary question*, opening the door to incidental review. What is more, the ICJ finalized its deliberations on validity with a remarkable statement on the binding character of SC resolutions, concluding that, as the respective decisions of the Security Council were "adopted in conformity with the purposes and principles of the Charter and in accordance with its Articles 24 and 25", they were "consequently binding on all States Members of the United Nations."[16] What we see here is a combination of all pertinent norms and principles in order to make the binding effect of SC decisions dependent on the fulfillment of certain substantial requirements. The ICJ delivered an undisputed main message (SC decisions are "binding") in order to place, by adopting the method of conjoining norms, certain conditions on it, namely the duty to observe the purposes and principles of the U.N. Charter (Art. 1 and 2 of the UN Charter), and to respect Art. 24 of the UN Charter delimitating the functions and powers of the Security Council. As these conditions were considered to be fulfilled in the case before the court, the strategy of the ICJ did not cause too much controversy or excitement.

Art. 25 of the UN Charter, relating to the binding character of decisions of the SC, plays the most important role in this context: so long as the SC acts in conformity with the material and formal rules mentioned above, its decision shall be binding on all States Members of the UN. However, the same passage can be deemed to establish that, *vice versa*, SC decisions shall not be binding if they violate "the purposes and principles of the Charter", or exceed the powers accorded to the SC by Arts. 24 and 25. In other words, the ICJ has attributed to itself the *final say on the binding character* of SC resolutions, which can be considered as a *light version of annulment*. While the principles of the Charter represent the material or substantive side of the ICJ's standard of incidental review, Art. 24 relates to the competences of the SC, i.e. whether the SC has acted *ultra vires*. Both standards are interlinked with each other, as Art. 24 itself refers to the "Purposes and Principles of the United Nations" which the *Travaux Préparatoires* considered the "sole reserve" to the wide freedom of judgment that should be left to the SC.[17] It should be noted, however, that taking into account the broadness of the purposes and principles of the UN, substantive constraints on the Chapter VII

[15] *Legal Consequences for States of the Continued Presence of South Africa in Namibia – Notwithstanding Security Council Resolution* 276 (1970), ICJ, Advisory Opinion of 21 June 1971, Rep. 1971, p. 16, para. 89: "Undoubtedly, the Court does not possess powers of judicial review or appeal in respect of the decisions taken by the United Nations organs concerned. The question of the validity or conformity with the Charter of General Assembly resolution 2145 (XXI) or of related Security Council resolutions does not form the subject of the request for advisory opinion. However, in the exercise of its judicial function and since objections have been advanced the Court, in the course of its reasoning, will consider these objections before determining any legal consequences arising from those resolutions."

[16] *Ibidem*, para. 115.

[17] Case IT-94-1-T *Tadić*, ICTY, Trial Chamber, Defence Motion on Jurisdiction, Decision of 10 August 1995, para. 7 (with reference).

powers of the Security Council cannot be considered very realistic. It is not surprising that until the present time the ICJ has never defied the SC in this way in any of its judgments or opinions.

Interestingly, the ICJ, in its Advisory Opinion on *Namibia*, did not refer to the concept of judicial self-restraint. Instead it mentioned that the SC was acting in the exercise "of what it deemed to be its primary responsibility,"[18] and concluded that the reference in Art. 24(2) of the UN Charter to specific powers of the SC under certain Chapters of the Charter does not exclude the existence of general powers to discharge the responsibilities conferred in paragraph 1.[19] As the latter vests in the Security Council "primary responsibility for the maintenance of international peace and security", it is hard to imagine any action of the SC that would not, under any circumstances, contribute to the maintenance of international peace and security. This applies all the more as the Charter itself is based on the conception that peace and security are dependent on a multitude of factors including, *inter alia*, good governance, economic wealth, and human rights.

1.1.1.3. General Assembly v. Security Council: *Kosovo* (2010)

The "Namibia Principles" were confirmed by the ICJ in its Advisory Opinion on the *Declaration of Independence with Respect of Kosovo* in 2010.[20] The request by the General Assembly for an Advisory Opinion in this case created the risk of the ICJ ruling upon SC Resolution 1244 (1999). In this resolution the SC had instructed the parties to the conflict to engage in "a political process" that, only in the final stage of settlement, could result in the transfer of authority to Kosovo. Kosovo, however, declared its independence immediately.

The ICJ, in its Advisory Opinion, not only confirmed its own competence "to consider the interpretation and legal effects of such decisions,"[21] but also strengthened the General Assembly's capacity to challenge decisions of the SC via a request for an advisory opinion. As the ICJ put it:

> Where, as here, the General Assembly has a legitimate interest in the answer to a question, the fact that that answer may turn, in part, on a decision of the Security Council is not sufficient to justify the Court in declining to give its opinion to the General Assembly.[22]

This statement addresses the institutional side of the incidental control mechanism, because it is the General Assembly that, in the first instance, may have an interest in challenging decisions of the Security Council, even though this may be conceived as a

[18] ICJ in *Namibia, supra* note 15, para. 109.

[19] *Ibidem*, para. 110.

[20] *Unilateral Declaration of Independence in Respect of Kosovo*, ICJ, Advisory Opinion of 22 July 2010, Rep. 2010, p. 403.

[21] *Ibidem*, para. 46.

[22] *Ibidem*, para. 47.

"vote of no confidence."[23] As the General Assembly represents the whole community of states, the ICJ, in its *Namibia* Advisory Opinion, revalued the principle of equality of states *vis-à-vis* the privileged position of those members sitting in the Security Council.

1.1.2. Contentious Procedure: A Missed Opportunity in *Lockerbie* (1992)

Decisions of the SC can also be challenged in contentious cases submitted to the Court by one state against another. As the ICJ later clarified, it considers the interpretation and legal effects of such decisions both in the exercise of its advisory jurisdiction, and in the exercise of its contentious jurisdiction.[24] However, as early as in the *Lockerbie* Case the question came up whether the Provisional Measures requested of the Court by Libya could undermine the essential messages of SC resolution 748 (1992). Libya at that time objected to such concerns, arguing that "the risk of contradiction between the resolution and the provisional measures (…) does not render the Libyan request inadmissible, since there is in law no competition or hierarchy between the Court and the Security Council, each exercising its own competence."[25] This argumentation reminds us very much of the statement of the ICJ in *Certain Expenses*, according to which "each organ must, in the first place at least, determine its own jurisdiction."[26] It can be doubted, however, whether the issue as framed actually related to "hierarchy", or instead to the inter-organizational duties of different organs in the same international organization, including the concept of judicial self-restraint. Unfortunately, there was no need for the Court to definitively determine the legal effects of Security Council resolution 748 (1992).[27] It should be noted that even in the event the ICJ would ever deny a SC decision binding effect, its own judgment would be binding only on the parties of the contentious case.

1.2. Practice of International Criminal Tribunals

The issue whether, and to what extent, a judicial organ may examine SC decisions has also been taken up by courts other than the ICJ. With respect to International Criminal Tribunals the issue arises in a different light, because such courts have been established mostly by SC decision. Accordingly, any procedure undertaken by such a court can raise the fundamental question of the legality of the establishment of the Tribunal, which in turn leads to a situation whereby an international body created by the SC (the Tribunal) has to examine the decision of the SC relating to its own creation.

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[23] Fassbender, *supra* note 7, p. 223.

[24] ICJ in Kosovo, *supra* note 20, (and 1.1.1.3 herein), para. 46.

[25] *Case Concerning Questions of Interpretation and Application of the 1971 Montreal Convention Arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v. U.K.)*, ICJ, Request for the indication of Provisional Measures, Order of 14 April 1992, Rep. 1992, pp. 50 et seq., para. 39.

[26] ICJ, *supra* note 14 (with reference).

[27] ICJ, *supra* note 25, para. 43. Shahabuddeen, J., sep. op., Rep. 1992, p. 142, formulated the relevant questions concerning potential limits to the Council's power.

This appears to be problematic, because an International Criminal Tribunal, in contrast to the ICJ, is not specifically entrusted with the function of a "principal judicial organ of the United Nations" (Art. 92 of the UN Charter). On the other hand, it has to be admitted that Criminal Tribunals are commonly explicitly charged to examine their "jurisdiction".[28] If a SC decision establishing a particular Tribunal ought to be set aside because of a serious violation of the applicable law, then the Tribunal lacks jurisdiction. It is, however, not very likely that any International Criminal Tribunal would end its own existence by making such a "suicidal finding". The most relevant cases were delivered by the International Criminal Tribunal for the Former Yugoslavia ("ICTY") and the Special Tribunal for Lebanon ("STL"), though the International Criminal Court may also be affected.[29]

1.2.1. Subjecting the Security Council to its "Constitutional Framework": The ICTY in *Tadić* (1995)

The ICTY had to deal with the issue in the *Tadić* case, when the Defence argued that the establishment of the International Tribunal by SC resolutions 808 (1993) and 827 (1993) violated international law.

In its Decision on the Defence Motion on Jurisdiction of 1995, the ICTY Appeals Chamber made it clear that it regarded the issue as one of "*primary jurisdiction*" and not of "incidental jurisdiction"[30]. On the other hand, it spoke of the "pivotal role" of the SC, which exercises a "very wide discretion" under Art. 39 when determining the existence of a breach of or a threat to the peace.[31] This wide discretion of the SC was then considered by the Appeals Chamber in the context of the system as a whole. Inasmuch as the UN Organization was established by a treaty, which serves as a "*constitutional framework*", the SC itself should be "subjected to certain constitutional limitations", however broad its powers under the constitution might be. Its powers could not go beyond the limits on the jurisdiction of the Organization at large, nor compromise the internal division of power within the UN. Concerning the applicable standard of interpretation, the Appeals Chamber, having regard to Article 39 of the UN Charter, distinguished between an "act of aggression", which it considered "more amenable to a legal determination", and a "threat to the peace", which it considered to be "more of a political concept". The Appeals Chamber made it very clear however that any determination that there exists a threat to the peace must remain within the limits of the Purposes and Principles of the Charter.

The decision of the Appeals Chamber of the ICTY is one of the most expressive examples of the advancement of constitutionalism in international law. Whereas the Trial Chamber had very anxiously refused to conduct any judicial review in the

[28] S*upra* note 12.

[29] *See generally*, J. Pichon, *Internationaler Strafgerichtshof und Sicherheitsrat der Vereinten Nationen*, Springer-Verlag, Berlin Heidelberg: 2011.

[30] ICTY in Tadić, *supra* note 11, para. 21.

[31] *Ibidem*, para. 28.

context of Art. 39 of the UN Charter, the Appeals Chamber dispelled its doubts by referring to the constitutional character of the Charter and to "a modern vision of the administration of justice."[32] This approach has found followers in other International Criminal Tribunals,[33] but it has also evoked critiques, e.g., in the Special Tribunal for Lebanon (STL).

1.2.2. Denying Justice: The Special Tribunal for Lebanon in *Ayyash* (2012)

In marked contrast to the *Tadić* decision of the ICTY, the STL, in its *Ayyash* decision, (2012)[34] came to the conclusion that "the Security Council's determination as to the existence of a threat to international peace and security is not subject to judicial review", and that the same applies "to the Security Council's decision regarding the measures it employs once it has found that such threat exists."[35] The Appeals Chamber in the *Ayyash* case based its holding mainly on the argument that the Statute of the Tribunal does not provide an explicit source empowering the STL to review a SC decision, but it also resorted to the distinct role and nature of the STL, which had been established by the SC as an independent institution outside of the UN system. While it explicitly acknowledged the competence of the ICJ to pronounce itself incidentally on the legality of SC decisions, it denied itself the same competence by holding that the authority of the STL "must necessarily be much more limited than that of the ICJ."[36] In order to underpin this conclusion, the STL Appeals Chamber warned of the consequences of the opposite view: If the STL were entrusted with the power to potentially invalidate its own legal basis (SC Resolution 1757 [2007]), this power could ultimately result in the discontinuance of all proceedings in front of the Tribunal and undermine the fundamental decision of the SC on the establishment of a Special Tribunal.[37] The Appeals Chamber also referred to the difficulty of establishing any meaningful standard of review with regard to the prerequisites for a finding of what precisely constitutes a breach of the peace or a threat to the peace (Art. 39 of the UN Charter). As there exists a "plethora of complex legal, political, and other considerations", such a decision must be left to the wide margin of discretion of the SC.[38]

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[32] *Ibidem*, para. 6

[33] Case SCSL-2004-15-AR72(E) *Kallon et al., Special Court for Sierra Leone*, Decision on Constitutionality and Lack of Jurisdiction of 13 March 2004, para. 37; *see also* Case ICTR-96-15-T *Kanyabashi, International Criminal Tribunal for Rwanda*, Decision of the Defence Motion on Jurisdiction of 18 June 1997, paras. 19-22. *See also* Virginia Morris, *Prosecutor v. Kanyabashi – Decision on Jurisdiction*, in: 92 American Journal of International Law 66 (1998).

[34] Case STL-11-01/PT/AC/AR90.1 *Salim Jamil Ayyash et al.*, STL Appeals Chamber, Decision on the Defence Appeals Against the Trial Chamber's "Decision on the Defence Challenges to the Jurisdiction and Legality of the Tribunal" of 24 October 2012.

[35] *Ibidem*, para. 35.

[36] *Ibidem*, paras. 36, 39.

[37] *Ibidem*, para. 42.

[38] *Ibidem*, para. 51.

This denial of review by the STL has been criticized by some authors as being motivated less by the law than by timidity and fear.[39] Indeed, one may question whether the lack of a specific procedure or explicit empowerment,[40] or the wide margin of appreciation granted to the SC's decisions, constitute arguments which preclude all forms of judicial review, including incidental control.[41] As Judge Baragwanath put it, the Tribunal is the creation of the Security Council, but not its mere creature.[42]The same applies to the difficulty of establishing a meaningful standard of scrutiny in a highly political matter. Such a difficulty cannot constitute the basis for a total denial of justice, but calls for an adequate standard of scrutiny while at the same time respecting the principle of judicial self-restraint. As the STL explicitly distanced itself from the *Tadić* decision of the ITCY,[43] the *Ayyash* case leaves us with the question whether we are confronted with an isolated finding, or with a general trend towards a more deferential attitude vis-à-vis the SC.

1.3. Practice of the Human Rights Committee: *Sayadi and Vinck* (2008)

Focus on the legal limits of Security Council actions has become increasingly important since, following the political changes of 1989/90, a re-activated Security Council started to exercise global legislative functions, and in the exercise of such functions imposed *individualized sanctions* pursuant to Art. 41 of the UN Charter. A large number of the cases relevant to the issue of judicial review of SC decisions pertain to the obligation of member States to implement these measures, i.e. to freeze the assets or restrict the movement of specific individuals and organizations suspected of terrorist activities, whose names are put on a list annexed to a pertinent SC resolution.[44] In this context a series of decisions of Human Rights Treaty Bodies, as well as of domestic and regional courts, including the Courts of the European Union (the ECJ and the CFI)[45] have contributed to the discussion.

In the case of *Sayadi and Vinck v. Belgium,*[46] the UN Human Rights Committee (HRC) was charged with the examination of national implementation of the sanctions

[39] *See e.g.* J. E. Alvarez, *Tadić Revisited, – The Ayyash Decisions of the Special Tribunal for Lebanon*, 11 Journal of International Criminal Justice (2013, forthcoming).

[40] In this sense, the STL's reasoning was in accord with that of the ICJ in *Certain Expenses of the United Nations* (Section1.1.1.1 herein).

[41] *See also* Judge David Baragwanath, Separate Opinion to the Ayyash Decision of the STL, *supra* note 34, para. 47: "A criminal court does not require explicit authority in order to engage in a judicial review of conduct which, if unlawful, will provide a defence. The power to do so is inherent in the judicial office and in the court or tribunal seized of a case: …"

[42] Judge Baragwanath, Separate Opinion, *supra* note 34, para. 48.

[43] STL, *supra* note 34, para. 41.

[44] *E.g.*, SC Res. 1267 of 15 October 1999; SC Res. 1452 of 20 December 2002.

[45] *Infra* 2.

[46] Communication 1472/2006 *Nabil Sayadi and Patricia Vinck v. Belgium*, HRC 22 October 2008, CCPR/C/94/D/1472/2006. For a description of the legal proceedings against the Belgian state in Belgium, *see* Magnusson, *supra* note 10, p. 57.

regime established by SC Resolution 1267 (1999). It rightly denied the relevance of Art. 46 of the Covenant on Civil and Political Rights (CCPR), which states that nothing in the Covenant shall be interpreted as impairing the provisions of the Charter of the United Nations. As the HRC clarified, the case was not about the interpretation of the UN Charter, but rather about the compatibility with the Covenant of *national* measures taken by the State party in its implementation of the SC resolution.[47] On this basis, the HRC considered itself a "guarantor of the rights protected by the Covenant", with a duty to consider to what extent the obligations imposed on State parties by SC resolutions may justify the infringement of the rights guaranteed by the Covenant.[48] Even though the obligation to comply with SC decisions adopted under Chapter VII of the Charter may constitute a "restriction" covered by the Covenant, Belgium had violated the Covenant, because the suspects' names were transmitted to the Sanctions Committee prematurely, without waiting for the outcome of the criminal investigation in Belgium and even before they had been heard.[49] As the suspects turned out to be innocent, Belgium was found to be responsible for the presence of their names on the Sanctions Committee's anti-terror list. Although it had no competence to remove their names from the list, it had a duty to endeavor to have these names removed, to provide them with compensation, and to make public the requests for their removal.[50]

Though this view may appear to be rigorous, it should not be so considered. The HRC focused exclusively on State action that had not been demanded by the SC. Belgium alone was found to be blameworthy for not having complied with the requirements of due diligence to be applied with respect to its discretional power. As in these circumstances the SC decision neither directly nor indirectly becomes a target of judicial review, the problem of cases like this lies ahead of a potential conflict between the judiciary and the SC.

2. CHALLENGING THE SECURITY COUNCIL FROM OUTSIDE OF THE SYSTEM: UN TARGETED SANCTIONS IN EUROPEAN COURTS

Targeted Sanctions imposed by the SC have increasingly become a challenge in the relationship between the European Union and the United Nations, as well as to the traditional habits of the SC. As the European Union has competence to implement the relevant SC resolutions with respect to freezing the assets of suspected terrorists,[51] the then-EC legislature felt obliged to incorporate the relevant Chapter VII resolutions

[47] *Ibidem*, para. 10.3.
[48] *Ibidem*, para. 10.6.
[49] *Ibidem*, paras. 10.7 et seq.
[50] *Ibidem*, para. 12.
[51] At the time of the judgment: Art. 60, 301, 308 EC Treaty; today: Art. 75, 215, 352 TFEU.

of the SC into Community law. It was here that the problem arose again. When plaintiffs, such as, e.g., *Kadi, Yusuf and the Barakaat International Foundation*,[52] *SEGI*,[53] *Möllendorf* [54] or the *Organisation des Modjahedines*[55] asserted that their fundamental rights, namely their rights to property, free movement, defense, and effective judicial remedy were violated by an EC (EU) act of implementation, the question arose whether they in effect were challenging the legality of the underlying SC resolution. It should be noted that the judgments considered herein below represent judicial practice delivered *outside of* the UN system, and stand as well for the practice of *domestic courts*[56] ruling on implementing measures within the framework of their respective constitutional orders.

2.1. A "Limited Revolt" by EU Jurisprudence in *Kadi et al.*

2.1.1. The *Ius Cogens* Doctrine of the Court of First Instance (*Kadi* 2005)

In 2005 the European Union Court of First Instance ("CFI")[57] came to the conclusion that, having special regard to Article 103 of the UN Charter, it had no authority to call into question, even indirectly, the lawfulness of resolutions of the Security Council.[58] However, it considered itself empowered to review, indirectly and exceptionally, the lawfulness of the resolutions in question with regard to *ius cogens,* which the CFI considered as a body of rules that constitute the "international public order".[59] Though it was overruled by the ECJ (Grand Chamber) judgment of

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[52] *Infra* 2.1.

[53] Case C-355/04 P *SEGI et al. v. Council, Spain and U.K.*, ECJ (GC) 27 February 2007; *SEGI et al. v. 15 States of the European Union* (6422/02), ECHR 23 May 2002, Rep. 2002-V, available at <www.echr.coe.int>: Mere listing "may be embarrassing, but the link is much too tenuous to justify application of the Convention."

[54] Case C-117/06 *Gerda Möllendorf and Christiane Möllendorf-Niehuus*, ECJ 11 October 2007, ECR I-8361.

[55] Case T-228/02 *Organisation des Mojahedines du peuple d'Iran v. Council*, CFI 12 December 2006, ECR II-4665.

[56] For a comprehensive overview of the disparate practice of national courts, see E. de Wet, A. Nollkaemper, *Review of Security Council Decisions by National Courts*, 45 German Yearbook of International Law 166 (2002), pp. 166 et seq. For more on the practice of the U.K., particularly in the *Al Jedda* case, see Reinisch, *supra* note 7, pp. 281-283; also Magnusson, *supra* note 7, pp. 55-56. According to the House of Lords, Regina (on the application of *Al-Jedda) v. Secretary of State for Defence* (12 December 2007), UKHL 58, para. 39, the U.K. may implement SC resolutions, but must ensure that the detainees's rights under the European Convention on Human Rights are not infringed to a greater extent than is inherent in such detention. For the prevalence of core constitutional law principles, *see* Reinisch, *supra* note 7, p. 286 (with references to U.S., German and Italian law). For the U.S. practice, *see* Reinisch, *supra* note 7, pp. 269-271. For the Dutch Court Practice, e.g., in the case *Milošević v. the Netherlands*, see J. Pichon, *supra* note 29, p. 3319, note 993. For the Swiss Practice see *supra* note 61.

[57] Since 1 December 2009: "General Court".

[58] Joined Cases T-315/01 *Yassin Abdullah Kadi v. Council and Commission*, and T-306/01 *Yusuf and Al Barakaat International Foundation v. Council and Commission*, CFI 21 September 2005.

[59] CFI in: *Kadi 2005*, *supra* note 58, para. 226.

2008,[60] the *ius cogens* doctrine represents a first layer of judicial practice and can still be considered influential as one of the possible approaches to dealing with SC decisions in courts.[61] At first sight it seems reasonable to review a SC decision only exceptionally, if the alleged violation is intolerable, such as in the case of a violation of a peremptory norm. It also seems reasonable to relate that exceptional review to the violation of those norms of international law which are considered applicable to SC actions. However, the *ius cogens* standard is a make-or-break-standard, too narrow to produce any likelihood of judicial review, as can be inferred from the same *Kadi* decision in which the CFI postulated its use. Another objection relates to the fact that the *ius cogens* doctrine could not be based plausibly on any legal ground.[62] The CFI's bare note concerning the international *ordre public* cannot settle the doubts.

2.1.2. The "So-long-as Formula" of the European Court of Justice (*Kadi* 2008)

The ECJ, in its Appeals Decision, started the relevant part of its deliberations with the statement that the EU (then the EC) is based on the rule of law.[63] It noted that an international agreement could not affect the allocation of powers fixed by the Treaties, that the European legal system enjoyed *autonomy from the U.N. system*, that within the European system exclusive jurisdiction was conferred to the European Court, and that such jurisdiction formed part of the very foundations of the Community.[64] From this starting point the ECJ proceeded to the more crucial parts of its judgment, alleging that it would apply its review of legality exclusively to the EU act intended to give effect to the SC resolution, and not to the latter as such.[65] It was not for the European judicature to review the lawfulness of a SC resolution, even if that review were limited to an examination of the compatibility of a particular resolution with *ius cogens*.[66]

Considering the EU's "autonomous" system of sanctions, the ECJ found that measures incompatible with respect for human rights were not acceptable in the Community,[67] because obligations imposed by an international agreement like the UN Charter could not have the effect of prejudicing the "constitutional principles" of the European Treaties.[68] While the ECJ was not, to say the least, unaware of the need for respecting the main responsibility of the SC for the maintenance of peace and security, it denied the SC a" generalised immunity" from jurisdiction within the

[60] *Infra* 2.1.2.

[61] *E.g.*, the Swiss Federal Court (Bundesgericht) adopted the CFI's *ius cogens* doctrine in 2007: BG, Case No. 1A 45/2007, Judgment of 14 November 2007 – *Youssef Nada v. SECO*, BGE 133 II 450.

[62] *See also* Magnusson, *supra* note 7, p. 68.

[63] ECJ, Case Nos. C-402/05 P and C-415/05 P, Judgment of 3 September 2008 – *Kadi et al. v. Council of the EU et al.*, para. 281.

[64] ECJ in *Kadi 2008*, *supra* note 63, para. 282.

[65] *Ibidem*, para. 286.

[66] *Ibidem*.

[67] *Ibidem*, para. 284.

[68] *Ibidem*, para. 287.

internal legal order of the Community.[69] Instead, it pleaded for a quality-oriented form of judicial self-restraint by using the "so-long-as formula,"[70] to wit: *So long as,* under the UN system of sanctions, the individuals or entities concerned had an acceptable opportunity to be heard through the means of an administrative review forming part of the United Nations legal system, the European Court must not intervene in any way whatsoever.[71] As the UN system did not comply with these requirements, the ECJ felt obliged to ensure "in principle the full review", including review of an EU regulation which was designed to give effect to the resolutions adopted by the Security Council under Chapter VII of the UN Charter.[72]

What we see here is a "limited revolt". The ECJ showed disobedience in its result, by partly annulling an EU regulation which was enacted to give effect to the resolutions adopted by the Security Council under Chapter VII of the UN Charter. The same applies to the somewhat obscure formulation "in principle the full review".[73] On the other hand, the ECJ explicitly refrained from reviewing the SC as such by the standards of international law. With this strategy it eliminated the much criticized need to identify the *ius cogens* character of the relevant human rights guarantees as it followed from the CFI judgment.[74] However, in doing so the Court instead ran the risk of being criticized for not employing international law, but rather sticking to a pure European (regional) law perspective.[75] It seems artificial to review an EU regulation designed to give effect

[69] *Ibidem*, para. 321.

[70] For the introduction of this concept into the judiciary see with respect to the review of European law: *Internationale Handelsgesellschaft ("Solange I")*, Federal Constitutional Court (Germany), Judgment of 29 May 1974, Common Market Law Reports 2 (1974), 540; *Wünsche Handelsgesellschaft ("Solange II")*, Judgment of 22 October 1986, 3 Common Market Law Review 225 (1987).

[71] ECJ in *Kadi 2008*, *supra* note 63, para. 319.

[72] *Ibidem*, para. 326.

[73] An explanation is given, e.g., by Advocate General Bot in the new Kadi case, *infra* 2.1.3 (with note 82) in para. 59: "The Court's use of the expression, 'in principle [a] full review', is therefore intended to emphasise the fact that the judicial review extends to all EU acts, whether or not they are adopted pursuant to a rule of international law, and that the review concerns both the external lawfulness of those acts and their internal lawfulness in the light of fundamental rights protected by EU law." And, *ibidem*, para. 61: "The true position is that, (…) the Court expressed clearly and concisely the idea that its review, however broad it is, is full only in principle and that there are therefore possible exceptions. If there is an area in which an exception is appropriate, it is, (…) in the area of the fight against terrorism, which includes prevention, seen from the perspective of global coordination."

[74] Reinisch, *supra* note 7, p. 275.

[75] *See e.g.*, P. Palchetti, *Judicial Review of the International Validity of UN Security Council Resolutions by the European Court of Justice*, in: E. Cannizzaro, P. Palchetti, R. A. Wessel (eds.), *International Law as Law of the European Union*, Martinus Nijhoff Publishers, Leiden:2012, pp. 383-386: "hardly understandable why, in the presence of an internal act which implements the Security Council resolution, judicial review should be conducted only in the light of domestic standards" (*ibidem*, p. 385). Palchetti also speaks of "avoidance behavior" by the ECJ (p. 386). According to F. Francioni, *The Right of Access to Justice to Challenge the Security Council's Targeted Sanctions: After-Thoughts on Kadi*, in: U. Fastenrath et al. (eds.), *From Bilateralism to Community Interest, Essays in Honour of Judge Bruno Simma*, Oxford University Press, Oxford: 2011, p. 920: the legal parameter employed by the ECJ "remains exclusively a European Union law parameter", rather than the

to a SC decision without touching upon the latter. By such a restricted standard, EU courts will be deprived of the possibility to participate in the process of developing international law standards within the UN.[76] Even though the ECJ explained that the Charter of the United Nations neither imposed the choice of a particular model for implementation, nor prohibited "any judicial review of the internal lawfulness of the contested regulation in the light of fundamental freedoms,"[77] it did not really address the problem of the EU member states, being also U.N. member states, running the risk of non-compliance with Art. 25 of the UN Charter as a possible result of its judgment.[78]

2.1.3. *Kadi* (2010, 2013 et seq.) – A Never-ending Story?

The "so-long-as formula" was willingly adopted by the General Court in the new *Kadi* case that was brought before it shortly after a new Regulation had been enacted. In 2010 the General Court annulled Commission Regulation (EC) No. 1190/2008 of 28 November 2008 insofar as the measure concerned Mr. Kadi.[79] Based on the judgment of the Court of Justice in *Kadi* (2008), it took the position that its review – "in principle [a] full review" – should extend not only to the apparent merits of the contested measure but also to the evidence and information on which the findings were based.[80] According to the General Court "the principle of a full and rigorous judicial review" of such measures was all the more justified as they had a marked and long-lasting effect on the fundamental rights of the persons concerned.[81]

The Appeals Proceedings are still pending and are likely to result in a Judgment of the Grand Chamber of the ECJ which will finally determine the appropriate standard(s) of judicial review. As *Advocate General Bot,* in his Opinion of March 2013, has proposed to the Grand Chamber, the objective of combating terrorism and the optimum protection of the fundamental rights of listed persons *must be balanced, in the spirit of cooperation* between the European Union and the United Nations, as demanded by Article 220(1) TFEU.[82] Considering the listings to be "part of a political process which goes beyond any individual case" and acknowledging certain improvements in the procedure before

international human rights standards under which the Security Council (…) should be held accountable." The vindication of human rights thus would be made for the benefit of "a cosy regional club of European States rather than for the promotion of human rights and the rule of law worldwide" (*ibidem,* p. 922). Krieger, *supra* note 5, p. 1473, criticizes the fact that the legal conflict was solved unilaterally, to the detriment of international law. She also points to the "regionalization" of the UN by EU jurisprudence (*ibidem*, p. 1475).

[76] Palchetti, *supra* note 75, p. 390.

[77] ECJ in *Kadi 2008*, *supra* note 63, paras. 298-299.

[78] But *cf.*, ECJ in *Kadi 2008*, *supra* note 63, paras. 32-33, where the Court consents that "the European [Union] must respect international law in the exercise of its powers."

[79] *See* Case T-85/09 *Kadi et al. v. Council of the EU et al.*, General Court, Judgment of 30 September 2010, para. 127: "That must remain the case, at the very least, so long as the re-examination procedure operated by the Sanctions Committee clearly fails."

[80] General Court in *Kadi 2010*, *supra* note 79, paras. 132-135.

[81] *Ibidem*, para. 151.

[82] Joined Cases C-584/10 P, C-593/10 P and C-595/10 P *Commission, Council and United Kingdom v. Yassin Abdullah Kadi*, Opinion of Advocate General Bot (ECJ) of 19 March 2013, para. 76.

the Sanctions Committee, *AG Bot* called for moderation in the carrying out of judicial review by the EU judicature, advising the Court not to substitute its own assessment for that of the competent political authorities.[83] Taking note of the fact that both organizations share the same values concerning respect for fundamental rights, he argued that an effective global fight against terrorism required confidence and collaboration between the European Union and the United Nations, rather than mistrust.[84]

Eventually, AG Bot pleaded for a distinction between two different standards of review. Whilst the EU judicature should carry out a strict review of the way in which the implementation procedure was conducted by the Commission ("external" or procedural lawfulness), the review of the internal (substantive) lawfulness of the contested EU act should be limited to manifest errors of assessment. In other words, the EU judicature must rigorously review whether the EU Regulation was adopted employing a procedure which respected the rights of the defense, but must not call into question the merits of the listing effected by the U.N. Sanctions Committee, except in cases where the implementation procedure within the European Union has highlighted a flagrant error in the factual finding made, in the legal classification of the facts, or in the assessment of the proportionality of the measure.[85] Advocate General Bot explained that proposed differentiation by arguing that it was for the Sanctions Committee to evaluate the appropriateness of a listing and to obtain, from the States concerned, the information or evidence justifying inclusion on the list, whilst the EU institutions were not intended to have that information or evidence.[86]

The recent developments demonstrate that the debate is reaching an ever more sophisticated level. However, it may be doubted whether the novel approach presented by Advocate General Bot in 2013 would really be helpful. If the Sanctions Committee may freely resort to secret service information submitted by any dubious state, and such information is not available to the EU institutions, there exists no possibility at all for the suspect to reveal any error, – not even "flagrant error".

2.2. Selected Practice of the European Court of Human Rights

2.2.1. So long again: The *Bosphorus* Judgment (2005)

The *Bosphorus* case was considered by the ECJ as well as by the European Court of Human Rights (ECtHR). The ECJ was asked for an interpretation of an EC regulation which, by implementing a freezing order of the SC, had led to the impoundment of two aircraft in Ireland. Though its Judgment[87] did not address the legality of the SC resolution in question, some authors argue that by finding the measures to be proportionate the

[83] *Ibidem*, paras. 80-81.
[84] *Ibidem*, para. 85.
[85] *Ibidem*, paras.90, 98, 105-107, 110.
[86] *Ibidem*, paras.105, 107.
[87] Case C-84/85 *Bosphorus Hava Yollari Turizm ve Ticaret AS v. Minister of Transport, Energy and Communication, Ireland and the Attorney General* [1996], ECR I-3953.

ECJ implicitly affirmed the legality of the UN sanctions.[88] This, however, is far from certain. After the impoundment had been re-effected by the Irish authorities subsequent to the ECJ judgment, the *Bosphorus* enterprise lodged a complaint with the European Court of Human Rights (ECtHR).

In its *Bosphorus* Judgment,[89] the ECtHR confirmed the rule according to which a Contracting Party transferring sovereign power to an International Organization cannot by such means escape from its obligations under the European Convention on Human Rights (ECHR). Thus, in principle, the ECHR signatory states cannot escape by claiming that they were obliged by Art. 25 of the UN Charter to carry out a SC decision. However, a State Party is considered liable under the ECHR only with respect to treaty commitments entered into *subsequent* to the entry into force of the Convention.[90] This means that judicial review within the framework of the ECHR will be to no avail if, as is usually the case, a state acceded to the UN Charter prior to its accession to the European Convention on Human Rights.

The most relevant part of the *Bosporus* Judgment relates to the notorious "so-long-as formula". In the Court's view, State action taken in compliance with legal obligations emanating from external sources such as, e.g., the UN Charter, is justified *as long as* the respective International Organization is considered to protect fundamental rights, both as regards the substantive guarantees offered and the procedural mechanisms controlling their observance, in a manner which can be considered to be "*at least equivalent*" to that for which the Convention provides. By "equivalent" the Court means "comparable", as any requirement that the International Organization's protection be "identical" could run counter to the interests of international cooperation. Nevertheless, any such finding of equivalence would be susceptible to review in the light of any relevant changes in fundamental rights protection. If equivalent protection is considered to be provided by the International Organization, the *presumption* will be that a State has not violated the requirements of the ECHR when it does no more than implement the legal obligations flowing from its membership in that particular organization.[91] This presumption can be rebutted only if, in the circumstances of a particular case, the protection of Convention rights is "manifestly deficient". Only in such a case would the interest of international cooperation be outweighed by the Convention's role as a "constitutional instrument of European public order" in the field of human rights.[92]

Although the guarantees offered by the UN sanctions mechanism were far from "equivalent" to those for which the Convention provides, the ECHR did not find any violation. The explanation for this result lies in the fact that the Court narrowed its perspective to the EC (EU). Though it admitted that the Regulation (EC) against which

[88] *E.g.*, Reinisch, *supra* note 7, p. 281.

[89] *Bosphorus Hava Yollari Turizmve Ticaret Anonim Şirketi v. Ireland* (45036/98) Grand Chamber, ECHR 30 June 2005, Rep. 2005-VI.

[90] *Ibidem*, para. 154.

[91] *Ibidem*, para. 155.

[92] *Ibidem*, para. 156.

the complaint was lodged originated in a SC resolution adopted under Chapter VII of the UN Charter, and also that the latter was "pertinent to the interpretation of the regulation", it came to the conclusion that the SC resolution could not have constituted a legal basis for the impoundment of the aircraft, because it did not form a part of Irish domestic law.[93] Consequently, the equivalence test was applied exclusively to the guarantees provided by the then-EC law – which not surprisingly passed the test.

Thus, in the end, there is a delicate interoperation of two International Organizations, with one of them serving as the reference Organization (the EC/EU), which sufficiently conforms to the rule of law, and the other representing the real actor in the background (UN), to which no such test is applied. The Court did not address the question of whether the UN resolution had left any margin for the appreciation of individual rights to the EC (acting in place of the European UN Member States), nor did it review the EC regulation with regard to its protection of human rights. Instead, we are faced with an approach which formalistically focuses on the last part of a multi-stage process of the implementation of a SC decision. While according to this conception the SC decision itself is screened out, the human rights reputation of the EC (EU) serves as a "whitewash machine".

2.2.2. Escaping the Problem: The *Nada* Judgment (2012)

Nada v. Switzerland also relates to the UN Sanctions Committee's listing practice. However, the facts of this case were unique, insofar as Mr. Nada (the Applicant), had been trapped in an Italian exclave on Swiss territory as a consequence of the Sanctions regime, whilst Switzerland was neither the Applicant's State of citizenship nor his State of residence. As distinguished from Ireland in the *Bosphorus* case, Switzerland became a member state of the UN only *after* having acceded to the European Convention on Human Rights. Accordingly, its liability under the Convention for acts implementing SC decisions was not limited by *a priori* commitments.[94] In this situation, the ECtHR resorted to a finding of a lack of effort undertaken taken by Switzerland in order to release Mr. Nada from his distress. Even though the UN Sanctions Committee was entitled to grant exemptions in specific cases, Switzerland had not attempted to take all possible measures (e.g., encourage Italy to approach the Sanctions Committee) to adapt the sanctions regime to the applicant's individual situation in order to harmonize diverging obligations. It was thus found to have violated the Convention.[95]

By so deciding, the ECtHR has established an "obligation to endeavor" (*Bemühenspflicht*) as a minimum obligation under the Convention in cases where binding decisions of the SC must be carried out. If a State Party to the Convention fails to even bring forward its human rights concerns about a particular SC decision, or to seek such relief as it may possibly obtain, there is no need for any judicial review of the legality of

[93] *Ibidem*, para. 145.

[94] *See* Section 2.2.1 herein.

[95] *Nada v. Switzerland*, ECHR (No. 10593/8) Grand Chamber, ECHR 12 September 2012, available at <www.echr.coe.int>, paras. 193-198.

that (background) decision, i.e. the SC decision. As the ECtHR put it, such a failure absolves the Court of the need to determine the question of the hierarchy between the Convention and the UN Charter.[96] This is reminiscent of the argumentation of the HRC in the *Sayadi* case.[97] If the UN system shows any flexibility with respect to human rights concerns, the states must take the opportunities offered. In such constellations the ECtHR, as well as the HRC, seem to shift the problem from the judicial to the diplomatic sphere, i.e. from adjudication to negotiation. The ECtHR did not refer to anything like discretion, or even "free choice", being left to the UN Member States when implementing a SC decision. Nor did it resort to the strategy of releasing the states from any responsibility when acting on behalf of an International Organization, as it did on the grounds of a very strict authority and control test in *Behrami and Saramati* (2007) in favor of the NATO states.[98] After all, it cannot be in error to claim an obligation to endeavor.

3. FINDINGS AND PERCEPTIONS

3.1. Internal and External Judicial Review

As Court Practice has shown, there are various forms of direct and indirect scrutiny, and there also exists a category of cases where a state or another entity has not appropriately determined the margin of appreciation to be applied when implementing a SC decision. In the latter instance, courts tend to use shortcomings in the exercise of discretion by the UN Member States as a basis for avoiding review of problematic issues.

Two major forms of judicial review should be distinguished from each other. Where the ECJ annuls EU secondary law or where a domestic court annuls domestic law that was enacted in order to implement a SC decision, judicial review remains internal (*internal review*). In those cases the system possesses the instruments "to repair the damage". It can require or provide for a new act of implementation, and by so doing ensure its compliance with both internal laws and its obligations under the UN Charter.[99] If, in contrast, the SC decision itself is subjected to judicial review by external institutions (*external review*), the risks inherent in any *decentralized judicial review* may attach and, as a consequence, the obligatory character of the obligations under Art. 25 of the UN Charter, as well as the authority of the SC, will be affected.[100] This is what is referred to as the "fragmentation" of international law.[101]

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[96] *Ibidem*, para. 197.

[97] *See* Section 1.3 herein.

[98] *Behrami and Behrami v. France*, and *Saramati v. France et al.* (71412/01 and 78166/01) Grand Chamber, ECHR 2 May 2007 (Decision on Admissibility), available at <www.echr.coe.int>.

[99] *See* Reinisch, *supra* note 7, p. 284.

[100] *Cf.*, *ibidem*, p. 284.

[101] *E.g.*, International Law Commission, Report of the Study Group on *Fragmentation of International Law: Difficulties Arising From the Diversification and Expansion of International Law* (finalized by M. Koskenniemi), U.N. Doc. A/CN.4/L.682 of 13 April 2006.

The notions of "internal" or "external" review should not be confused with "principal" or "incidental" control/review, as the former terms concern the object of review, whilst the latter relate to the mode of review. Nonetheless, they can overlap. Even if the review is being narrowed down to internal law (internal review), it may indirectly affect the underlying SC decision. From the UN perspective there is only one point that matters, that being whether the Member States will effectively implement a certain SC decision, regardless of the means of implementation or standards and forms of judicial review they may employ. Depriving implementing measures of their validity means that – at least for a certain period of time – the particular UN resolution will not be effectively carried out and, accordingly, international responsibility will be invoked.[102] In addition, the issue of the immunity rights of the United Nations[103] must be considered. It is worth considering whether, e.g., a mere declaratory statement on the illegality of a SC decision can amount to a violation of such rights. The answer to this question should depend on the effects which such a statement might have.

From the EU and domestic perspectives the crucial point is whether EU or domestic courts consider themselves competent to review, in any respect, either directly or indirectly, *the SC decision as such*, or whether they hedge around it by focusing on the implementing act (external review).[104] There is a clear tendency in external jurisdiction to limit the judicial focus to the implementing act, so that the object of review remains totally within the framework of the domestic legal order and its pertinent hierarchy of norms. From the internal standpoint, as being represented particularly by the ECJ, judicial review is not only justified but even required, because the act of implementation being reviewed is considered to be part of the European *constitutional* order. This refers to the "*constitutional hegemony*" of the fundamental law, on the basis of which the reviewing organ operates.[105] Determining the legality or validity of an act of an International Organization thus appears to be analogous to a constitutional review in States[106] which, at least implicitly, was recognized by the ICJ in *Certain Expenses*, by the ICTY in *Tadić*, and also by the ECJ in *Kadi*.[107] The respective courts presume to fulfill their duty as guarantors of the fundamental principles of their own legal order, including above all the protection of human rights. However, the problem remains that even the strictest focus on domestic law cannot prevent a decision based thereon from having repercussions on the underlying SC decision. This is why the principles of loyalty and cooperation between the different systems and their organs have to be taken into consideration.[108]

[102] *Cf.*, *ibidem*, p. 285.

[103] *See* Art. 105 of the UN Charter, together with the Convention on the Privileges and Immunities of the United Nations of 13 February 1946, 21 UNTS 1418.

[104] In this instance Tzanakopoulos, *supra* note 8, p. 110, suggests employing the term "auto-determination" rather than "judicial review".

[105] *Ibidem*, pp. 99, 102.

[106] Peters, *supra* note 9, Article 24, MN 28.

[107] *See* Sections 1.1.1, 1.2.1 and 2.1.2. herein.

[108] *Infra* 3.5.

3.2. The Fine Line between Reform Pressure and International Responsibility

Judicial review also creates the risk of saddling the UN Member States with international responsibility for not effectively implementing SC decisions (Art. 25 of the UN Charter). However, "disobedient states" should not fear becoming the target of any sanctions. To the contrary, the UN system seems to retreat whenever serious human rights concerns have been ascertained by international or national courts. For example, subsequent to the delivery of the views of the Human Rights Committee in the *Sayadi* case, the complainants' names were removed from the list pursuant to a decision of the Sanctions Committee.[109] Even in the general perspective, considerable improvements in the UN sanctions mechanism can be observed.[110] Pursuant to SC Resolution 1526 (2004) an *Analytical Support and Sanction Monitoring Team* has been appointed, which scrupulously monitors to what extent the UN Sanctions regime is being challenged in the courts.[111] The refusal of national and international courts to apply SC resolutions believed to violate human rights thus appears to build up the pressure necessary to make sure that the SC and its members will seriously take human rights concerns into account.[112] There is also a "social review"[113] of SC measures, preventing them from insisting in the implementation of decisions that are found to be intolerable from the human rights perspective, all the more so as the UN lacks any enforcement mechanism of its own. Last not least, the so-called "EC narrative" should be taken into account. Taking into account that the former EC was successfully forced by national courts to include human rights into its legal system, it seems likely that a similar process may be replayed in the UN.[114] This experience indicates that a strategy of dosages of well-founded disobedience by domestic courts forces, in the first instance, the judiciary of an International Organization to expand its human rights jurisprudence, and subsequently causes the legislature of that Organization to amend its human rights system accordingly.

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[109] HRC in *Sayadi and Vinck*, *supra* note 46, para. 92. It is true that the problem in this case laid with the state and not with the U.N. Even so, it is remarkable that the UN responded to the outcome of the procedure.

[110] *E.g.* S.C. Res. 1822 (2008), 1904 (2009), 1989 (2011) and 2083 (2012).In particular, S.C. Res. 1822 (2012), para. 24, where the SC "Requests that Member States and relevant international organizations and bodies encourage individuals and entities that are considering challenging or are already in the process of challenging their listing through national and regional courts to seek removal from the Al-Qaida Sanctions List by submitting delisting petitions to the Office of the Ombudsperson". This can be understood as an offer of cooperation by the SC to the Member States in order to prevent decentralized judicial review in external courts. *See also* N. Krisch, *Beyond Constitutionalism: The Pluralist Structure of Postnational Law*, Oxford University Press, Oxford: 2010, pp. 154-160.

[111] *See* the most recent, Thirteenth Report of the Analytical Support and Sanction Monitoring Team: U.N. Doc. S/2012/968 (31 December 2012). For earlier Reports, see Magnusson, *supra* note 7, p. 54 with note 71.

[112] Reinisch, *supra* note 7, p. 288, speaks of "beneficial spill-over effects".

[113] Zappalà, *supra* note 12, p. 178.

[114] *Cf.*, Reinisch, *supra* note 7, p. 289.

3.3. Art. 103 of the UN Charter – An Overestimated Conflict Norm

The problem of "second-guessing" the Security Council is often considered a normative conflict in instances where compliance with UN Security Council resolutions would collide with the fundamental values (particularly human rights) of another legal order. As the International Law Commission (ILC) has pointed out, a strong presumption against normative conflict, also extending to adjudication, already existed in international law.[115] Indeed, Art. 103 of the UN Charter establishes a hierarchy between Charter obligations and other obligations of the Member States.[116] However, it does not say either that the *Charter* prevails or that a *SC decision* prevails,[117] but rather refers to *obligations under the Charter* which must prevail. Though it is widely recognized that Art. 103 covers not only the rights and obligations in the Charter itself but also obligations imposed on binding decisions by the United Nations bodies (e.g., Art. 25 of the UN Charter),[118] it does not deal with the problem which arises if such decisions are presumed to being illegal. In other words, Art. 103 of the UN Charter is not intended to preclude national courts from reviewing the correct applicability of SC decisions against those very principles of the UN Charter which the SC itself is bound to respect (Art. 24(2) of the UN Charter).[119] Thus, one should not speak of a conflict of norms but rather the issue of *quis iudicabit* – which eventually may lead to a *conflict of systems*.

3.4. The Procedural Dimension: "Jurisdiction" As a Door-opener to Judicial Review

Judicial review, especially with respect to SC decisions, contains both a procedural and a substantive dimension. The procedural side concerns the "jurisdiction" of the court. If, e.g., the validity or legality of a SC decision is a preliminary question to a main question over which the court undoubtedly has jurisdiction, it must also have jurisdiction with regard to the preliminary question, at least in the form of incidental review.[120] If a court is even established by a SC decision, it utterly lacks jurisdiction if that decision turns out to be invalid because of a violation of superior law, i.e. UN primary law, comprising Charter law and the applicable principles of international law. As international courts are entitled or even explicitly obliged[121] to examine whether they have jurisdiction in a case, the validity or legality of the respective SC Resolution can constitute a precondition for the existence of jurisdiction. This is why the ICTY

[115] International Law Commission, *supra* note 101, para. 37.

[116] *E.g.*, Case Concerning Military and Paramilitary Activities in and against Nicaragua (*Nicaragua v. United States of America*, ICJ 26 November 1984, ICJ Reports, 1984, 392, para. 107.

[117] But cf. CFI in *Kadi 2005*, *supra* 2.1.1 herein.

[118] International Law Commission, *supra* note 101, para. 331.

[119] *See* Francioni, *supra* note 75, p. 918. *Contra* Krisch, *supra* note 110, p.163.

[120] *See* ICJ *Advisory Opinion in Namibia*, *supra* 1.1.1.2 herein (with reference); see also the Introduction to this article.

[121] *E.g.*, Art. 19 (1) of the Rome Statute of the International Criminal Court.

Appeals Chamber speaks of a "*primary jurisdiction*" in this context.[122] It is true that the SC did not establish the Yugoslav Tribunal to buttress its own legitimacy, even though it created such bodies as a more impartial alternative to its own politicized processes.[123] But a mere expectation on the part of the Council does not militate against the court's jurisdiction. The question of what standard of review must be applied once jurisdiction is affirmed is a separate issue.

3.5. The Substantive Dimension: Primary Responsibilities on Both Sides and Adequate Standard of Review

Whenever a court reviews a SC decision, the primary responsibility of the SC for the maintenance of peace and security (Art. 24(1) of the UN Charter) can be affected. On the other hand however, courts also have a primary responsibility – for the maintenance of the *rule of law*[124] within their respective legal systems. This applies in particular to the ICJ (Art. 92 of the UN Charter), but as well to the ECJ and domestic supreme courts.

In consideration of the essential message of Art. 92 of the UN Charter a distinction should be made between the ICJ and all other courts. Since its *Namibia* Advisory Opinion (1971), the ICJ feels itself authorized to examine whether the SC, as a precondition of the binding character of its decision, has complied with its obligations under Article 24(2) of the UN Charter. If it should ever use this authority to its fullest extent, it ought to take into consideration that it owes loyalty to the SC. The *principle of mutual loyalty* between the UN and their Member States[125] not only applies to the relationship between the UN and their members, but also requires a "constructive dialogue"[126] between the SC and the ICJ when exercising their competences independently. In the exercise of their competences, both organs must respect the legitimate interest of the other, and not impede each other in their action.[127]

If, in contrast, a court reviewing a SC decision belongs to a foreign (external) system such as, e.g., the ECJ, it owes loyalty in the first instance to its own organization and its members and organs. A domestic court (including EU courts) accordingly puts its focus on the fulfillment of the exigencies of domestic law. This applies all the more if the object of judicial review is not the SC decision itself, but only the implementing act, notwithstanding the fact that even then repercussions to the SC decision will be likely.

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[122] ICTY Appeals Chamber in Tadić, *supra* note 30, para. 21.

[123] *See* Alvarez, *supra* note 3, p. 11.

[124] *See* UN General Assembly, *Declaration of the High-level Meeting of the General Assembly on the Rule of Law at the National and International Levels*, Doc. A/RES/67/1 of 30 November 2012; and generally S. Chesterman, *An International Rule of Law?,* 56 American Journal of Comparative Law 331 (2008), pp. 331 et seq.

[125] *See* K. Doehring, *Unlawful Resolutions of the Security Council and their legal Consequences*, 1 Max Planck Yearbook of United Nations Law 91 (1997), pp. 105 et seq.

[126] Palchetti, *supra* note 75, p. 392.

[127] *See* Fassbender, *supra* note 7, p. 223.

Depending on the perspective taken, i.e. UN law or domestic law, judicial review may lead to different outcomes.[128] Here again, a *duty of loyalty and cooperation* is required in order to prevent damage to the applicable law of both systems. Although the EU is not itself a member of the UN, and while the UN cannot claim any rights from the EU treaties, there are some indications of the existence of a duty of loyalty *vis-à-vis* the UN in European law. As can be inferred from Arts. 3(5), 21(1), and 21(2)(c) of the TEU, and particularly from Art. 220 of the TFEU, support for the aims and principles of the UN, above all the maintenance of peace and security, as well as cooperation of the EU with the UN, are declared to be (constitutional) principles of the EU itself.[129] The European Court of Human Rights has also long recognized "the growing importance of international cooperation and of the consequent need to secure the proper functioning of international organizations" as a principle enshrined in the ECHR system.[130] Accordingly, many Constitutions of the world pledge allegiance to the United Nations and its fundamental Charter, which correlates to the duty of the UN Member States to assist the UN in any action it takes (Art. 2(5) of the UN Charter). Where such a duty of loyalty arises, there already exists some kind of community flowing from the *global interdependence of the UN and various types of infra-orders*, e.g., legal orders of a subject-specific International Organization or of a regional or state system. As these orders become more homogeneous, they extenuate the need for hegemony or ultimate authority as exercised by the traditional SC in a disparate world order.[131]

However, the problem cannot be solved by recognizing the existence of an abstract principle of loyalty *vis-à-vis* the UN in any of the (sub-)systems concerned. The decisive question rather is how such loyalty must be exercised and what limitations may result from it. It goes without saying that the SC, when deciding on the existence of a threat to international peace and security (Art. 39 of the UN Charter), and also on the measures necessary to combat or eradicate that threat, must enjoy a *very wide margin of appreciation*. However it remains difficult to demarcate this appreciation, as it appears impracticable and not convincing to distinguish between the "more political" and the "more legal" aspects of a SC decision,[132] or to distinguish between fact finding and the assessment of facts by the SC, and other questions left to judicial review.[133] Having particular regard to the issue of targeted sanctions, it has also been proposed to resort to a combination of both interests by balancing the need for international cooperation with the defense of human rights.[134] However, with the exception of the ICJ, there are no courts competent to balance and weigh all the interests in the field of worldwide

[128] *Cf.*, Reinisch, *supra* note 7, p. 268.

[129] *See also* General Advocate Bot in *Kadi 2013*, *supra* note 82, para. 73.

[130] ECHR in Bosphorus*, supra* note 89, para. 150 (with further references).

[131] *Cf.*, Krisch, *supra* note 110, p. 153, 157. The same author speaks of an "enmeshment of laws" (*ibidem*, at 160 et seq.).

[132] ICTY Appeals Chamber in *Tadić*, *supra* 1.2.1 herein.

[133] AG Bot in *Kadi 2013*, *supra* 2.1.3 herein.

[134] Reinisch, *supra* note 7, p. 287.

security, all the more so as this form of judicial review must be considered to be the most flexible of all. The power of weighing and balancing could serve as a pretext for undermining the proper functioning of mechanisms established by the SC, such as, in particular, the functioning of International Criminal Tribunals.

Instead, a limited standard[135] of review is needed in order to adapt the intensity of judicial review to the goal of maintaining the proper functioning of all organs and systems concerned. This standard must ensure the execution of jurisdiction of the courts on the one hand, and respect for the primary responsibility held by the Security Council for the maintenance of international peace and security on the other. It must, in principle, prevent all courts from substituting the SC's political assessment with their own.[136] *Judicial review from outside of the U.N. system, moreover, must be limited to the "hard legal facts"*, i.e. to whether the SC had competence (Art. 27(3) of the UN Charter) and whether or not it manifestly violated the principles it is bound to respect (Art. 24(2) of the UN Charter). These include universal human rights to the fullest extent, given that the latter are manifestly violated. There is no justification whatsoever for limiting the obligations of the SC under Art. 24(2) of the UN Charter to peremptory norms.

On the other hand, it must taken into account that judicial self-restraint, particularly in cases of individualized sanctions, seems required only when there exists an adequate level of procedural and substantive guarantees in the relevant system itself, i.e. the UN. This applies all the more because unilateral disobedience by the states, which might result in cases of a flagrant lack of such guarantees, may weaken the SC's authority much more than any adjudication could ever do.[137] It is also well-known that due to the limited legitimacy of the Security Council, judicial blind spots within the UN system would be less acceptable than on the national plane. At this stage of deliberation the application of the "so-long-as formula" comes into the play. The human rights deficit has to be compensated for on the national or regional level *so long as and insofar as* the new form of actions by the SC (individualized sanctions) do not correspond with extended procedural or institutional measures of legal control.[138]

Judicial review from inside of the U.N. system, i.e. by the ICJ, should be assessed differently. The loyal ICJ pays tribute to the specific role of the other organs of the UN, e.g., by granting the SC's decisions a very wide margin of appreciation when it comes to the maintenance of peace and security. However, there is no rule preventing the ICJ from weighing the SC's interests against human rights interests, given that it has jurisdiction. From a quality-oriented point of view the mere threat of a subsequent

[135] For more on the varieties in methods, see Alvarez, *supra* note 2, pp. 26-27: e.g., applying a test of manifest irregularity or abuse of power, demarcating areas of "political discretion", focusing on "fundamental norms", applying distinct levels of scrutiny.

[136] For a more far-reaching version of the argument of non-substitution, see General Advocate Bot in *Kadi 2013*, *supra* note 82, para. 71.

[137] *Cf.*, Alvarez, *supra* note 2, pp. 12-13.

[138] *Cf.*, M. Payandeh, *Rechtskontrolle des UN-Sicherheitsrates durch staatliche und überstaatliche Gerichte*, 66 Zeitschrift für ausländisches öffentliches Recht und Völkerrecht 41 (2006), pp. 61-62, 70-71.

judicial review will cause the SC to strengthen the persuasiveness and legitimacy of its decisions. It has rightly been observed that if the ICJ were to declare a SC decision *ultra vires*, such a decision would fundamentally change the UN system and could even politicize the ICJ.[139] The basis for such change, however, is the presumption that, having regard to the power and manifold means of the SC, *peace and security can always be maintained in at least one way among many that will not manifestly violate human rights*. In this sense the Security Council of the future will be capable of adapting itself to a "modern vision of the administration of justice."[140]

[139] Alvarez, *supra* note 2, pp. 36-37.
[140] ICTY in *Tadić*, *supra* note 32.