Judicial and Quasi-Judicial Control over Targeted Sanctions Imposed by the Security Council

FAN Xiaomei

Graduate School of Law, Nagoya University

TABLE OF CONTENTS

List of Abbreviations

ACP	African, Caribbean and Pacific Group of States
AQO	Al-Qaida and Taliban (UN Measures) Order 2006
ARIO	Draft Articles on the Responsibility of International Organizations
CFI	Court of First Instance of the European Communities
Dutchbat	Dutch Battalion (UNPROFOR Srebrenica)
EC	European Communities
ECHR	European Convention of Human Rights and Fundamental Freedoms
ECJ	European Court of Justice of the European Communities
ECOSOC	United Nations Economic and Social Council
ECtHR	European Court of Human Rights
ed(s)	editor(s)
EJIL: Talk!	Blog of the European Journal of International Law (http://www.ejiltalk.org)
ESA	European Space Agency
EU	European Union
EWCA Civ	England and Wales Court of Appeal (Civil Division)
EWHC	High Court of Justice of England and Wales
GA	General Assembly (UN)
HRC	Human Rights Committee
ICC	International Criminal Court
ICCPR	International Covenant on Civil and Political Rights
ICJ	International Court of Justice
ICTR	International Criminal Tribunal for Rwanda
ICTY	International Criminal Tribunal for the former Yugoslavia
ILA	International Law Association
ILC	International Law Commission
ILO	International Labour Organization
IO(s)	International Organization(s)
IOLR	International Organizations Law Review
IOs' Responsibility Articles	Draft Articles on the Responsibility of

	International Organizations
KFOR	Kosovo Force (NATO)
MONUC	United Nations Mission in the Democratic Republic of the Congo
MS	Member State(s)
NATO	North Atlantic Treaty Organization
NGO	Non-governmental organization
OAS	Organization of American States
OAU	Organization of African Unity (now African Union)
P5	The five permanent Members of the Security Council
PCIJ	Permanent Court of International Justice
PKO(s)	Peacekeeping Operation(s)
SC	Security Council (UN)
S-G	Secretary-General (UN)
State Responsibility Articles	Draft Articles on Responsibility of States for Internationally Wrongful Acts
TO	Terrorism (UN Measures) Order 2006
2013 Guidelines	Guidelines of the Committee for the Conduct of Its Work as amended on 15 April 2013
UKSC	Supreme Court of United Kingdom
UN	United Nations
UNAT	United Nations Administrative Tribunal
UNC or UN Charter	Charter of the United Nations
UNPROFOR	United Nations Protection Force (former Yugoslavia)
WEU	West European Union
WHO	World Health Organization
WTO	World Trade Organization

GENERAL INTRODUCTION

> In the years after 1990, the activism the Security Council demonstrated for the first time in its history gave rise to the question whether the body's powers under Chapter VII of the UN Charter are virtually unlimited, how far the Council can extend the scope of its activities, and whether there are sufficient means of legal control. [1]

Since the time of when the deadlock of the Security Council ("SC") had been broken, questions such as these have not been new, such as discussions about the legality or legitimacy of the SC's involvement in situations without transborder elements; the delegation of its Chapter VII power to specific Member State(s) ("MS") (such as the response to Iraq's invasion of Kuwait); the establishment of *ad hoc* criminal tribunals such as the International Criminal Tribunal for Rwanda ("ICTR") and the International Criminal Tribunal for the former Yugoslavia ("ICTY"). These questions attracted attention especially after the *Lockerbie* case on the topic of whether judicial review of the SC should be conducted by the International Court of Justice ("ICJ").

Discussions on these problems based on the approval of the role the SC have ensued since the end of the Cold War. Studies then came to consider how to restrain the power of the SC by legal bands. From the onset, it is still questionable if the SC is undoubtedly playing a positive role to ensure international peace and security. Bardo Fassbender says

> [i]t is up to the members of the international community to decide whether they want to enable the Council to perform its functions or whether they wish gradually to return to pre-Charter habits and

---

1 Bardo Fassbender, Review Essay: *Quis judicabit?* The Security Council, Its Power and Its legal Control, 11 European Journal of International Law (2000), 219.

practices.[2]

Therefore, the present study side-steps discussions on the importance of the SC in maintaining international peace and security. Factually, the SC's activism is not a thing to be held back. To the contrary, when imagining a utopia of future international law, academia emphasizes the significant SC role where centralized decision-making needs to occur.[3]

Currently the discussions do not touch upon the question of the necessity of the SC to retreat. For those unsolved questions about the SC's power, it is generally accepted that the SC's power is not unlimited but it is still not sure about the standards for limiting its power. Moreover, the means of legal control are far from sufficient.

The present study is not trying to address whether the SC should abstain from stepping into areas directly affecting individuals. Nor is it trying to find an answer to these unsolved problems. Faced with new implications of SC conduct and the same old unsolved questions about judicial control over SC conduct, this study tries to discuss the practical options inspired by new approaches to address unsolved questions in specific cases.

This research is unavoidable because when individuals are directly affected by the SC's conduct, the affected have to at least deal with these questions for their own cases. For this practical purpose, the lawyers at least have to seek some possibilities of redress from the present flawed systems for the affected parties. Moreover, present cases imply that although there are difficulties, it is not a completely hopeless situation for affected individuals to seek ways to argue their cases. Therefore, the main purpose of these examinations on the different mechanisms of redress is to investigate the difficulties and possibilities for the states or individuals in pursuing review of SC conduct, especially the targeted sanctions.

---

2 Ibid, 232.

3 Antonio Cassese (ed.), Realizing Utopia: The Future of International Law (2012),

The present study is to focus on mechanisms, and concerns the use of those mechanisms in a practical way rather than adopting a revolutionary approach aiming at establishment of a new universal mechanism to adjudicate. In other words, the study does not go so far as to purportedly solve the problem universally or deal with the question of the legality or legitimacy of the SC itself but to find possible mechanisms and legal arguments to exert some controlling effect on SC conduct, only from the perspective of law.

This dissertation has an Introductory Chapter and two Parts.

The Introductory Chapter is a combination of a general depiction of the targeted sanctions regime and an examination of the review system established within the sanctions regimes. It will disclose the legal problems inside the sanctions regimes and show how the sanctions regimes are changed or reformed according to major concerns such as humanitarian concerns, counter-terrorism, the human rights concerns. The Introductory Chapter constitutes the context in which this study is to be conducted.

Part I deals with two concrete questions which form the first two Chapters respectively: the applicable laws in the judicial review of SC conduct and the immunities of International Organizations ("IO") before national courts.

From Chapter Three to Six, the mechanisms provided by the UN framework are separately examined, such as the ICJ; the European Union ("EU") courts as in the example of the *Kadi* case; other judicial or quasi-judicial institutions established under international law, such as the Human Rights Committee ("HRC") and the European Court of Human Rights ("ECtHR"); and national courts. The arguments of the decisions of the selected cases are summarized and the issues relevant to the cases are analyzed accordingly.

The present study will serve its purpose if the lawyers for the persons or states affected by SC targeted sanctions could find some guide to proceed with their cases using available mechanisms in seeking to challenge the legality of sanctions imposed upon the individuals.

Oxford University Press.

INTRODUCTORY CHAPTER: The Legal Regime of Targeted Sanctions and Its Problems

Targeted sanctions are today an important and customary tool in the maintenance and restoration of international peace and security.[4] The general sanctions regimes affect the lives of people at large, especially the weakest members of a targeted state.[5] Humanitarian considerations and the changed nature of the current threats to international peace and security are the main reasons to explain the shift from general sanctions regimes to targeted sanctions regimes, although they are not limited to fighting against terrorism and proliferation of weapons of mass destruction.[6]

However, targeted sanctions make the problem of the legality of SC conduct more significant than ever before. Before the time of targeted sanctions, the problem of legality of SC conduct was of more political nature than character of law as they were not directly relevant to private persons. Targeted sanctions now are addressed directly to specific persons and leave little margin of appreciation to the member states for the implementation, which entail an aggravated form of restriction of the individuals' rights. This situation causes many attacks from individuals on the sanctions regime through judicial and quasi-judicial institutions. However, in most cases the UN is not the party.

The topic of judicial control over SC sanctions is in fact not a new issue in

---

4 Annalisa Ciampi, Security Council Targeted Sanctions and Human Rights, in: Bardo Fassbender (ed.), Securing Human Rights?—Achievements and Challenges of the UN Security Council (2011), Oxford University Press, 101.

5 August Reinisch, Developing Human Rights and Humanitarian Law Accountability of the Security Council for the Imposition of Economic Sanctions, 95 American Journal of International Law (2001), 851; Annalisa Ciampi, Security Council Targeted Sanctions and Human Rights, in: Bardo Fassbender (ed.), Securing Human Rights?—Achievements and Challenges of the UN Security Council (2011), Oxford University Press, 101.

6 Ibid.

the study of the UN. Such issues can be traced back to the *Expenses* case (1961-1962) and the *Lockerbie* case (1992-2003). The rising use of targeted sanctions regimes however has refreshed the topic. With the increasing use of targeted sanctions and concomitant attacks on their legality from a human rights perspective, the old topic comes into the eye of the scholars and heated discussions on the topic have arisen again.

This present study is to join in discussions on the legality of SC conduct and choose an angle for research into mechanisms which can exert some control over SC conduct. Therefore, the new implications of the targeted sanctions regimes and the mechanisms residing within the regimes are necessary to first be explained.

This Chapter has two parts: a general picture of targeted sanctions regimes; and a detailed elaboration of the internal revision mechanisms available to states and individuals. Each part serves a distinct purpose: first to assess the availability and quality of internal control mechanisms (listing and de-listing procedures) and second the necessity of the present study.

The SC sanction regime established by Resolution 1267 (1999) ("1267 Sanctions Regime") attracts the most attention in the academic world. Depiction of the 1267 Sanctions Regime is done through descriptions of the changing history of the institutions of the 1267 Committee and the listing and de-listing procedures. Finally, the problems of procedural rights are discussed for the present study's concern about the controlling mechanisms.

I. The 1267 Sanctions Regime

For the fight against terrorism, the SC adopted a series of resolutions under Chapter VII which established a targeted sanctions regime with a Consolidated List of terrorist suspects. This sanctions regime is special, because, *inter alia*, after the Taliban were removed from power in Afghanistan, there was no particular link between the targeted individuals and entities and a specific

country. This sanctions regime is still being used.

The 1267 Committee was established to undertake the task of keeping and updating a list of individuals and entities designated as being associated with Osama bin Laden, Al-Qaida or the Taliban, all of which are subject to freezing of assets, travel bans and an arms embargo. However, the mechanism initially operated in an absence of any guidelines, and procedures have totally lacked transparency. Due to these problems, the regime has been constantly developed, but there are still serious problems remaining.

I.A. The changing history of the institutions in the 1267 Committee

I.A.i. The Monitoring Team

The Consolidated List administered by the 1267 Committee was first introduced by SC Resolution 1333 of 19 December 2000, paragraph 16(b) to which the states have no discretion as to who shall be sanctioned. On 30 July 2001, Resolution 1363 (2001) was adopted and decided to establish a Monitoring Group composed of five experts to monitor the implementation of all measures imposed by Resolution 1267 (1999) and 1333 (2000).[7] Resolution 1526 (2004) was adopted on 30 January 2004 by which the Monitoring Group was succeeded by the Analytical Support and Sanctions Monitoring Team for a period of eight months with eight experts appointed by the Secretary-General. The experts are specialized in one or more of the following areas: counter-terrorism and related legislation; financing of terrorism and international financial transactions, including technical banking; alternative remittance systems, charities, and use of couriers; border enforcement, including port security; arms embargoes and export controls; and drug trafficking.[8] They work under the direction of the Committee with the responsibilities *inter alia* to

7 Resolution 1363 (2001), para. 4(a).

8 Ibid, para. 7.

collate, assess, monitor and report on and make recommendations regarding implementation of the measures; and to pursue case studies. The Monitoring Team's mandate was extended for a period of 17 months by Resolution 1617 (2005) adopted on 29 July 2005[9] and a period of 18 months by Resolution 1822 (2008) on 30 June 2008[10] and another 18 months by Resolution 1904 (2009)[11] and then another 18 months by 1989 (2011)[12] and the latest extension of another thirty months by Resolution 2082 (2012)[13]. In the Monitoring Group's working period, including the time of the Analytical Support and Sanctions Monitoring Team, fourteen reports were submitted to the Committee.[14]

The Monitoring Team was established to assist the work of the Committee and the affected persons had no chance to petition to the Monitoring Team for their own case. In fact, it is a mechanism to assist in guaranteeing the implementation of the sanction rather than to monitor the possible mistakes of the sanctions regime. The situation changed from Resolution 1730 (2006) which introduced a de-listing procedure and established the "Focal Point" which can directly receive de-listing requests.[15]

I.A.ii. The Focal Point

Resolution 1730 (2006) establishing the Focal Point was adopted on 19 December 2006. The Focal Point is from the SC's commitment to ensure fair and clear procedures for placing and removing individuals and entities on

9 Resolution 1617 (2005), para. 19.

10 Resolution 1822 (2008), para. 39.

11 Resolution 1904 (2009), para. 47.

12 Resolution 1989 (2011), para. 56.

13 Resolution 2083 (2012), para. 60.

14 All the fourteen reports (http://www.un.org/sc/committees/1267/monitoringteam.shtml), last visited on 27 January 2014.

15 Resolution 1730 (2006), para. 1 and the Annex.

sanctions lists.[16] The Focal Point is established within the Secretariat (SC Subsidiary Organs Branch) by the Secretary-General[17] and is not only for the 1267 Sanctions Regime before the establishment of the Office of Ombudsperson but for all active Sanctions Committees.[18] The Focal Point's main tasks are, *inter alia*, to receive de-listing requests from petitioners including individual(s), groups, undertakings, or entities on the Sanctions Committee's lists;[19] to acknowledge receipt of the request to the petitioner and inform the petitioner on the general procedure for processing that request;[20] to forward the request to the designating government(s) and to the government(s) of citizenship and residence;[21] and to inform the petitioner of the decisions of the Committee.[22]

The petitioner can send a request for de-listing directly to the Focal Point instead of requesting through their government of residence or citizenship.[23] The Focal Point forwards the request to the designating government(s) and to the government(s) of citizenship and residence for information and possible comments. Those governments are encouraged to consult with the designating government(s) before recommending de-listing.[24]

If, any of these governments recommends de-listing, that government will forward its recommendation with an explanation either through the Focal Point or directly to the Chairman of the Sanctions Committee, who will place the request on the Committee's agenda. If any of the consulted governments opposes the request, the Focal Point will so inform the Committee. All Committee members are encouraged to share information in support of the

16 Resolution 1730 (2006), recital.
17 Ibid, para. 1 of the Annex.
18 Ibid, para. 2.
19 Ibid, para. 2 (1) of the Annex.
20 Ibid, para. 2 (4) of the Annex.
21 Ibid, para. 2 (5) of the Annex.
22 Ibid, para. 2 (8) of the Annex.
23 Ibid, para. 1 of the Annex.
24 Ibid, para. 5 of the Annex.

de-listing request with the designating government(s) and the government(s) of citizenship and residence.[25]

If after a reasonable time (three months), none of the consulting governments comment or indicate that they are still working on the request and require additional time, the Focal Point will so notify all members of the Committee and will provide copies of the de-listing request. Any Committee member may then, after consultation with the designating government, recommend de-listing. If, after one month, no Committee member recommends de-listing, the request shall be deemed rejected. The Chairman of the Committee shall inform the Focal Point accordingly. The Focal Point will inform the petitioner of the decision once it has been taken.[26]

If the petition is put on the agenda of the Committee, the Committee will decide on the de-listing by consensus. If consensus cannot be reached, the matter shall be submitted to the SC.

From the petition's tasks and procedures, petitioners are indeed provided with a chance to directly access the UN mechanism. However, the petition also shows that the Focal Point is mainly an assistant mechanism for the Sanctions Committees working on transfer and notification of requests, information and decisions. It is not an organ to do substantial examination of the petitioner's case or even forward the request directly to the Sanctions Committees.

I.A.iii. The Office of Ombudsperson

Due to defects in the Focal Point, the mechanism of Ombudsperson was established, which is much refined compared with the mechanism of the Focal Point.

On 17 December, Resolution 1904 (2009) was adopted to establish the Office of Ombudsperson for an initial period of eight months. It was decided

25 Ibid, para. 6(a) and (b) of the Annex.
26 Ibid, para. 6(c).

that, when considering de-listing requests, the Committee should be assisted by an Office of the Ombudsperson and requested the Secretary-General to appoint an eminent individual of high moral character, impartiality and integrity with high qualifications and experience in relevant fields, such as law, human rights, counter-terrorism and sanctions, to be Ombudsperson, and decided that the Ombudsperson should perform these tasks in an independent and impartial manner and shall neither seek nor receive instructions from any government.[27] After the appointment of the Ombudsperson who would be responsible specifically for the de-listing from Consolidated List of the 1267 Sanctions Regime, the Focal Point would no longer receive de-listing requests from the 1267 Sanctions Regime and its mandate regarding de-listing of other sanctions regimes continues.

Apart from all those mandates the Focal Point once had regarding transfers and notifications, the Office of Ombudsperson is additionally entrusted, *inter alia*, with the mandates of information gathering with the aid of the Monitoring Team; and dialogue with the petitioner and drafting and presenting of the Comprehensive Report in person and answering Committee members' questions regarding the request in the Committee discussion.[28]

The mandate of the Office of Ombudsperson was extended for 18 months by Resolution 1989 (2011)[29] and another extension of thirty months by Resolution 2083 (2012)[30]. The current Ombudsperson is a former *ad litem* judge of ICTY, Kimberly Prost, who was appointed on 3 June 2010 and re-appointed for thirty months on 1 January 2013. The Office of Ombudsperson is now the working mechanism for the persons sanctioned by the 1267 Sanctions Regime to seek de-listing and is worthy of close observation.

I.B. The present listing and de-listing procedures of the 1267 Sanctions

---

27 Resolution 1904 (2009), para. 20.

28 Resolution 1989 (2011), Annex II.

29 Ibid, para. 21.

Committee

The present listing and de-listing procedures of the 1267 Sanctions Committee is based on the "Guidelines of the Committee for the Conduct of Its Work" adopted on 7 November 2002, as amended on 10 April 2003, 21 December 2005, 29 November 2006, 12 February 2007, 9 December 2008, 22 July 2010, 26 January 2011, 30 November 2011 and 15 April 2013.[31]

I.B.i. The listing procedure

Although the Member States are encouraged to establish a national mechanism or procedure to identify and assess names for inclusion on the Al-Qaida Sanctions List and to appoint a national contact point concerning entries on that list according to national laws and procedures, and are strongly encouraged to approach the state(s) of residence or nationality of the person to seek additional information as soon as possible,[32] the submission of names to the Committee does not require a criminal charge or conviction. Only supporting evidence of "association with" Al-Qaida is enough for the preventive nature of the sanction.[33] The proposing states should use the standard forms for listing (separate forms for individual and entity).[34] This form requires a "statement of the case" as much detail as possible on the basis for listing, including specific information supporting a determination that the person meets the criteria; the nature of the information, for example,

---

30 Resolution 2083 (2012), para. 19.

31 Guidelines of the Committee for the Conduct of Its Work (2011), (http://www.un.org/sc/committees/1267/pdf/1267_guidelines.pdf), visited on 10 January 2012. The Guidelines is amended again on 15 April 2013 ("2013 Guidelines") after the completion of this part of dissertation. Therefore, the relevant contents are checked according to the 2013 Guidelines and reflected in the respective footnotes.

32 Ibid, para. 6 (b) and (c).

33 Ibid, para. 6 (d). There is no change in 2013 Guidelines.

34 Ibid, para. 6 (g). There is no change in 2013 Guidelines.

intelligence, law enforcement, judicial, media, and admissions by subject; and additional information or documents provided with the submission. The information in the statement provided by the proposing states is classified as "releasable upon request", which may be used to develop the narrative summary of reasons for listing,[35] except for parts identified as "confidential to the Committee".[36] In the same form, the proposing state should specify whether the state can be made known upon request.[37]

From the process of submitting names of individuals or entities by the state(s), it is criticized that it lacks any *ex ante* protection.[38] This criticism is quite true. The requirements of providing information are prescribed not by mandatory but by recommendatory language. It is indicated that although these requirements are highly desirable, the designating state is not obliged to provide detailed information. On the other hand, the information submitted to the Committee can never been released to the designated person except as a simple "narrative summary of reasons for listing" released on the website of the Committee after the persons' designation.

At the stage of consideration of submission, the Committee will consider listing requests within a period of ten full working days, which may be shortened if requested at the Chairperson's discretion for emergency and time-sensitive listings.[39] The decision shall be made by the no-objection procedure.[40] If no objection to the de-listing proposal is received by the end of the no-

---

35 Ibid, para. 6 (h). There is no change in 2013 Guidelines.

36 Explanatory Notes for the Standard Form For Listing Individuals, 8 (http://www.un.org/sc/committees/1267/pdf/sfl_explan_notes.pdf), visited on 10 January 2012.

37 Guidelines of the Committee for the Conduct of Its Work (2011), para. 6(i). There is no change in 2013 Guidelines.

38 Annalisa Ciampi, Security Council Targeted Sanctions and Human Rights, in: Bardo Fassbender (ed.), Securing Human Rights?—Achievements and Challenges of the UN Security Council (2011), Oxford University Press, 106.

39 Guidelines of the Committee for the Conduct of Its Work (2011), para. 6 (n). There is no change in 2013 Guidelines.

40 2013 Guidelines, para. 6(n).

objection period, the decision will be deemed adopted.[41] Upon the addition of new names, a narrative summary of reasons for listing will immediately be made accessible and all publicly releasable information will be published on the Committee's website.[42] The listing shall be communicated by the Secretariat to the Permanent Mission of the country where the listed person is located and his or her home country as soon as possible.[43] The informed states are required to take all possible measures to notify or inform in a timely manner the listed person. In case the person's address is known to the Committee, the Ombudsperson shall notify the person after the Secretariat's official notification.

The listing procedure is criticized in different ways especially from the perspective of the right to a fair hearing and its decision-making by consensus.[44] However, these defects can be justified as a preliminary measure in light of the seriousness of international terrorism, as well as the difficulties in combating its hidden character. It is alleged that the SC would be obliged to grant the affected persons the right to a fair hearing to dispute the allegations and evidence against them afterwards.[45] In fact, the 1267 Sanctions Regime has the de-listing procedure. Whether this meets the requirements of a fair hearing is another question.

I.B.ii. The de-listing procedure

De-listing can be requested by either a Member State of the UN or the affected persons. The procedures are different depending on who submits the

41 Ibid.

42 Guidelines of the Committee for the Conduct of Its Work (2011), para. 6 (q). There is no change in 2013 Guidelines.

43 Ibid, para. 6 (t). There is no change in 2013 Guidelines.

44 Erika de Wet, The Role of Human Rights in Limiting the Enforcement Power of the Security Council: A Principled View, in: Erika de Wet and Andre Nollkaemper (eds.), Review of the Security Council by Member States (2003), Intersentia, 14-23.

45 Ibid, 28.

request.

If the request is submitted by a Member State of the UN, the state is requested to bilaterally consult with the designating state(s), the state(s) of nationality, residence or incorporation, where applicable, prior to a de-listing[46] and should use the standard form for de-listing to explain, *inter alia*, the justifications for the de-listing.[47] The Chairperson shall circulate the request including additional information under a written no-objection procedure.[48] The Committee will decide on the requests within ten working days normally.[49] The objecting states shall provide reasons for the objection. If there is no objection, the de-listing request is considered approved and the list will be updated accordingly.[50]

If the request is submitted by designating state(s), a consensus of the submission among all the designating states is required in the case of multiple designating states.[51] The Chairperson will circulate the de-listing request within the 10-working-day no-objection period.[52] If there is no objection in this period, the request is deemed approved. Otherwise, another 60-day period is required for a reverse consensus requiring all Members to object to the de-listing, to strike down the request; or one or more Members' requests for submitting the de-listing request to the SC for decision during which the sanctions shall remain.[53] The objecting state shall provide reasons for the

---

46 Guidelines of the Committee for the Conduct of Its Work (2011), para. 7 (b). There is no change in 2013 Guidelines.

47 Standard form for request de-listing from the List (http://www.un.org/sc/committees/1267/delisting.shtml), visited on 10 January 2012.

48 Guidelines of the Committee for the Conduct of Its Work (2011), para. 7 (e). There is no change in 2013 Guidelines from this aspect. But more relevant states are included in the Chairperson's scope of facilitating the contacts.

49 Ibid, para. 7 (f). There is no change in 2013 Guidelines.

50 Ibid, para. 7 (i) and (j). There is no change in 2013 Guidelines.

51 Ibid, para. 7 (q). The basis of delisting is changed from resolution 1989 (2001) to resolution 2083 (2012).

52 Ibid, para. 7 (r). There is no change in 2013 Guidelines.

53 Ibid, para. 7 (t). There is no change in 2013 Guidelines.

objection.

If the request is through the Office of the Ombudsperson, the admissibility of the petition will be decided by the Ombudsperson according to the standards set in Annex II, paragraph 1 (d) and (e) of Resolution 2083 (2012). A petition which fails to properly address the original designation criteria or a repeated request without additional information will be regarded as inadmissible.

For admissible petitions, the Ombudsperson shall immediately forward the request to the Members of the Committee, the designating state(s), state(s) of residence, nationality or incorporation, relevant UN bodies and any other relevant states. The request shall also be forwarded immediately to the Monitoring Team for all relevant information, fact-based assessments of the information provided by the petitioner and questions or requests for clarifications to the petitioner concerning the request. All this information gathering shall be finished within four months and a two-month extension is possible upon the Ombudsperson's decision, by the Monitoring Team or at the Ombudsperson's request from the relevant states.[54]

After gathering information, the Ombudsperson shall prepare a written update to the Committee on the progress[55] and facilitate a two-month period (an up to two-month extension is possible upon the decision of the Ombudsperson) of engagement, which may include a dialogue with the petitioner. In this period, the Ombudsperson mainly engages in investigation of the petitioner's case and also facilitates the exchange of information, questions or requests among all the relevant actors. The Ombudsperson should meet with the petitioner if possible.[56] After the period of engagement, the Ombudsperson shall draft and circulate to the Committee a Comprehensive Report which exclusively summarizes and specifies all

54 Resolution 2083 (2012), Annex II, para. 2 and 3.

55 Ibid, Annex II, para. 4.

56 Ibid, Annex II, para. 5 and 6.

information, and describes the Ombudsperson's activities and recommendation of the case based on all the information and with the principal arguments.[57]

The Committee has fifteen days to review the Comprehensive Report and shall put the request on its agenda.[58] The Committee's consideration of the Comprehensive Report requires the Ombudsperson to present the Report and answer questions in person. The consideration shall be finished no later than 30 days from the date when the Report is submitted in all official languages of the UN to the Committee for review.[59]

The decision-making procedures are different depending on the recommendation which the Ombudsperson makes. If retaining the list is recommended, the Committee will notify the decision to retain the list unless a Member requests de-listing and decide the case by normal consensus procedures.[60] If de-listing is recommended, the Chairperson will circulate the de-listing request with a no-objection period of 10-working days after the consideration of the Report. If no objections are received in the no-objection period, the de-listing will take effect. In the situation that objection is received, the de-listing will take effect in 60 days after the initial submission of the Report in all official language, unless there is a reverse consensus (written objections from all Committee Members) or one or more Members request the Chairperson to submit the request to the SC for a decision. The sanctions shall remain in force until the SC decides on the question.[61]

A clear progression can be seen from the de-listing procedures explained above: the Office of Ombudsperson has substantial involvement in the case by

---

57 Ibid, Annex II, para. 7.

58 Guidelines of the Committee for the Conduct of Its Work (2011), para. 7 (aa). The 2013 Guideline, para. 7 (cc) has no change on this matter.

59 Ibid, para. 7 (bb) and (cc). The 2013 Guideline, para. 7 (dd) has no change on this matter.

60 Ibid, para. 7 (dd). The 2013 Guideline, para. 7 (ff) has no change on this matter.

61 Ibid, para. 7 (ee)-(gg). The 2013 Guideline, para. 7 (gg)-(jj) has no change on this matter.

information gathering and the period of engagement, which is much more than a go-between to transfer information, especially if the Ombudsperson meets with the petitioner if possible; and the recommendation of the Ombudsperson directly affects the decision-making procedure of the Committee.

However, what does not change is that the petitioner is not provided with a right of direct access to the Committee and has no chance to be heard in person,[62] but has the burden of proof of his innocence, which is extremely difficult.[63] Moreover, the Ombudsperson's recommendation is not necessarily a fact-based assessment and political considerations are not excluded although it is information-based with principal arguments and the Monitoring Team's assessments are fact-based. Also, the procedure is different from the normal consensus if de-listing is recommended. However, an objection is enough to bring the procedure back to a political one by the SC, which means a change from the veto power of every Member of the Committee to the veto power of the permanent Members of the SC and the group veto power of the Members of the SC is enough to bar 9 positive votes.[64]

Therefore, the progression of the mechanisms has not changed its political nature in assessing the private persons' cases and the persons remain in the passive position and do not have any substantial rights during the process of listing or de-listing.

II. The problem of procedural rights in the targeted sanctions regime

II.A. The UN's attempt to reform

The targeted sanctions, usually financial sanctions and travel bans, affect

62 Annalisa Ciampi, Security Council Targeted Sanctions and Human Rights, in: Bardo Fassbender (ed.), Securing Human Rights?—Achievements and Challenges of the UN Security Council (2011), Oxford University Press, 109.

63 Alexander Orakhelashvili, Collective Security (2011), Oxford University Press, 220.

64 Art. 27 of the UN Charter.

specific persons' right to property; right to respect for privacy of family life; and related rights including reputation and other freedoms of the persons. However these rights are not absolute and may be subject to limitations in certain circumstances. These limitations can be justified by the legitimate objective and the requirement of necessity and proportionality.[65] The due process right is not only a right affected by the sanctions regime but also an index to show the proportionality of the limitations to the other fundamental rights.

The right of due process has been generally recognized in international law as protecting individuals from arbitrary or unfair treatment by state organs.[66] Generally recognized due process rights include the right of every person to be heard before any individual measure which would affect him or her adversely is taken, and the right of a person claiming a violation of his or her rights and freedoms by a state organ to an effective remedy before an impartial tribunal or authority.[67] These rights can be considered as a part of the corpus of customary international law and are protected by general principles of law.[68]

There was a comprehensive study on targeted sanctions in 2003 for the purpose of enhancing "the prospect of sanctions achieving their stated objectives, while minimizing unintended consequences",[69] but the study's focus was on the effectiveness of targeted sanctions and human rights concerns were not specifically addressed.

In the World Summit Outcome Document, adopted on 24 October 2005,

---

65 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, 20 March 2006 (final), 7.

66 Ibid, 6.

67 Ibid.

68 Ibid.

69 Peter Wallensteen, Carina Staibano and Mikael Eriksson (eds.), Making Targeted Sanctions Effective: Guidelines for the Implementation of UN Policy Options (Results from the Stockholm Process on the Implementation of Targeted Sanctions),

the heads of states and governments of the MS of the UN called upon

> the Security Council with the support of the Secretary General to ensure that fair and clear procedures exist for placing individuals and entities on sanctions lists and for removing them, as well as for granting humanitarian exceptions.[70]

This was reflected in a statement issued on 22 June 2006 by the President of the SC, according to which

> [t]he Council is committed to ensuring that fair and clear procedures exist for placing individuals and entities on sanctions lists and for removing them, as well as for granting humanitarian exemptions. The Council reiterates its request to the 1267 Committee to continue its work on the Committee's guidelines, including on listing and de-listing procedures.[71]

Thus, certainly there is an express commitment for the SC to establish fair and clear procedures for listing and de-listing as well as humanitarian exemptions, but the 1267 Sanctions Regime as it now stands still has the problem of due process. There is still no proper balance between the principle of respect for fundamental rights and individual liberties and the need to ensure the effectiveness of sanctions for the purposes of international peace and security.[72]

---

viii.

70 World Summit Outcome Document, 24 October 2005, UN Doc A/RES/60/1, para. 109.

71 Statement by the President of the Security Council, UN Doc S/PRST/2006/28, 22 June 2006, 2.

72 Annalisa Ciampi, Security Council Targeted Sanctions and Human Rights, in: Bardo Fassbender (ed.), Securing Human Rights?—Achievements and Challenges of the UN Security Council (2011), Oxford University Press, 130.

II.B. Current criticisms and efforts within the UN

Current procedures allow the designating state to withhold relevant information not only from states outside the Committee but also from the interested person and the Committee itself. As there is no *ex ante* procedural protection for the targeted persons, *ex post* protection is extremely difficult because of the evidentiary information.

As for *ex post* protection, the decision-making process endows every Member of the Committee with veto power. Therefore, the procedures provided by the sanctions regime leave very broad discretion to the MS of the Sanction Committee. Seen from the evidentiary requirement and the transparency of the process, these procedures far from provide adequate due process protection for the affected persons.

Moreover, there is general lack of mechanism for reviewing the legality of the conduct of the UN. It is extremely difficult for targeted persons to challenge their designation before an independent and impartial authority.

In fact, this problem is not new for the targeted sanctions regime, because in the era of the general sanctions regime, there was still a lack of mechanism to review the conduct of the UN and deal with possible damage to people caused by the organization. Customary international law does not provide sufficiently clear rules which would oblige IOs to observe standards of due process vis-à-vis individuals.[73]

However the targeted sanctions regimes, especially the 1267 regime, changed the story: as the trend of widening the scope of customary law in regard to due process to include direct governmental action of IOs vis-à-vis

---

73 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, 20 March 2006 (final), 6.

individuals, the targeted sanctions, which directly affect specific persons and leave little margin of appreciation to the MS, now fall into the scope. Since the sanctions are neither imposed generally upon a state nor addressed only upon the officials of specific countries, sanctions are addressed to many other persons without official capacity in order to fight against terrorism. While confirming the importance of the targeted sanctions regime in addressing the problems of international peace and security by the SC, the lack of due process in the targeted sanctions regime has been impugned before national, regional or international judicial or quasi-judicial institutions.[74]

Bardo Fassbender, in the study commissioned by the United Nations Office of Legal Affairs completed in 2006, gave three suggestions in improving the procedural problem of the targeted sanctions:

> (a) the right of a person or entity against whom measures have been taken to be informed about those measures by the Council, as soon as this is possible without thwarting their purpose;
> (b) the right of such a person or entity to be heard by the Council, or subsidiary body, within a reasonable time;
> (c) the right of such a person or entity to an effective remedy against an individual measure before impartial institution or body previously established.[75]

Some of these suggestions were responded to by the establishment of the Office of Ombudsperson and its listing and de-listing procedures as described

---

74 Improving fair and clear procedures for a more effective sanctions system, Document submitted to the Security Council by Switzerland and the Like-Minded State in April 2011,
(http://www.news.admin.ch/NSBSubscriber/message/attachments/22759.pdf).

75 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, 20 March 2006 (final), 8.

above. However, the right to be heard, the right to information, and the impartiality of the current process are still problematic when compared with the recognized standard of due process.

To further address this problem, the Group of Like-minded States on Targeted Sanctions composed of Austria, Belgium, Costa Rica, Denmark, Finland, Germany, Liechtenstein, the Netherlands, Norway, Sweden and Switzerland, sent a letter to the Secretary General and the President of the Security Council on 7 November 2012.[76] In the letter, the Group of Like-minded States expressed their worry that

> the recent judgment of the European Court of Human Rights in the Nada case, for instance, stated that United Nations sanctions do not prevent judicial review of domestic implementation of sanctions. However, if domestic lawsuits of such cases indeed lead to national delistings, the uniform application of and full compliance with United Nations sanctions will be at stake. As long as courts and parliaments perceive sanctions procedures as not satisfying the basic elements of rule of law and due process, the implementation of the Al-Qaida sanctions regime will continue to be challenged.[77]

These countries put forward several suggestions for improving the current listing and de-listing procedures of the Ombudsperson. These suggestions include, *inter alia*, timely provision of relevant information by the MS; recommendation of de-listing in case of insufficient information; inadmissibility of the information from torture or illegal means; disclosure of designating state; and time limits for all listings.

Clearly efforts are being put forth in improving the information and

---

76 Identical letters dated 7 November 2012 from the Permanent Representative of Switzerland to the United Nations addressed to the Secretary General and the President of the Security Council, A/67/557-S/2012/805, 9 November 2012.

77 Ibid, 4.

transparency of the process. These suggestions are not satisfying according to the due process requirement and may not be adopted by the Sanctions Committees. The inter-governmental nature of the decision-making process and the weak evidentiary basis render the mechanism in a difficult situation to meet the due process requirements.

III. Interim conclusion

The sanctions regime originally had no self-revision mechanism. The sanctions regime later developed the mechanism of the Monitoring Group, the Monitoring Team, the Focal Point and finally the Office of Ombudsperson which enables individuals to directly access the UN level and the Ombudsperson has been entrusted with great mandates of investigation with assistance of the Monitoring Team. The mechanism in fact has made great progress to correct possible mistakes.

However, the self-revision mechanism has defects which domestic court procedures should not have. Moreover, the decision of the self-revision mechanism can be different or even opposite from the recommendation of the Ombudsperson. The recommendation to de-list can very easily be barred with an objection of a Member of the Sanctions Committee. The nature of the procedure is still far from being fact-based or being called a proper judicial procedure.

Unfortunately, there is still no mechanism to balance the need to ensure the effectiveness of the sanctions regime and the need to guarantee human rights. Absolute power is dangerous. This fear of the danger is considered as one origin for the calling for an independent body to examine the individuals' claims. However, in the framework of the UN, the creation of an independent body unavoidably touches upon the SC's prerogative. Therefore, the body to examine the individuals' claims (the Office of the Ombudsperson) was established and is being reformed progressively. However, it will never acquire

the quality of independence or of judicial nature.

PART I: Structural Difficulties in Judicial or Quasi-Judicial Review of UN Sanctions Measures

Part I deals with two problems in the possible judicial or quasi-judicial review of SC targeted sanctions: the applicable laws in the review and the immunity of the IOs which could be a bar to the exercising of the jurisdiction of national courts.

Chapter One is about the applicable laws in the review of legality of the UN sanctions measures. This problem is discussed both in principle and practice.

Chapter Two concerns the immunity of IOs, especially the immunity of the UN. It focuses on human rights considerations in immunity of IOs from the national courts indicated in the jurisprudence of the *Waite and Kennedy* case. Putting this issue at the beginning of the study is due to considerations that immunity is the first barrier to encounter if an IO is brought before national courts. This jurisprudence indicates increasing possibility for the domestic courts to entertain such cases, in which the IO is directly involved as a party.

Chapter ONE: Applicable Laws in the Legal Review of SC Sanctions

The issue of substantial matters of the legal limits of SC conduct is also an unavoidable question. To answer whether there are any legal limitations and what are those limitations on the SC in adopting Chapter VII resolutions imposing sanctions on private persons is a precondition to do the review. This Chapter explains the problem from both a principled view and practical view to show situations of doing the judicial or quasi-judicial review.

I. A principled view

There is no consistent opinion about the scope of legal limits to the conduct of the SC. The various opinions range from the view that the UN Charter only is applicable to the view that both the Charter and general international law apply. As for the scope of general international law binding upon the SC, opinions are also varied.

The often quoted author Hans Kelsen stated in his book published in 1950 that the "purpose of the enforcement action under Article 39 is not: to maintain or restore the law, but to maintain, or restore the peace, which is not necessarily identical with the law".[78] He confirmed that according to Article 1, paragraph 1, "in taking enforcement actions under Article 39, the Security Council is bound to act 'in accordance with the Purposes and Principles of the United Nations' (Article 24, paragraph 2)".[79] However, such restrictions are only imposed on the functions of "bringing about by peaceful means adjustment or settlement of international disputes or situations" which are the

78 Hans Kelsen, the Law of the United Nations: A Critical Analysis of its Fundamental Problems (1950), London: Stevens, 294.

79 Ibid.

functions of the SC under Chapter VI.[80] Kelsen continued that, when the SC is acting under Chapter VII, the SC may wish to enforce a decision which is considered to be just, though not in conformity with existing international law. In such situations, Kelsen thought that decisions enforced by the SC may create new law for concrete cases.[81] However, such statements made by Kelsen are based on the precondition that an Article 39 determination has been made.[82]

Dapo Akande recognized the Article 39 determination as a discretion of the SC and did not consider any further limits to this discretionary power.[83] However, his discussions were on the premise that the Article 39 determination has been made.

He examined the Charter provisions, especially the negotiating history of Article 24 (2), to argue that the power of the SC is not unlimited and has the duty to act in accordance with the purposes and principles of the Charter.[84] This is the general limitation, and for specific limitations he pointed out general international law, *jus cogens*, and human rights principles. When he used general international law, Han Kelsen was quoted as the most typical of arguments against the limits of international law on the SC in exercising the power to maintain international peace and security. Dapo Akande admitted that Kelsen's argument has some support in the text of Article 1(1), because this article divides the means for maintaining international peace and security into two areas: collective measures for the prevention and removal of threats to peace, and for the suppression of acts of aggression or other threats to peace; and peaceful adjustment or settlement of international disputes or situations which might lead to the breach of peace. Only for the latter, the requirements for

---

80 Ibid, 295.

81 Ibid, 295.

82 Ibid, 438.

83 Dapo Akande, The International Court of Justice and the Security Council: Is there Room for Judicial Control of Decisions of the Political Organs of the United Nations?, 46 (2) The International and Comparative Law Quarterly (1997), 315.

conformity with the principles of justice and international law are added. In other words, it implies that for the SC, Chapter VII decisions are not subject to constraints of general international law.[85] Additionally, Article 103 is also considered as a support of Kelsen's arguments.[86] However, Dapo Akande argued in terms of the subject of international law and the mandated powers principle against Kelsen's statement and he confirmed that "it is not correct to contend that the Security Council is not at all restrained by principles of international law when it is taking collective measures to enforce the peace or to suppress aggression."[87] It can be understood that some principles of international law are binding SC conduct even in the scope of Chapter VII decisions. The limitation of *jus cogens* on the powers of the SC was subsequently explained and accepted with little doubt.[88] Finally, human rights obligations were considered and are the most noteworthy.

Dapo Akande invoked Article 1(4), Article 55 of the UN Charter; the ICJ's confirmation of the human rights obligation as enshrined in the Charter principles and as a substantive obligation of the UN Charter; the wrongfulness of the SC as an organ of UN to promote human rights if the SC is empowered to violate human rights; and Judge *ad hoc* Lauterpacht's confirmation of the human rights obligations as limitations on the power of the SC.[89] However, as for the question of which fundamental human rights the SC is bound to respect, he just quoted a few authors' proposals such as the non-derogable rights; human rights with status of general international law; and human rights obligations adopted in the UN system.[90] However, it is not certain what scope

---

84 Ibid, 315-316.

85 Dapo Akande, The International Court of Justice and the Security Council: Is there Room for Judicial Control of Decisions of the Political Organs of the United Nations?, 46 (2) The International and Comparative Law Quarterly (1997), 318.

86 Ibid, 318-319.

87 Ibid, 319-320.

88 Ibid, 322.

89 Ibid, 323.

90 Ibid, 323-324.

of human rights should bind the SC in exercising its Chapter VII powers.

Karl Doehring in the same year (1997) published his article "Unlawful Resolutions of the Security Council and their Legal Consequence" and stated that "one can, prima facie, assume that a resolution of the Security Council could be unlawful, measured on objective rules of international law. The competences [of the SC] may be overstepped, or substantive rules of the Charter or of customary international law applicable besides the Charter may be disregarded."[91] He asked whether the resolutions violating the Charter or general international law were still binding on the states. He asserted that SC resolutions do not create law but they have to apply it. However, since dispositive law can be abrogated through the consent of states, one may conclude that the acceptance of the Charter as a legal system represents or replaces a general consent concerning resolutions of the SC, abrogating dispositive rule of international law, but is not applicable to *jus cogens*, which is not dispositive.[92] In conclusion, the non-dispositive rules, in Doehrings opinion, constitute limits to the SC's power.

August Reinisch, in his article "Developing Human Rights and Humanitarian Law Accountability of the Security Council for the Imposition of Economic Sanctions" published in 2001, mentioned that most commentators, with very few exceptions, simply assume that the SC is obliged to respect human rights or humanitarian law rules when imposing sanctions but do not analyze the issue in detail.[93] With increased SC activity, the debate on possible limitations has been spurred since 1990.[94] In the same article, he also confirmed that the UN is not bound by any humanitarian law or human

---

91 Karl Doehring, Unlawful Resolutions of the Security Council and their Legal Consequence, 1 Max Planck Yearbook of United Nations Law (1997), 92.

92 Ibid, 108.

93 August Reinisch, Developing Human Rights and Humanitarian Law Accountability of the Security Council for the Imposition of Economic Sanctions, 95 (4) The American Journal of International Law (2001), 853.

94 Ibid, 854.

rights obligations as a matter of treaty law.[95] However, he sought to answer the question whether—in absence of any treaty obligations—general international law (custom or general principles) binds the UN and thus the SC.

By a textual approach, he invoked Article 24(2) of UN Charter that obliges the SC to act "in accordance with the Purposes and Principles of the United Nations," among which Article 1(1) provides, *inter alia*, the maintenance of peace and security "in conformity with the principles of justice and international law." He also agreed with Kelsen on division of Chapter VI and Chapter VII competences in terms of restrictions. However, considered together with the statements in the preamble that one of the major goals of the UN is to "establish conditions under which justice and respect for the obligations arising from treaties and other sources of international law can be maintained". Such conditions would fail to be established if an organization violates international law. As for human rights obligations, he invoked Article 1(3) referring to the promotion of human rights as one of the major purposes of the UN, and Article 55(c) that the UN "shall promote […] universal respect for, and observance of, human rights and fundamental freedoms for all without distinction."[96] Although these articles do not oblige the UN to observe human rights, it is plausible to regard the UN as having violated its duty to promote respect for and observance of human rights if it disregards these rights, and this opinion is supported by the *Effect of Award* case by the UN Administrative Tribunal.[97] The situation is much clearer than ever before because the SC has been placed at the center of the human rights protection system.[98] By considerations of the UN of its nature as an IO with legal personality under international law created by the common will of States, the

---

95 Ibid.

96 Ibid, 857.

97 Ibid.

98 Daphna Shraga, The Security Council and Human Rights—from Discretion to Promote to Obligation to Protect, in: Bardo Fassbender (ed.), Securing Human Rights?—Achievements and Challenges of the UN Security Council (2011), Oxford

principle of mandated powers was mentioned that the creatures cannot acquire more powers than their creators. Therefore, it is unconvincing that the member states could collectively opt out of customary law and general principles of law by creating an IO.[99] The conclusion is the same even without consideration of the mandated powers, because the UN as an IO is subject of international law and subject to international law.[100] In addition to this argument, he quoted the UN's acknowledgement of its international responsibility for damage caused in the course of the Congo operation which demonstrated that general international law is applicable to the UN.[101] He also confessed that views may differ over whether the SC was bound by international law in general, and hardly disputed that the Council must respect *jus cogens* norms.

Antonios Tzanakopoulos differentiated the rules imposing obligations upon the UN as the *lex specialis* and *lex generalis*, namely the Charter law and the general international law[102] in talking about limits on the SC's discretionary power.

As for the Charter law, he argued that "only decisions taken in accordance with the Charter (i.e. *intra vires* decisions) acquire binding force".[103] For the SC adopting binding enforcement measures, the determination under Article 39 of the existence of a threat to the peace is considered as a prerequisite and constitutes a legal limit for the SC's discretionary power in making binding decisions.[104] Consequently, he argued that the discretion of the SC to choose the measures to restore or maintain peace should be governed by the principle

---

University Press.

99 August Reinisch, Developing Human Rights and Humanitarian Law Accountability of the Security Council for the Imposition of Economic Sanctions, 95 (4) The American Journal of International Law (2001), 858.

100 Ibid.

101 Ibid, 858-859.

102 Antonios Tzanakopoulos, Disobeying the Security Council: Countermeasures against Wrongful Sanctions (2011), Oxford University Press, 57.

103 Ibid, 58.

of proportionality which is expressly or implicitly accepted by the ICJ in the *Expenses* case and the ICTY in the *Tadić* case and scholarly opinion, and considered the principle as positive Charter law.[105] Even if it is not, it is also applicable as rules of general international law.[106] Besides, he also points out the difference of the SC's competences between Chapter VI and Chapter VII, namely the binding force difference. So the obscure transitions should be alerted as the SC has such tendency.[107] Moreover, the division of powers by and the procedural rules of the Charter should be respected, but the latter limit is considered minor with little significance in practice.[108] Finally, he points out that the SC is under no obligation to respect its previous resolutions.[109]

As the nature of *jus cogens* and *jus dispositivum* are different, he examines the two separately. As for *jus cogens,* he concluded that

> some scholars, as well as the ICTY, the CFI, and national courts, stop at this: the Council is bound by obligations stemming from the Charter and from *jus cogens* norms, but these are the *only*[110] limits to Council action under Article 41. Beyond that, the Council is the beneficiary of a power of appreciation which cannot be the object of any type of control.[111]

Then the heated debate moves to the derogability of *jus dispositivum* by the SC in exercising its competence to maintain or restore international peace. As described above, Karl Doehring also mentioned the dispositive norms, but he left the question open by casually stating that "one may tolerate the disregard of dispositive norms of international law if otherwise peace among states could

---

104 Ibid, 62.

105 Ibid, 64-65.

106 Ibid, 81.

107 Ibid, 67.

108 Ibid, 68.

109 Ibid, 69.

110 The word "only" is italicized by the original text.

111 Ibid, 72.

not be preserved".[112] By an analogous approach between the countermeasures and sanctions, and then analogy of countermeasures by states and by an IO, Antonios Tzanakopoulos came to the conclusion that

> [i]nternational obligations are directly incumbent upon the Council under general international law, without the need for attempting to channel these obligations through the Charter: the obligations exist under general international law, limiting the content of measures short of armed force, which aim at inducing compliance of a recalcitrant entity. Since the Charter cannot be shown to permit divergence from these norms, they apply to Security Council action for the imposition of sanctions directly, and their violation engages the responsibility of the UN.[113]

As for the requirements of necessity and proportionality[114], Alexander Orakhelashvili agrees with Antonios Tzanakopoulos by stating that "[t]he requirement of necessity is inherently linked to the entire structure of Chapter VII. If Chapter VII measures are goal-related, then their legality depends on their necessity to achieve these goals".[115] However, he does not classify the principle under positive Charter law or general international law. "Among different levels of human rights norms, least controversial is the observance of human rights established as *jus cogens*, which cannot be overridden by the effect of Article 103 of the Charter."[116] But, "the extent to which human rights qualify

---

112 Karl Doehring, Unlawful Resolutions of the Security Council and their Legal Consequence, 1 Max Planck Yearbook of United Nations Law (1997), 99.

113 Antonios Tzanakopoulos, Disobeying the Security Council: Countermeasures against Wrongful Sanctions (2011), Oxford University Press, 83.

114 Although the two authors used different wording "proportionality" and "necessity and proportionality", in the context indicate the same meaning with some difference about the way of test the proportionality, which is not relevant here.

115 Alexander Orakhelashvili, Collective Security (2011), Oxford University Press, 190.

116 Machiko Kanetake, Enhancing Community Accountability of the Security Council through Pluralistic Structure: The Case of the 1267 Committee, 12 Max Planck Yearbook of United Nations Law (2008), 137.

as *jus cogens* remains controversial. The list of non-derogable human rights under Article 4(2) of the ICCPR is partly the recognition of the peremptory nature of those norms. Neither Article 4 nor Article 2(3) is mentioned. While the Human Rights Committee holds the view that the category of peremptory norms extends beyond the list of non-derogable provisions provided in article 4(2), the growing consensus that the core elements of the right to a fair hearing are non-derogable and *jus cogens* may still remain restricted to the context of criminal proceedings."[117] That is why there are heated discussions on the nature of the restrictions on the designated individuals.[118]

Bardo Fassbender found that

> in accordance with the established system of sources of international law, the United Nations could be obliged to observe such standards by virtue of international treaties (including the UN Charter as the constitution of the United Nations), customary international law, or general principles of law recognized by the members of the international community. Since the United Nations is not a party to any universal treaty for protection of human rights, it is not directly bound by the respective treaty provisions guaranteeing rights of due process. The United Nations being an autonomous subject of international law, it does not follow from the fact that its Member States have ratified certain human rights instruments that an according obligation of the Organization has come into existence.[119]

---

117 Ibid, 138.

118 Erika de Wet, The Role of Human Rights in Limiting the Enforcement Power of the Security Council: A Principled View, in: Erika de Wet and Andre (eds.), Review of the Security Council by Member States, Intersentis, 19-24. Alexander Orakhelashvili also followed the same line in discussing the nature of the anti-terrorism sanctions in Collective Security (2011), Oxford University Press, 214-216.

119 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, 6 (http://www.un.org/law/counsel/Fassbender_study.pdf).

However, Fassbender pointed out that the emergence of supranational organizations like the EU has changed the traditional picture. As the UN begins to engage in actions directly affecting individuals, the constitutional traditions common to the Member States might be taken into consideration as sources of UN law.

Fassbender mentioned the term "governmental action of international organization vis-à-vis individuals" in his research on the Targeted Sanctions and Due Process.[120] He argued that

> the due process rights of individuals recognized as general principles of law are also applicable to international organizations as subjects of international law when they exercise governmental authority over individuals.[121]

For human rights law in general, he pointed out that the UN did make a great contribution to its development, and therefore, it is reasonably expected that the UN itself, when its action has a direct impact on the rights and freedoms of an individual, observes standards set up by the UN.[122] This is also anticipated by the UDHR that those rights called for by UNHR would not only be demanded from States but also from other bodies and institutions exercising elements of governmental authority, including international organizations. Fassbender also agrees that the UN Charter as the principal source of its human rights obligations "obliges the organs of the UN, when exercising the functions assigned to them, to respect human rights and fundamental freedoms of individuals to the greatest possible extent."[123] Besides the human rights law, he mentioned the principle of necessity and

120 Ibid, 6 and 7.

121 Ibid, 7.

122 Ibid.

proportionality that

> when imposing sanctions on individuals in accordance with Chapter VII of the UN Charter, the Security Council must strive for discharging its principal duty to maintain or restore international peace and security while, at the same time, respecting the human rights and fundamental freedoms of targeted individuals to the greatest extent. […] Every measure having a negative impact on human rights and freedoms of a particular group or category of persons must be necessary and proportionate to the aim the measure is meant to achieve.[124]

According to the advisory opinion given by the ICJ on the interpretation of the World Health Organization ("WHO") and Egypt Agreement, the ICJ ruled that as international organizations are subjects of international law, they are bound by any obligations incumbent upon them under general rules of international law, under their constitutions or under international agreements to which they are parties.[125]

Ian Brownlie said that even if political organs of the UN have a wide margin of appreciation in determining that they have competence by virtue of Chapter VI or Chapter VII, and further, in making dispositions to maintain or restore international peace and security, it does not follow that the selection of the modalities of implementation is unconstrained by legality. "Indeed when the rights of individuals are involved, the application of human rights standards is a legal necessity. Human rights now form part of the concept of the international public order".[126]

---

123 Ibid.

124 Ibid.

125 Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt, Advisory Opinion, ICJ Report 1980, 89-90.

126 Ian Brownlie, The Decisions of Political Organs of the United Nations and the Rule of Law, in Ronald St. John Macdonald (Editor), Essays in Honour of Wang Tieya,

Machiko Kanetake, when examining whether the customary law is binding on an IO, concluded that it seems that the observance of customary human rights norms is yet to join these categories of *jus cogens*, and so is still premature to conclude that such rights can be invoked against international organizations in general.[127]

Although not the majority view, the binding force of the *jus cogens* on SC conduct is also doubted by Bernd Martenczuk.[128] The notion of *jus cogens* was created by Article 53 of the Vienna Convention on the Law of Treaties, so is a concept of the law of international treaties which is not easily transplanted into the law of the UN. For example, the generally accepted *jus cogens* rule of non-use of force is not binding on the SC.[129] However, the majority opinion of the authors recognize the binding force of the *jus cogens* on the SC for the *jus cogens* is a group of rules which do not allow any derogation from any subject of international law.

Exhaustive research of the literature on arguments on the legal limits of the SC's powers is not necessary to come to the conclusion (conditioned on the Article 39 determination) that the SC in exercising its Chapter VII power is at least bound by the UN Charter. The binding force of the *jus cogens* is generally accepted with some doubts as stated above by Bernd Martenczuk. As for other legal limits, the arguments are varied from different interpretations of the Charter.

II. A view of practice

Martinus Nijhoff (1993), 102.

127 Machiko Kanetake, Enhancing Community Accountability of the Security Council through Pluralistic Structure: The Case of the 1267 Committee, , 12 Max Plank Yearbook of United Nations Law (2008), 125.

128 Bernd Martenczuk, The Security Council, the International Court and Judicial Review: What Lessons from Lockerbie?, 10(3) European Journal of International Law (1999), 544-546.

129 Ibid.

If the lawfulness of a SC Resolution is under review, logically, we should first see whether there is Article 39 determination, and then whether the Article 39 determination is proper and finally whether the resolution is consistent with all rules applicable to Article 39 legal limits. There are differences in the third question according to different approaches. In practice, the SC Resolutions are not that "standardized" as prescribed in the UN Charter. Therefore, even without considering the characteristics of the recent SC Resolutions especially addressed in this study, these questions are general for all the SC Resolutions in assessing their lawfulness.

II.A. The limit of Article 39 determination

As for the first question—whether there is Article 39 determination when adopting Chapter VII SC Resolutions, the question is based on the understanding that there should be Article 39 determinations when the SC intends to exercise its Chapter VII power.[130] In the *Kadi* case, the Court did not mention the first question but went to the examination of the legality under *jus cogens* (CFI in *Kadi I*) or the legality of the EU implementing measures (European Court of Justice of the European Communities ["ECJ"] in *Kadi I* and the General Court in *Kadi II*). However, the Article 39 determination is not completely out of problem.

In practice, there are instances that the SC exercised its Chapter VII power without Article 39 determination as in for example Resolution 1160 (1998), 1422 (2002).[131]

As for Resolution 1160 (1998), Professor Matsuda pointed out that it was due to disagreements among the five permanent Members of the Security

---

130 Alexander Orakhelashvili, Collective Security (2011), Oxford University Press, 339-340. This opinion is also indicated from the Kelsen and Akande's discussions in the II.A.i.

131 Matsuda Takeo, 安保理の暴走？（一）[Runaway of the Security Council], 法学雑誌、第五十六巻、第一号、平成二一（２００９）年[56(1) Journal of

Council ("P5") in the SC which caused the use of Chapter VII power without the Article 39 determination.[132] Resolution 1422 (2002), which was adopted under Chapter VII to exempt American personnel from the jurisdiction of the International Criminal Court ("ICC") pursuant to Article 16 of the Rome Statue, far from addresses the "threat to international peace and security" or "breach of peace". It is impossible to imagine that the exercise of ICC jurisdiction could constitute a threat to international peace or security.

Alexander Orakhelashvili explained the reason for this big defect—up to that point, "the US position had been to block the renewal of peace-keeping mandates unless its concerns were addressed".[133] It is criticized that "the withdrawal of one nation from peace operations is regrettable but not so critical as to justify their deferral under Article 16 [of the Rome Statue]".[134] Alexander Orakhelashvili insists on the identification of a "genuine existing threat."[135] Let alone the "genuineness" of the threat, the identification of the threat in the pertinent SC Resolution is at least necessary. The lack of this identification is criticized by the MS for example Canada and Germany.[136]

Professor Matsuda introduced the "tacit determination" under Article 39 to explain this problematic practice of the SC. Since Article 39 determination is the precondition for exercise of Chapter VII power, there must be a tacit determination under Article 39 if the SC Resolution is expressly adopted under Chapter VII.[137] To explain the rationale of this understanding, Professor Matsuda considered perhaps it is that

---

Law 2009], 8.

132 Ibid.

133 Alexander Orakhelashvili, Collective Security (2011), Oxford University Press, 339.

134 Ibid.

135 Ibid.

136 Takeo Matsuda, 安保理の暴走？（一）[Runaway of the Security Council], 法学雑誌、第五十六巻、第一号、平成二一（２００９）年[56(1) Journal of Law 2009], 10.

137 Ibid, 12.

> the Security Council has a broad discretion in determining the existence of the "threat to peace", etc. Besides, there is no mechanism or procedure to examine the propriety of the determination. Therefore, it is almost worthless if we criticize that the "threat to peace" is not identified. It is better to treat it as a tacit Article 39 determination.[138]

However, Professor Matsuda did not accept this rationale. He stated that existence of Article 39 indicates that the enforcement power of the SC is not universal or unlimited but should be limited to necessary measures addressed to the threat to international peace and security. The legality of the use of enforcement measures could be impugned for the lack of Article 39 determination as a precondition to trigger enforcement measures. Hence, the SC must be held accountable.[139] Professor Matsuda also pointed out that the lack of Article 39 determination has never been invoked to invalidate relevant SC Resolutions. One of the reasons could be that those measures are provisional and aimed at preventing aggravation of the situation.[140] Furthermore, he pointed out that the lack of Article 39 determination may be justified by the tacit consent of the affected parties.[141]

Although the problematic practice of the SC was criticized by both the MS and academia, a judicial decision of the unlawfulness of such SC Resolutions for the lack of Article 39 determination for the exercise of Chapter VII power has never happened. It is also true that there is no such centralized institution to decide on the lawfulness of the SC Resolutions.

As for the propriety of Article 39 determination, the drafters intended to endow the SC with broad discretion on this matter in order to strengthen the authority of the SC as seen from the drafting history of this Article.[142] This is

---

138 Ibid, 12. Translation by the author.

139 Ibid, 12.

140 Ibid, 13.

141 Ibid, 14.

142 Bruno Simma and others (eds.), 1 The Charter of the United Nations: A Commentary

regarded as reflecting the "political rather than legal approach of the Charter and its tendency to emphasize procedural, not substantive limits".[143] There are also authors supporting the absolute power of the SC in Article 39 determination.[144]

However, if the SC's Article 39 determination is interpreted as unreviewable, careful division of Chapter VI and VII power of the SC by the UN Charter would be rendered redundant and the SC's interference into the affairs of the MS would be unlimited. The view that the SC enjoys an unlimited discretion of Article 39 determination could lead to patently dysfunctional results.[145]

Judge Kooijmans in his separate opinion attached to the *Lockerbie* case decision also shared the opinion that the SC's Article 39 determination did not have a determinative or final character.[146] But in the absence of the any clear standard and mechanism to do the review, the absolute power in the Article 39 determination may be introduced through the back door. Although, some had argued that "only through constant and renewed attempts to clarify the meaning of Article 39 will it be possible to provide orientation and guidance for the Council in the exercise of its functions under Chapter VII."[147] In fact, the propriety of Article 39 determination has never been touched upon by the ICJ or any other judicial institutions which exercised incidental jurisdiction on

---

(2012), Oxford University Press, 1274-1275.

143 Ibid, 1275.

144 Hans Kelsen, The Law of the United Nations (1951), Stevens, 95; John W. Halderman, The United Nations and the Rule of Law (1966), Oceana Publications, 73; R. Higgins, Policy Considerations and the International Judicial Process, 17 International and Comparative Law Quarterly (1968), 58.

145 Bernd Martenczuk, The Security Council, the International Court and Judicial Review: What Lessons from Lockerbie?, 10(3) European Journal of International Law (1999), 542.

146 Lockerbie case, Preliminary Objections (Libya v US), para. 18 of Judge Kooijmans's sepate opinion.

147 Bernd Martenczuk, The Security Council, the International Court and Judicial Review: What Lessons from Lockerbie?, 10(3) European Journal of International Law (1999), 543.

the matter. If the *Lockerbie* case had proceeded to the stage of assessing the merits of the case, it could have been a good chance for the ICJ to interpret the Article 39 threshold.

II.B. The difference depending on the approaches

If the object of the review is to directly evaluate the lawfulness of the relevant SC Resolutions, then the applicable rules to review are the same as discussed above in principle. It means the UN Charter and the *jus cogens*, which are generally accepted; and the others such as customary international law (or general international law), and human rights rules (except those rules which overlap in scope with *jus cogens*). The limits imposed by the UN Charter are different according to different interpretations and the same thing can be said as for the *jus cogens* due to vagueness of the terms of scope of the *jus cogens* itself.

In the *Tadić* case, the Appeal Chamber declared that "[i]t is not necessary for the purposes of the present decision to examine any further question of limits of the discretion of the Security Council".[148] The Appeal Chamber focused on debuting the Appellant's grounds to attack the SC Resolution. However, it expressly mentioned the Purposes and Principles of the Charter as the limits in this decision. In the rulings in *Kadi I*, the CFI was not restrained by the arguments of the plaintiffs and based the review of the relevant SC Resolutions on the *jus cogens*,[149] although the approach was overruled by the ECJ in the appeal of the case.[150]

The situations of indirect review of the lawfulness of the SC Resolutions are different from the direct dispute. "Indirect review" means the object of the review is not the SC Resolutions but the implementation of the measures. This is the most likely case in practice.[151] Therefore, the applicable rules for

---

148 Prosecutor v Tadić (Appeal on Jurisdiction) IT-94-1-AR72, 2 October 1995, para. 30.

149 Kadi I (CFI), para. 226, 282.

150 For the detail examination of the case, see Chapter Four.

151 Anthony Aust, The Role of Human Rights in Limiting the Enforcement Powers of

reviewing the lawfulness of specific SC Resolutions changed, because the question changed to what rules are applicable to judge the lawfulness of specific implementing measures. Therefore, the scope of applicable rules is different according to the forum to which the case is brought.

For example, in the *Nada* case before the European Court of Human Rights ("ECtHR"), the Court is based on the European Convention of Human Rights and Fundamental Freedoms ("ECHR"), the jurisprudence of its own and the Courts of European Union ("EU") to decide the case. In the *Sayadi* case before the Human Rights Committee, the Committee is based on the International Covenant on Civil and Political Rights ("ICCPR"); and in the *A, K, M, Q & G v Her Majesty's Treasury* case, British national law, namely the UN Act was applied.[152]

The indirect review is of crucial importance in the case of strict SC Resolutions. In other words, in case of normative control by the SC, the review of the implementing measures constitutes the comments on the relevant SC Resolutions. Relevant SC Resolutions are judged as legal or illegal if they are examined according to such rules as the judicial institution considers applicable to the implementing measures.

III. Interim conclusion

The most controversial question is the limits of SC power. There are no settled answers from either a principled view or practical view.

In principle, the UN Charter and the *jus cogens* are generally accepted as limits to the SC's power. However, the interpretations of the Charter provisions and *jus cogens* (the terms and scope) are highly divergent. As for the others—the customary international law (the general international law) and the human rights rules—are more controversial than the former as possible limits

---

the Security Council: A Practitioner's View, in: Erika de Wet and André Nollkaemper (eds.), Review of the Security Council by Member States, (2003) Intersentia, 36.

to the power of SC. In practice, the limits are different according to the approaches the parties choose to argue for his or her case and also depend on the forum to which the case is brought.

152 For detailed examination of these cases, see Chapter Six.

CHAPTER TWO: The Immunities of International Organizations before National Courts

The immunity of IOs by national courts is an unavoidable question posed to the court before going to the substantial issue of the case, in which the IO is involved as a respondent party. As the UN enjoys a sweeping immunity before the national courts, this issue is especially crucial in discussing the judicial review of the legality of the targeted sanctions imposed by the SC.

The considerations of human rights of individuals are in the trend of the decision on the immunity of IOs. The immunity issue is directly related to the right of access to court and it may entail a human rights mandate for states to limit the immunity they grant to IOs before the national courts.[153]

This Chapter focuses on the "reasonable alternative means" jurisprudence. Three cases are used to explain the jurisprudence: the *Waite and Kennedy* case, to show a typical application of this jurisprudence by the ECtHR; the *Difference Relating to Immunity* case to see how the ICJ touched upon the question; and the *Mothers of Srebrenica* case to see a example of the application of this jurisprudence in the national court towards the UN and the ECtHR's opinion in applying the jurisprudence in this case.

I. "Reasonable alternative means" jurisprudence

The "reasonable alternative means" jurisprudence was adopted by the ECtHR in two decisions of *Beer and Reagan v Germany*[154] ("*Beer and Reagan*") and *Waite and Kennedy v Germany*[155] ("*Waite and Kennedy*"). The two cases were heard on the same day by the ECtHR and almost identical decisions were delivered

---

153 August Reinisch, International Organizations before National Courts (2000), Cambridge University Press, 324.

154 Case of Beer and Regan v Germany, Application No. 28934/95, 18 February 1999.

155 Case of Waite and Kennedy v Germany, Application No. 26083/94, 18 February 1999.

by the Court.

The applicants had served the European Space Agency ("ESA") for a number of years at the European Space Operations Center in Darmstadt, Germany. This work was performed when they were placed at the disposal of the ESA by their actual employers, namely British, Irish, French and Italian companies. When their employment contracts came to an end or were likely to terminate, the applicants sought recognition before the German labour courts that they had acquired the status of employees of the ESA pursuant to the German Provision of Labour (Temporary Staff) Act, according to which in the situation that the contracts between the actual employer and the employee are void, a contract between the hiring employer and the employee is deemed to have been concluded.

The applicants brought the case before the German labour courts against the ESA and were dismissed. The applicants then petitioned the case before the ECtHR.

I.A. The *Waite and Kennedy* case

The immunity claimed by the ESA barred the case of the applicants at the preliminary stage before the German Labour Court.[156] The applicants brought the case before the ECtHR claiming the violation of Article 6(1) of the ECHR by Germany and argued that the right of access to a court would require that the courts address the merits of their claims.

The ECtHR decided to examine "whether this degree of access limited to a preliminary issue was sufficient to secure the applicants' 'right to a court', having regard to the rule of law in a democratic society."[157]

---

156 The case was declared inadmissible by the Darmstadt Labour Court, dismissed by the Frankfurt/Main Labour Appeal Court, dismissed by the Federal Labour Court and not accepted by Federal Constitutional Court.

157 Case of Waite and Kennedy v Germany, Application No. 26083/94, 18 February 1999, para. 42.

Recognizing that the right of access to courts is not absolute and that the states have a margin of appreciation, the ECtHR considered that the limitations applied to the right to access to the court must "not restrict or reduce the access left to the individual in such a way or to such an extent that the very essence of the right is impaired".[158] Then the Court decided to examine the propriety of the limitation according to two factors: a legitimate aim and the principle of proportionality.[159]

As for the legitimate aim, the Court confirmed that the immunity from jurisdiction accorded by states to IOs is "an essential means of ensuring the proper functioning" of the IOs "free from unilateral interference by individual governments" and is "a long-standing practice established in the interests of the good working of these organizations".[160] Therefore, the legitimate aim was confirmed in the case.

As for the issue of proportionality, the Court emphasized that the ECHR was "intended to guarantee not theoretical or illusory rights, but rights that are practical and effective".[161] So if the accordance of the immunity would absolve the IOs from their responsibility under the ECHR, it would be incompatible with the purpose and object of the Convention. Therefore, the Court considered that

> a material factor in determining whether granting ESA immunity from German jurisdiction is permissible under the Convention is whether the applicants had available to them reasonable alternative means to protect effectively their rights under the Convention.[162]

---

158 Case of Waite and Kennedy v Germany, Application No. 26083/94, 18 February 1999, para. 43.

159 Ibid.

160 Ibid, para. 47.

161 Ibid, para. 51.

162 Ibid, para. 52.

This is the elaboration of the "reasonable alternative means" standard to examine the proportionality to grant the immunity to a certain IO. Taking this standard, the Court found that the applicants could and should have had recourse to the ESA Appeals Board as a dispute between the ESA and its staff members, or the ESA could have sought remedies from the firms they had employed and hired them out.[163]

Therefore, the granting of immunity to ESA by the German Labour Court succeeded in the test of proportionality according to the "reasonable alternative means" standard. Together with a legitimate aim, the Court found that there was no violation of Article 6(1) by granting the ESA immunity from the jurisdiction.

I.B. A test from human rights considerations

The immunity of IOs from suits is vaguely prescribed and sweeping immunity is enjoyed by most of the IOs.[164] The UN is a typical IO and Article 105 of the UN Charter provides a mere functional immunity to be enjoyed by the organization before the national courts without a clear definition of this immunity. Moreover the Convention on the Privileges and Immunities of the UN speaks of the immunity in an absolute way in Article II, Section 2 providing that the organization "shall enjoy immunity from every form of legal process except insofar as in any particular case it has expressly waived its immunity". The functional immunity provided by the UN Charter turns out to be absolute immunity in both Convention and in practice.[165] The phenomenon

---

163 Case of Beer and Regan v Germany, Application No. 28934/95, 18 February 1999, para. 59 and 60.

164 August Reinisch, Case of Waite and Kennedy v Germany, 93 American Journal of International Law (Oct. 1999), 933.

165 August Reinisch and Ulf Andreas Weber, In the Shadow of Waite and Kennedy: the Jurisdictional Immunity of International Organizations, the Individual's Right of Access to the Courts and Administrative Tribunals as Alternative Means of Dispute Settlement, 1 International Organizations Law Review (2004), 60-61; Benjamin E.

is similar for many other IOs such as OAS, WHO, WTO and Council of Europe.[166]

However, there is a trend towards limiting the jurisdictional immunity of IOs and functional immunity is regarded as an appropriate immunity standard for IOs, but the test for functional immunity is rather difficult and easily results in absolute immunity.[167] In seeking an appropriate immunity standard,

> the paramount underlying rationale of functional immunity, [and] the protection of the independent functioning of the organization, […] should be balanced against the equally cogent demand of protecting the interests of potential litigants in having a possibility to pursue their claims against an international organization before an independent judicial or quasi-judicial body.[168]

The practice of the balance between the two values can be traced back to the *A.S. v Iran–United States Claims Tribunal* case[169] decided by the Dutch Supreme Court on 20 December 1985, in which the Court realized two

---

Brockman-Hawe, Questioning the UN's immunity in the Dutch Courts: Unresolved Issues in the Mothers of Srebrenica Litigation, 10(4) Washington University Global Studies Law Review (2011), 733.

166 Art. 133 of OAS Charter, Art. 67(a) of WHO Constitution, Art. VIII, para. 2 of Agreement Establishing the WTO and Art. 40(a) of the Statute of the Council of Europe share the wording "necessary for" to limit the granting of immunity. However, it is not defined in the constituent instrument or any other documents.

167 August Reinisch and Ulf Andreas Weber, In the Shadow of Waite and Kennedy: the Jurisdictional Immunity of International Organizations, the Individual's Right of Access to the Courts and Administrative Tribunals as Alternative Means of Dispute Settlement, 1 International Organizations Law Review (2004), 60-61; Benjamin E. Brockman-Hawe, Questioning the UN's immunity in the Dutch Courts: Unresolved Issues in the Mothers of Srebrenica Litigation, 10(4) Washington University Global Studies Law Review (2011), 63.

168 Ibid, 65.

169 A.S. v Iran-United States Claims Tribunal, Supreme Court, 20 December 1985, RvdW (1986) No. 20, NJ (1986) N. 438, in: Netherlands judicial decisions involving questions of public international law, 1985-1986, 18 Netherlands Yearbook of International Law (1987), 357

conflicting values in the situation, namely the protection of the independent functioning of the organization and the other party's right to have an independent and impartial judicial body to decide the case.[170]

The availability of "reasonable alternative means" jurisprudence established by the *Waite and Kennedy* case serves as a persuasive analytical framework to test the legitimacy of immunity granted to IOs. The judgment of the case may be considered as "a step towards scrutinizing more closely the grants of immunity from the jurisdiction of national courts which deprive claimants of access to dispute settlement institutions."[171] The judgement affirmed the position that where states establish IOs in order to pursue or strengthen their cooperation in certain fields of activities, and where they attribute to these IOs certain competence and accord them immunities, there may be implications as to the protection of fundamental rights.[172] This is also the increasing worry that states might circumvent the limitations of international law through conduct of the IOs.

The case expressly exhibited a departure from the Commission's early jurisprudence, which considered the immunity as a legitimate limitation to the state's sovereignty and outside the scrutiny of the ECtHR.[173] In fact, the *Dyer v United Kingdom* case decided in 1984 mentioned the danger of arbitrary power if a State Party was enabled to remove the jurisdiction of the courts to decide in certain civil claims or to confer immunities to certain groups without any possibility of control by the Convention organs.[174] The *Waite and Kennedy* case is meaningful in confirming that the granting of immunity may involve the

---

170 Ibid, 65, footnote no. 23.

171 August Reinisch, Case of Waite and Kennedy v Germany, 93 American Journal of International Law, 935.

172 Footnote no. 66 of the International Law Association Report of the Seventy-first Conference, Berlin, 2004, 18.

173 August Reinisch, Case of Waite and Kennedy v Germany, 93 American Journal of International Law, 935.

174 Graham Dyer v the United Kingdom, Application No. 10575/83, European Commission of Human Rights, 9 October 1984, para. 6.

problem of human rights violation.[175]

The *Waite and Kennedy* case also has an implicit rationale—the *solange* jurisprudence developed by the German Constitutional Court. The *solange* jurisprudence was developed to deal with the competence division between the German Constitutional Court and the European Community Courts. In *solange I* (1974), the German Constitutional Court upheld its human rights scrutiny of acts of Community organs "as long as" Community law did not contain a comparable adequate fundamental rights protection. In *solange II* (1986), the German Constitutional Court concluded that the German judiciary would no longer exercise its jurisdiction for reviewing European Communities ("EC") acts "as long as" the ECJ continued to generally and effectively protect fundamental rights against EC measures in manners comparable to the essential safeguards of German constitutional law.[176] In *solange III* (1993), the German Constitutional Court reasserted its jurisdiction when it declared that EC measures exceeding the limited EC competences, could not be legally binding and applicable in Germany. In *solange IV* (2002), the German Constitutional Court stated that German courts would interfere only if the required level of human rights protection in the EC had generally fallen below the minimum level required by the German Constitution.[177]

The *solange* jurisprudence shows a deep concern with fundamental human

---

175 水島　朋則[Mizushima Tomonori],ウエイト対ドイツ(Waite and Kennedy v. Germany), in: 松井芳郎（編集代表）[Matui Yoshio (ed.)], 判例国際法[Cases of International Law] (2006), 東信堂, 117-118.

176 Peter Hipold, UN Sanctions Before the ECJ: the *Kadi* case, at: August Reinisch (ed.), Challenging Acts of International Organizations before National Courts (2010), Oxford University Press, 45; August Reinisch, Case of Waite and Kennedy v Germany, 93 American Journal of International Law, 935; August Reinisch and Ulf Andreas Weber, In the Shadow of Waite and Kennedy: the Jurisdictional Immunity of International Organizations, the Individual's Right of Access to the Courts and Administrative Tribunals as Alternative Means of Dispute Settlement, 1 International Organizations Law Review (2004), 74.

177 Peter Hipold, UN Sanctions Before the ECJ: the *Kadi* case, at: August Reinisch (ed.), Challenging Acts of International Organizations before National Courts (2010), Oxford University Press, 45.

rights protection. The decision of the *Waite and Kennedy* case indirectly stated that if the states were allowed to be absolved from responsibility by granting immunity, it would be incompatible with the purpose and object of the Convention.[178]

However, in the *Waite and Kennedy* case, the ECtHR failed to apply the test in a strict manner to the facts at issue.[179] For the ESA Appeals Board, jurisdiction is expressly limited to staff members of the ESA.[180] The applicants who were in the employment dispute cannot be guaranteed access to the Appeals Board, although some of the administrative tribunals adopted a broad approach as to their jurisdiction to avoid possible denial of justice.[181] As a dissenter on the Commission noted, the applicants, in asserting a right to employment under German Labour Law, were not covered by the internal remedies of the ESA.[182] Therefore, the ECtHR's decision on this case is criticized that it might not have been entirely consistent with the Court's own strict commitment to guarantee rights that are practical and effective but not illusory.[183] Moreover, the "reasonable alternative means" jurisprudence was not strictly applied for the same reason.

The ECtHR in this decision was also criticized that "it feared that the ESA might be exposed to German labour legislation", which led to the decision

---

178 Case of Waite and Kennedy v Germany, Application No. 26083/94, 18 February 1999, para. 50.

179 August Reinisch and Ulf Andreas Weber, In the Shadow of Waite and Kennedy: the Jurisdictional Immunity of International Organizations, the Individual's Right of Access to the Courts and Administrative Tribunals as Alternative Means of Dispute Settlement, 1 International Organizations Law Review (2004), 79.

180 Case of Waite and Kennedy v Germany, Application No. 26083/94, 18 February 1999, para. 53.

181 August Reinisch, Case of Waite and Kennedy v Germany, 93 American Journal of International Law, 937.

182 Case of Waite and Kennedy v Germany, Application No. 26083/94, Report of the European Commission of Human Rights, 2 December 1997, Dissenting Opinion of Mr. G. Ress, para. 2.

183 August Reinisch, Case of Waite and Kennedy v Germany, 93 American Journal of International Law, 937.

against the applicants but not the satisfaction of the reasonable alternative remedies.[184] This is seen from the ECtHR's reasoning that "the test of proportionality cannot be applied in such a way as to compel an IO to submit itself to"[185] domestic labour law about employment conditions. The problem that the ECtHR worried about is a question of applicable law rather than a question of immunity. In the *WEU v Siedler* case, the Belgian Court of Cassation denied the immunity of the West European Union ("WEU") but "did not simply apply Belgian substantive law to the case, in particular in relation to the indemnity allowance to which the claimant would be entitled."[186] Therefore, the fear of the interference with the internal affairs only could not have been the compelling reason to deprive the German courts of the chance to answer question of the choice of law.[187]

Taking the "reasonable alternative means" jurisprudence seriously could have resulted in a different finding without necessarily opening the door to unilateral interference in an IO's internal affairs.[188] In the *General Secretariat of the ACP Group v Lutchmaya* case, after the African, Caribbean and Pacific Group of States ("ACP") failed in the case of contract breach and was ordered to pay compensation, the issue of immunity from execution led to the case. The Brussels Court of Appeal adopted the *Waite and Kennedy* case reasoning of "reasonable alternative means" and found the alternative settlement mechanism in the form of the Council of Ministers stated by the ACP Group "lack of proof that the Council offered all the conditions and guarantees which

---

184 Ibid.

185 Case of Waite and Kennedy v Germany, Application No. 26083/94, 18 February 1999, para. 56.

186 David J. Bederman (ed.), International Decisions: Western European Union v Siedler; General Secretariat of the ACP Group v Lutchmaya; General Secretariat of the ACP Group v B.D.: Belgian Supreme Court decisions on the immunity of international institutions in labor and employment matters, 105 American Journal of International Law (July, 2011), 566.

187 August Reinisch, Case of Waite and Kennedy v Germany, 93 American Journal of International Law, 937.

188 August Reinisch, Case of Waite and Kennedy v Germany, 93 American Journal of

the right of access to a judge supposes".[189]

The *WEU v Siedler* case[190] exemplified an even stricter test of "reasonable alternative means", in which the rule of law quality of the internal dispute settlement mechanism was examined.[191] The Belgian Court of Cassation confirmed that "the mere existence of a dispute settlement mechanism at the level of the organization did *not*[192] suffice for the organization to invoke its immunity successfully before a domestic court".[193] In the *Waite and Kennedy* case, the Court did not consider whether the ESA Appeals Board offered all the guarantees inherent in the notion of fair trial conceived by Article 6(1) of the ECHR.[194]

The "reasonable alternative means" jurisprudence is of increasing importance and the stricter test shown in the national practice is a substantial step forward for this jurisprudence.[195] Although the standard of the "reasonable alternative means" test is not uniformly applied by the courts, the domestic courts seem to tend toward rejecting immunity of the organization if it has not established any dispute settlement mechanism. Moreover, even

---

International Law, 937.

189 Mizushima Tomonori, Denying Foreign State Immunity on the Grounds of Unavailability of Alternative Means, 71(5) The Modern Law Review (2008), 740-741.

190 David J. Bederman (ed.), International Decisions: Western European Union v Siedler; General Secretariat of the ACP Group v Lutchmaya; General Secretariat of the ACP Group v B.D.: Belgian Supreme Court decisions on the immunity of international institutions in labor and employment matters, 105 American Journal of International Law (July, 2011).

191 Ibid, 562.

192 The word "not" is italicized in the original text.

193 David J. Bederman (ed.), International Decisions: Western European Union v Siedler; General Secretariat of the ACP Group v Lutchmaya; General Secretariat of the ACP Group v B.D.: Belgian Supreme Court decisions on the immunity of international institutions in labor and employment matters, 105 American Journal of International Law (July, 2011), 562.

194 S.M. v WEU [2004] JT 618 (Brussels Labour Court), in: Mizushima Tomonori, Denying Foreign State Immunity on the Grounds of Unavailability of Alternative Means, 71(5) The Modern Law Review (2008), 741.

195 Mizushima Tomonori, Denying Foreign State Immunity on the Grounds of Unavailability of Alternative Means, 71(5) The Modern Law Review (2008), 743.

though the Belgian Court of Cassation's application of the *Waite and Kennedy* case jurisprudence by examining the substantial quality of the internal mechanism of WEU in the *Siedler* case received some criticism by Maarten Vidal,[196] the Belgian Court of Cassation's strict examination of alternative remedies and the choice of applicable rules were commented upon as "the right balance between the autonomy of the organization and the individual's right to access to a court"[197]

However promising the *Waite and Kennedy* case jurisprudence and the application of it in the subsequent cases may be, the trend is not certain for countries outside the membership of ECHR.[198] In Japan, the *UN University* case before the Tokyo District Court on 21 September 1977, granted immunity and did not mention the issue of possible violation of right to a court in the situation that the UN University did not have an internal dispute settlement mechanism at all.[199] Moreover, in the ECHR area, the standard of examining

---

196 Maarten Vidal commented that the due process quality of the WEU procedure is not substantially inferior to the general practice in IOs. Moreover, he criticized that "the Brussels Labor court of Appeals seems to have been overzealous in transposing the qualitative criteria of Article 6, para. 1, of ECHR to the level of international administrative tribunals", respectively in: David J. Bederman (ed.), International Decisions: Western European Union v Siedler; General Secretariat of the ACP Group v Lutchmaya; General Secretariat of the ACP Group v B.D.: Belgian Supreme Court decisions on the immunity of international institutions in labor and employment matters, 105 American Journal of International Law (July, 2011), 564; August Reinisch, 7 (2) Chinese Journal of International Law (2008), footnote no. 94, 302.

197 David J. Bederman (ed.), International Decisions: Western European Union v Siedler; General Secretariat of the ACP Group v Lutchmaya; General Secretariat of the ACP Group v B.D.: Belgian Supreme Court decisions on the immunity of international institutions in labor and employment matters, 105 American Journal of International Law (July, 2011), 566.

198 Ibid.

199 水島　朋則[Mizushima Tomonori],ウエイト対ドイツ(Waite and Kennedy v. Germany); 位田　隆一[Ida Ryuuichi], 国連大学事件[The UN University case], in: 松井芳郎（編集代表）[Matsui Yoshio (ed.)], 判例国際法[Cases of International Law] (2006), 東信堂, 113-114 and 118. For Japan, the ICCPR was ratified on 21 June 1979, which was after the decision of the *UN University* case. But from the customary international law perspective, the case is still valuable as a comparing case to the cases

the rule of law quality of the alternative means provided by the IOs is not a settled matter, which may let in uncertainties when the IO involved is not totally composed of ECHR members.[200] Moreover, it is problematic if the IO is the UN, which may involve the issue of a struck balance between human rights protection and not only the autonomy of the organization but also the maintenance of international peace and security.

II. The Difference Relating to Immunity case[201] before the ICJ

In Section I, the "reasonable alternative means" jurisprudence was discussed by the reasoning of the *Waite and Kennedy* case in the background of the ECHR. Section II is to set the questions in a broader background to see how the ICJ touched upon the relevant issue.

The *Difference Relating to Immunity from Legal Process of a Special Rapporteur* case ("*Difference Relating to Immunity* case") is the case which can show the ICJ's opinion on the similar issue as the "reasonable alternative means" jurisprudence. In this case, the ICJ was requested by the United Nations Economic and Social Council ("ECOSOC") to give an advisory opinion on, *inter alia*, the legal question of the applicability of Article VI, Section 22 of the Convention on the Privileges and Immunities of the United Nations to a Special Rapporteur of the Commission on Human Rights.[202]

The Special Rapporteur was a Malaysian jurist appointed by the ECOSOC

---

adopting "reasonable alternative means" jurisprudence.

200 David J. Bederman (ed.), International Decisions: Western European Union v Siedler; General Secretariat of the ACP Group v Lutchmaya; General Secretariat of the ACP Group v B.D.: Belgian Supreme Court decisions on the immunity of international institutions in labor and employment matters, 105 American Journal of International Law (July, 2011), 564.

201 Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights, ICJ Reports 1999.

202 Ibid, para. 1.

to report the situation of independence of judges and lawyers in Malaysia.[203] Several civil suits were brought against him for damages arising from an interview of him by the magazine "International Commercial Litigation", in which he commented on certain litigations of Malaysian courts.[204] The Malaysian High Court for Kuala Lumpur denied the immunity claimed by the Special Rapporteur and this decision was upheld by the Court of Appeal and the Federal Court of Malaysia.[205]

The ICJ underlined that

> the question of immunity from legal process is distinct from the issue of compensation for any damages incurred as a result of acts performed by the United Nations or by its agents acting in their official capacity.
>
> The United Nations may be required to bear responsibility for the damage arising from such acts. However, as is clear from Article VIII, Section 29, of the General Convention, any such claims against the United Nations shall not be dealt with by national courts but shall be settled in accordance with the appropriate modes of settlement that 'the United Nations shall make provisions for' pursuant to Section 29.[206]

In light of this reasoning, a couple of commentators consider the ICJ as having "touched upon the UN's obligation to provide for alternative modes of dispute settlement as a corollary of its right to immunity".[207] The UN may thus have to respond to claims brought by third parties which, in the ICJ's view, are excluded from the jurisdiction of national courts. Instead, they should be

---

203 Ibid, para. 4.

204 Ibid, para. 5.

205 Ibid, para. 17.

206 Ibid, para. 66.

207 August Reinisch and Ulf Andreas Weber, In the Shadow of Waite and Kennedy: the Jurisdictional Immunity of International Organizations, the Individual's Right of Access to the Courts and Administrative Tribunals as Alternative Means of Dispute Settlement, 1 International Organizations Law Review (2004), 69.

settled in accordance with the "appropriate modes of settlement"[208] provided for in the General Convention.[209]

However, the ICJ's advisory opinion was delivered in the situation that the UN's efforts to resolve the dispute in a negotiated settlement had failed.[210] After the failure, the Secretary-General's Special Envoy advised that the matter be referred to the ECOSOC to request an advisory opinion from the ICJ. It is obvious that the ICJ in its advisory proceeding cannot be considered as an alternative means of dispute settlement for cases in which private parties are involved.

Moreover, the "appropriate modes of settlement" are not necessarily understood as judicial method from the simple mention of the term of this case compared with the "reasonable alternative means" jurisprudence which is adopted to assess the proportionality of the limitation to the right to a court. Furthermore, in the *WEU v Sielder* case, the Belgian Court of Cassation even entered into examination of the quality of a fair trial with the internal mechanism provided by the WEU.[211] The mere mention of the obligation of the UN to establish a proper mode of settlement of disputes in cases where immunity waived is less protective than the *Waite and Kennedy* jurisprudence in considering the private party's rights. The ICJ's advisory opinion in the *Difference Relating to Immunity* case can well explain the problem of standards of

---

208 Article VIII, Section 29 of Convention on the Privileges and Immunities of United Nations.

209 August Reinisch and Ulf Andreas Weber, In the Shadow of Waite and Kennedy: the Jurisdictional Immunity of International Organizations, the Individual's Right of Access to the Courts and Administrative Tribunals as Alternative Means of Dispute Settlement, 1 International Organizations Law Review (2004), 69.

210 Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights, ICJ Reports 1999, para. 14 and 15; Dissenting Opinion of Judge Koroma, 113.

211 David J. Bederman (ed.), International Decisions: Western European Union v Siedler; General Secretariat of the ACP Group v Lutchmaya; General Secretariat of the ACP Group v B.D.: Belgian Supreme Court decisions on the immunity of international institutions in labor and employment matters, 105 American Journal of International Law (July, 2011), 560.

alternative means if applied to the UN.

Besides, the *Difference Relating to Immunity* case puts an emphasis on the Secretary-General's role in determining whether immunity should be granted, which was strongly supported by Judge Weeramantry but criticized by Judge Oda. Judge Weeramantry considered the Secretary-General's opinion as conclusive on the immunity issue[212] while Judge Oda and Judge Koroma considered it as irrelevant.[213]

From Judge Weeramantry's heavy reliance on the Secretary-General's opinion, the alternative means of dispute settlement could not be an element in deciding the immunity issue if the Secretary-General considered the conduct done in the official capacity should enjoy immunity from the national assessments. Judge Oda and Judge Koroma, despite his opinion on the irrelevance of the Secretary-General's opinion, just mentioned the authority of the ICJ in this case to determine the immunity issue.

To sum up the case, although the case touched upon the UN's obligation to provide an alternative mode, it is still not clear about the decisive element in deciding whether the immunity should be granted to the UN or its officials. The opinion of the ICJ is far less clear than the *Waite and Kennedy* case of ECtHR let alone the *Siedler* case before the Dutch court.

III. The *Mothers of Srebrenica* case: the application of jurisprudence to the UN

The Association of Mothers of Srebrenica is a Bosnian NGO, representing the interests of the 6000 relatives of victims of the genocide that took place in

---

212 Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights, ICJ Reports 1999, Separate Opinion of Vice-President Weeramantry, 96.

213 Ibid, Separate Opinion of Judge Oda, 102; Dissenting Opinion of Judge Koroma, 115.

East Bosnia in July 1995. In the *Mothers of Srebrenica* case[214], the Netherlands and the UN were sued before the District Court of the Hague by the Association and some other individuals on 4 June 2007. This was the first case before the Dutch court, in which the plaintiff claimed that the UN was liable for the Dutch troops failure in the operation mandated by the UN.[215] The plaintiffs motivated that

> [t]he State (with the Netherlands UN battalion Dutchbat) and the UN are responsible for the fall of the enclave in which Dutchbat had its base, as well as for the consequences, namely the murder by Bosnian Serbs of 8,000-10,000 citizens of Bosnia-Herzegovina who had taken refuge within the enclave. The State and the UN's act (and omissions) in the context of the implementation of various UN resolutions according to which the enclave Srebrenica was declared a "Safe Area" in violation of promises made and […] are wrongful towards [the Plaintiffs].[216]

It is clear that the plaintiffs did not place primary responsibility for maintenance of international peace and security on the SC but the resolutions declaring the Safe Area of Srebrenica and the UN's failure to keep the declared safe area safe. The focus of the case was not the merits but the jurisdiction issue to entertain the case.

This case went through all the possible proceedings before the domestic courts of the Netherlands and finally brought the Netherlands before the ECtHR and was decided on 11 June 2013.[217]

---

214 [A] et al. and the Mothers of Srebrenica v The State of The Netherlands & UN, 295247/HA ZA 07-2973, District Court in the Hague, 10 July 2008.

215 Benjamin E. Brockman-Hawe, Questioning the UN's immunity in the Dutch Courts: Unresolved Issues in the Mothers of Srebrenica Litigation, 10(4) Washington University Global Studies Law Review (2011), 728.

216 [A] et al. and the Mothers of Srebrenica v The State of The Netherlands & UN, 295247/HA ZA 07-2973, District Court in the Hague, 10 July 2008, para. 2.2.

217 Stichting Mothers of Srebrenica and Others v The Netherlands, Application No.

III.A. The District Court decision in the first instance: distinction from the *Waite and Kennedy* case

The District Court considered that it should first answer the question whether the Court had the jurisdiction to hear the case.[218] Then the Court ruled for the absolute immunity of the UN, namely, immunity from every form of legal process aside from express waiver, and the Court found no jurisdiction on this case.[219]

The Court considered the applicability of the *Waite and Kennedy* case jurisprudence which the Plaintiffs invoked to refute the immunity of UN and the Court explained why the jurisprudence of the *Waite and Kennedy* case could not be applied to this case.

The Court distinguished the present case from the *Waite and Kennedy* case mainly in two aspects: first, the UN was founded before the ECHR came into force but the European Space Agency ("ESA") was founded after that; and second, the UN has an almost universal membership but the ESA has a restricted European membership.[220] The Court took a restrictive view in applying the "reasonable alternative means" standard to the UN.

These factors for distinguishing the two cases were considered by the commentators of the *Waite and Kennedy* case and its relative cases. As for the membership issue, the *ACP v Lutchmaya* case is an example of applying the *Waite and Kennedy* case jurisprudence to an organization which has no overlapping of membership with the ECHR.[221] The key element was not the

---

65542/12, ECtHR, 11 June 2013.

218 [A] et al. and the Mothers of Srebrenica v The State of The Netherlands & UN, 295247/HA ZA 07-2973, District Court in the Hague, 10 July 2008, para. 5.1.

219 Ibid, para. 5.26.

220 Ibid, para. 5.24.

221 David J. Bederman (ed.), International Decisions: Western European Union v Siedler; General Secretariat of the ACP Group v Lutchmaya; General Secretariat of the ACP Group v B.D.: Belgian Supreme Court decisions on the immunity of international

membership of the organization in the case but the forum state's membership to the ECHR, but this element might be relevant in the standard of examining the "equivalent protection".[222] Although Article 14 of the ICCPR provides similar guarantees to that of Article 6(1) of the ECHR, it is still considered uncertain whether the jurisprudence could be applied outside the ECHR area.[223]

The Hague District Court decision in this case is commented to the effect that the District Court could have made it clearer that the ECtHR attached fundamental significance to the imperative nature of the maintenance of international peace and security, which is more important than the right of access to court.[224] Or the District Court could have attached the same significance to the *Waite and Kennedy* jurisprudence and declined to entertain the case for the reason that the Netherlands is not the state where the UN had its seat or where the alleged wrongful acts were committed.[225]

The comments just pointed out two options for the Courts to make a clearer judgment and techniques to avoid entertaining the case, but it also touched upon the problem of possible conflict between the UN's purpose of maintenance of international peace and security and the individual's right to access to a court.

It is not persuasive to deny the *Waite and Kennedy* case jurisprudence and uphold the absolute immunity of the UN by merely asserting the importance

---

institutions in labor and employment matters, 105 American Journal of International Law (July, 2011), 566.

222 Ibid, 566.

223 David J. Bederman (ed.), International Decisions: Western European Union v Siedler; General Secretariat of the ACP Group v Lutchmaya; General Secretariat of the ACP Group v B.D.: Belgian Supreme Court decisions on the immunity of international institutions in labor and employment matters, 105 American Journal of International Law (July, 2011), 566; Cedric Ryngaert, The Immunity of International Organizations Before Domestic Courts: Recent Trends, 7 International Organizations Law Review (2010), 136.

224 Guido den Dekker, Immunity of United Nations before the Dutch Courts, 3(2) Hague Justice Journal (2008), 23.

of the maintenance of international peace and security. As the lawyer for the Mothers of Srebrenica criticized, the far-reaching power of the UN "is exactly the reason why human rights should prevail as it is the ultimate objective of human rights to provide protection against strong powers of authorities".[226] A careful balance should be struck between the two values.

III.B. The reasoning of the Court of Appeal

The case was appealed to the Appeal Court in the Hague. The Court of Appeal adopted a different attitude to the *Waite and Kennedy* case approach in its decision.

The Court of Appeal found that the right to a fair trial and the right of access to a court of law it entailed was a matter of customary law, which can be invoked independently of Article 6 of the ECHR or Article 14 of the ICCPR.[227] This opinion directly refuted the membership problem stated by the District Court in the decision of the first instance.

To overrule the District Court's reason about the time of foundation, the Appeal Court stated that

> it is implausible that this ruling [of *Waite and Kennedy* case] implies that the single fact that an international organization has existed longer than the ECHR is sufficient reason to believe that the co-signatories are discharged from their obligation to guarantee fundamental rights under the ECHR. Particularly in the case of (older) international organizations (like the UN) that presumably will continue to exist for a long time yet

---

225 Ibid, 23-24.

226 Axel Hagedorn, UN-Immunity Disregards Fundamental Human Rights: A Decision by the Court of Appeal at the Hague in the Case of the Mothers of Srebrenica, 2 (http://www.haguejusticeportal.net/index.php?id=11659).

227 [A] et al. and the Mothers of Srebrenica v The State of The Netherlands & UN, 07-2973, District Court in the Hague, 30 March 2010, para. 5.1.

> this would mean that part of the rights guaranteed by the ECHR would be barred from application almost permanently.[228]

Therefore, the mere reason of the time of foundation of the organization was not considered decisive in applying jurisprudence in the *Waite and Kennedy* case.

Finally the Court of Appeal believes that Article 103 of the Charter does not preclude testing the immunity from prosecution against Article 6 of the ECHR and Article 14 of the ICCPR, for the increasing intention for and recognition of fundamental rights and the UN's purpose of promotion and encouragement of respect for human rights and fundamental rights.[229] The Court of Appeal then followed the approach of the *Waite and Kennedy* case to assess whether the limitation of the rights are far-reaching and if they violate the essence of the law, namely the legitimacy of purpose and proportionality of granting immunity to the UN.

The Court of Appeal confirmed the legitimacy of purpose. As for proportionality, the Court considered that

> UN peacekeeping operations will usually occur in areas around the world where a hotspot has developed, and that a reproach that, although it did not commit crimes against humanity itself, the UN failed to act against it adequately, under the circumstances can be latched onto too easily, which could lead to misuse. The reproach that the UN failed to prevent genocide in Srebrenica and therefore was negligent is insufficient in principle to waive its immunity from prosecution.[230]

Additionally, the Court of Appeal also considered that it was open for the

---

228 Ibid, para. 5.4.

229 Ibid, para. 5.4 and 5.5.

230 Ibid, para. 5.10.

plaintiffs to bring the case against the state although it still regretted that the UN had not instigated an alternative course of proceedings.[231] Therefore, immunity should be granted to the UN and the Court has no jurisdiction on this case.

Although the Court of Appeal applied the *Waite and Kennedy* case's two-fold examination and touched upon the "reasonable alternative means" jurisprudence in its decision, it still granted immunity to the UN expressively knowing that the UN did not provide for an alternative course of proceedings. It is not consistent with the trend to reject the immunity of the organization if it has no dispute settlement mechanism.[232] However, the trend is described in the context of employment dispute of IOs, in which there is no material difference in the conflict of values between the employment disputes and the other disputes, which similarly involve the conflict of the autonomy and function of the organization and the individual's rights to a court.

Moreover, the Court mentioned the possibility of suing the state before its domestic court as an alternative way to satisfy the plaintiffs' right to a court. The reasoning was problematic to the extent that it equated the claim against the Dutch State with that of the claim against the UN.[233] It is only the way to solve the dispute between the plaintiffs and the state but the claims against the UN are not covered by this method. For the dispute between the Plaintiffs and the UN, there are still no alternative remedies. This is considered to be against the provision of Article 29 of the Convention on the Privileges and Immunities of the UN, which prescribes for the UN's obligation to establish appropriate

---

231 Ibid, para. 5.12.

232 David J. Bederman (ed.), International Decisions: Western European Union v Siedler; General Secretariat of the ACP Group v Lutchmaya; General Secretariat of the ACP Group v B.D.: Belgian Supreme Court decisions on the immunity of international institutions in labor and employment matters, 105 American Journal of International Law (July, 2011), 562.

233 Benjamin E. Brockman-Hawe, Questioning the UN's immunity in the Dutch Courts: Unresolved Issues in the Mothers of Srebrenica Litigation, 10(4) Washington University Global Studies Law Review (2011), 744.

modes of settlements in case of invoking immunity.[234] This part of reasoning of the Court could be understood as confirmation of the impunity for the UN. The Court "neglected the fundamental human rights" of the plaintiffs towards the UN.[235]

However, the reasoning is still considered remarkable because the Court did not use the term of absolute immunity but adopted a functional immunity understanding to evaluate the scope of the UN's immunity,[236] although the Court still suggested that it should interpret the UN's immunity as broad as possible.[237] The Court in its reasoning stated that the failure of protection by the UN was serious but it was not blamed for assisting in the genocide, and therefore was not a pressing reason to hold the immunity unacceptable.[238] It implicitly leaves open the possibility of an exception to immunity if the UN would commit or be complicit in the commission of genocide as a "sufficiently serious" accusation.[239] In the other words, only in the case of committing violation of the rights of *jus cogens* nature, could the immunity of the UN be denied.[240] However, these cases are unlikely to happen and the significant problem is whether the UN could be held responsible for its failure of protection to the extent that it committed to.

---

234 Axel Hagedorn, UN-Immunity Disregards Fundamental Human Rights: A Decision by the Court of Appeal at the Hague in the Case of the Mothers of Srebrenica, 2 (http://www.haguejusticeportal.net/index.php?id=11659).

235 Ibid, 1.

236 [A] et al. and the Mothers of Srebrenica v The State of The Netherlands & UN, 07-2973, District Court in the Hague, 30 March 2010, para. 4.3: The Court considered that the Article 105 subsection 3 prescribing the functional immunity has priority over Article II(2) of the Convention on the Privileges and Immunities of the United Nations which provides absolute immunity of the UN.

237 Ibid, para. 4.2.

238 Ibid, para. 5.10.

239 Guido den Dekker & Jessica Schechinger, The Immunity of the United Nations before the Dutch Courts Revisited, 6 (http://www.haguejusticeportal.net/index.php?id=11748).

240 Benjamin E. Brockman-Hawe, Questioning the UN's immunity in the Dutch Courts: Unresolved Issues in the Mothers of Srebrenica Litigation, 10(4) Washington University Global Studies Law Review (2011), 743.

Moreover, this decision is still significant because it did not deny the obligatory nature of the right to a court and adopt the *Waite and Kennedy* case two-fold approach to access the propriety of the limitation to the right, although the "reasonable alternative means" test was applied in a very loose fashion.

III.C. The reasoning of the Supreme Court

The Supreme Court of the Netherlands also focused on the immunity of the UN. The Supreme Court distinguished the *Waite and Kennedy* case and cases of *Behrami and Behrami v France* and other cases concerning the UN. It did not agree with the opinion of the Appeal Court's adoption of the *Waite and Kennedy* case's two-fold examination in the case concerning the immunity of the UN.

The Supreme Court considered that the UN occupied a special place in the international legal community and recalled the ECtHR's decision in *Behrami and Behrami v France* and *Saramati v France, German and Norway* that the ECHR could not be interpreted in a way that would subject the conduct of the contracting parties in performing the missions pursuant to the SC's Chapter VII resolutions to the scrutiny of the ECtHR. Otherwise, it would interfere in the fulfillment of the UN's key missions and be tantamount to imposing conditions on the implementation of SC Resolutions which were not provided by the Resolutions themselves.[241]

Taking Article 103 of the UN Charter into consideration, the Supreme Court stated that

> [t]he interim conclusion must be that the appeal court erred in examining, on the basis of the criteria formulated in Beer and Regan and Waite and Kennedy, whether the right of access to the courts as referred

[241] [A] et al. and the Mothers of Srebrenica v The State of The Netherlands & UN, 10/04437, Supreme Court of Netherlands, 13 April 2012, para. 4.3.4.

to in article 6 ECHR prevailed over the immunity invoked on behalf of the UN.[242]

That immunity is absolute. [243] […]

Moreover, the Supreme Court did not find it established that "there is yet acceptance in international law of the proposition that States are not entitled to immunity in respect of civil claims for damages for alleged torture committed outside the forum state."[244] Further, the Court cited ICJ's judgment of 3 February 2012 in the *Jurisdictional Immunities* case[245] as follows:

> it could find no basis in the State practice from which customary international law is derived that international law makes the entitlement of a State to immunity dependent upon the existence of effective alternative means of securing redress.[246]

The ICJ addressed the state's immunity, but in the case before the Supreme Court, the Court found the ICJ's ruling was still applicable because the difference is not enough to justify a different understanding on the issue of immunity of the UN.[247]

This case well explains the difficulty in holding the UN directly accountable before domestic courts especially in civil cases. The UN's failure in preventing the breach of international peace and security cannot constitute committing such breach; the failure cannot be brought directly before a domestic court

---

242 Ibid, para. 4.3.5.

243 Ibid, para. 4.3.6.

244 Ibid, para. 4.3.8.

245 In this case, a question was posed as to whether the Italian courts should have respected Germany's immunity in cases in which compensation was claimed from Germany for violations of international humanitarian law committed by German forces during the Second World War.

246 [A] et al. and the Mothers of Srebrenica v The State of The Netherlands & UN, 10/04437, Supreme Court of Netherlands, 13 April 2012, para. 4.3.13.

unless the absolute immunity of UN can be overcome; and the jurisprudence developed by the EtCHR in the *Waite and Kennedy* case are not accepted to be applied to the UN according to the view of the Supreme Court of Netherlands.

III.D. The *Srebrenica Mothers* case before the ECtHR

The application was lodged with the ECtHR on 8 October 2012 by the Stichting Mothers of Srebrenica and the other individual applicants after their case failed in domestic courts of the Netherlands. The case was declared inadmissible by the ECtHR.

Concerning the alleged violation of Article 6 of the ECHR about the right of access to a court, the key of the case before the ECtHR is still the immunity of the UN. The Court considered that

> [i]t has only to decide whether the Netherlands violated the applicants' right of "access to a court", as guaranteed by Article 6 of the Convention, by granting the United Nations immunity from domestic jurisdiction.[248]

In considering the "reasonable alternative means" jurisprudence, the Court confirmed that in the situation there was no alternative means under Netherlands domestic law or under the law of the UN.[249] However, the Court did not think that the lack of alternative means was *ipso facto* constitutive of a violation of the right of access to a court.[250]

The UN had not established an appropriate mechanism of dispute

---

247 Ibid, para. 4.3.14.

248 Stichting Mothers of Srebrenica and Others v The Netherlands, Application No. 65542/12, ECtHR, 11 June 2013, para. 137.

249 Ibid, 11 June 2013, para. 163.

250 Ibid, para. 164.

settlement, but it was not imputable to the Netherlands.[251] Moreover, Article 6 does not require the Netherlands to step into this dispute between the applicants and the UN, which is fundamentally different from the former cases of the employment disputes.[252]

This decision put the "reasonable alternative means" jurisprudence into a grim situation in that the complete lack of alternative means does not necessarily entail the disproportionate restriction of the right to a court or the violation of the right to a court. Unfortunately, the Court did not make clear the legal reasons for this interpretation.

Moreover, the Court pointed out the differences in the nature of this case from the former employment dispute cases. The case was just randomly brought before the Netherlands courts for the United Nations Protection Force of former Yugoslavia ("UNPROFOR") because the Srebrenica safe area happened to be protected by the Dutchbat. In such a situation, it is not imputable to the state for not providing alternative means of dispute settlement.

Taking the two factors (reasonable alternative means and the nature of the case) together, it could be understood that in the employment cases in which the relevant IO has its seat in the country, the "reasonable alternative means" jurisprudence is still decisive in the proportionality of the restriction. However, for the other cases in which the IO has a random connection with the country, the "reasonable alternative means" jurisprudence cannot be interpreted in absolute terms.

Following this interpretation, the ECtHR seems to endorse the denial of justice in the situation when the IO has not established a dispute settlement mechanism and the domestic court is not compelled to do so, or the Court may indicate that the IO could be culpable. However, there is no such mechanism for blame. For the national courts, they are not obliged to provide

---

251 Ibid, para. 165.

252 Ibid.

such a mechanism for guaranteeing the right to a court in a case where the country of the court has little relevance. The *de facto* denial of justice is endorsed if the situation of the UN remains.

IV. Interim conclusion

The *Waite and Kennedy* case's two-fold examination and the "reasonable alternative means" jurisprudence shed light on the problem of denial of justice because of the sweeping immunity granted to the IOs, especially the UN.

The cases before the national courts of some member states of the ECHR show a trend toward examination of immunity of the IOs according to the *Waite and Kennedy* case's two-fold examinations and the "reasonable alternative means" jurisprudence, although the standards of examination are quite different.

Due to the uncertainty of the standard, it is very possible that the domestic courts of the ECHR Members just pay lip service to the jurisprudence and grant immunity to respective IOs very easily,[253] let alone those countries outside the ECHR area.

Moreover, if only the availability of the alternative mode of settlement is checked without an inquiry into the quality and effectiveness of such mechanism, the jurisprudence would lose most of its value in preventing the denial of justice. Besides, the issue whether the jurisprudence can be applied in cases other than employment cases remains pessimistic according to the ECtHR's own interpretation of the *Srebrenica Mothers* case. Therefore, directly disputing the UN for wrongful acts before a national court seems extremely difficult.

Finally, it is hoped that this jurisprudence should be applied in a way more than just lip service in order to strike a good balance between the autonomy of

---

253 Cedric Ryngaert, The Immunity of International Organizations Before Domestic Courts: Recent Trends, 7 International Organizations Law Review (2010), 143.

the IOs (the autonomy and the primary responsibility of protecting international peace and security in the case of the UN for SC's targeted sanctions) and the individual's right to a court and this jurisprudence should be adopted in analysis by the broader jurisdictions than merely the members of ECHR.

PART II: Judicial and Quasi-Judicial Review of UN Targeted Sanctions by National and International Institutions

Part II goes into examinations of the possible mechanisms for exercising judicial or quasi-judicial control. The International Court of Justice in the UN system; the EU judicatures; the other judicial or quasi-judicial institutions established under international law (HRC and ECtHR) and national courts are included in the scope of the examinations. Each chapter deals with one kind of mechanism respectively.

This kind of examination is not exhaustive and is not meant to be an exhaustive explanation. Instead, the goal is to explain the characteristics of the problems and approaches for dealing with the problem. The difficulties and inspiration of exercising control in these mechanisms are the two focuses of the examination.

CHAPTER THREE: Review by the International Court of Justice

The ICJ "shall be the principal judicial organ of the United Nations" according to the competence definition of the UN Charter.[254] There is no provision in the UN Charter which endows the ICJ with the power of judicial review. Moreover, as the ICJ in the *Certain Expenses* case recognized that

> [i]n 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 draft of the Charter to place the ultimate authority to interpret the Charter in the International Court of Justice were not accepted […] [E]ach organ must, in the first place at least, determine its own jurisdiction.[255]

The Charter expressly provides for the involvement of the Court in the conduct of the SC in two ways: as a body to which the sates might be recommended by the SC to refer their legal disputes through contentious proceedings;[256] and as a means of providing legal advice to the SC on legal questions through advisory proceedings.[257] As for the problematic SC resolutions, judicial review by the ICJ is a probable means in the internal mechanism of the UN. Presently, there is already a lot of research on the possibility or legality of the judicial review of the SC resolutions by the ICJ. However, taking into consideration the new characteristics of smart sanctions, the limitations rather than possibilities are more significant in such a review

---

254 Article 92 of the UN Charter.

255 Certain expenses of the United Nations (Article 17, paragraph 2, of the Charter), Advisory Opinion of 20 July 1962, ICJ Reports, 168.

256 Art. 36(3) of the UN Charter.

mechanism. The limitations may be detrimental to the effectiveness of the review of SC conduct by the ICJ.

I. The competence of the ICJ to review SC conduct

As regards the competence of the ICJ to review SC conduct, the UN Charter is silent on this matter. The proposal of Belgium to seek the ICJ's advisory opinion in cases that a state party considers its rights under international law have been infringed by the Council was rejected at the United Nations Conference on International Organization at San Francisco in 1945.[258]

The 1962 *Certain Expenses* case is an early case about the problem of review of the acts of political organs of the UN, the General Assembly ("GA") in this case, by the ICJ as quoted above and it was held that they enjoyed an assumption of validity. In the 1971 *Namibia* case, the Court affirmed that "undoubtedly, the Court does not possess powers of judicial review or appeal in respect of the decisions taken by the United Nations organs concerned."[259]

In the 1990s, the competence of the ICJ to review SC conduct was a hot topic among international legal scholars which were mostly triggered by the *Lockerbie* case.[260]

---

257 Art. 96(1) of the UN Charter.

258 Lucius Caflisch, Is the International Court Entitled to Review Security Council Resolutions Adopted under Chapter VII of the United Nations Charter?, in: Najeeb Al-Nauimi and Richard Meese (eds.), International Legal Issues Arising under the United Nations Decade of International Law (1995), Martinus Nijhoff Publishers, 651.

259 Legal Consequence 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, para. 89.

260 Thomas M. Franck, The Powers of Appreciation: Who is the Ultimate Guardian of UN Legality?, 86 The American Journal of International Law (Jul. 1992), 519-523; Mohammed Bedjaoui, The New World Order and the Security Council: Testing the Legality of Its Acts (1994), Martinus Nijhoff Publishers; Vera Gowland-Debbas, The Relationship between the International Court of Justice and the Security Council in the Light of the *Lockerbie* case, 88 American Journal of International Law (Oct. 1994), 643-677; Jose E. Alvarez, Judging the Security Council, 90 American Journal of

The situation which led to the *Lockerbie* case[261] was the terrorist explosion of Pan Am flight 103 above Lockerbie (Scotland) which caused the death of all passengers and crew members and some villagers in 1988. The two suspect terrorists of the explosion were of Libyan nationality. Then at the request of the USA and the UK, SC resolution 731 (1992) was adopted on 21 January 1992 to, *inter alia*, urge "the Libyan Government immediately to provide a full and effective response to those requests [to surrender the suspects] so as to contribute to the elimination of international terrorism",[262] but it was not adopted under Chapter VII. Libya, on 3 March 1992, instituted the proceedings before the ICJ against both the USA and the UK and requested provisional measures under Article 41 of the ICJ Statute. Libya based the jurisdiction of the ICJ on Article 14 of the Montreal Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation 1971 and asked the Court to declare that the USA and the UK violated and continued to violate the Convention because the Montreal Convention provided the principle *aut dedere aut judicare*. Three days after the close of the hearing for the provisional measures, that is 31 March 1992, prior to the decision, the SC adopted resolution 748 (1992) under Chapter VII imposing sanctions on Libya from 15 April 1992.[263]

The Court delivered the Order of the provisional measures on 14 April 1992. The Court upheld the resolution *prima facie* for the purpose of the

---

International Law (Jan. 1996), 1-39; Dapo Akande, The International Court of Justice and the Security Council: Is There Room for Judicial Control of Decisions of the Political Organs of the United Nations?, 46 The International Comparative Law Quarterly (Apr. 1997), 309-343; etc.

261 Questions of Interpretation and Application of the 1971 Montreal Convention Arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v. United States of America), Provisional Measures, Order of 14 April 1992, ICJ Reports 1992, 114; Questions of Interpretation and Application of the 1971 Montreal Convention Arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v. United States of America), Preliminary Objections, Judgment, the ICJ Reports 1998, 115. The same cases were brought before the ICJ against the United Kingdom.

262 Resolution 731 (1992), para. 3.

263 Resolution 748 (1992), para. 3.

proceedings related to provisional measures, but opened the possibility to review the resolution at the evaluation of merits stage. Thirteen out of sixteen members of the Court appended declarations or opinions to the Order. Almost all the members of the Court agreed not to question the legality of Security Council Resolution 748 at the preliminary stage of the proceedings, but not to rule out a re-examination of the issue in a later phase.[264]

In its judgment of 1998 on preliminary objections, the Court dismissed objections from the USA and the UK and ruled that the case was admissible even though there was Resolution 748 adopted under Chapter VII because the date on which the application was filed determined the jurisdiction and maintained the possibility to review the Resolution in the merits stage. Although we would like to see how the Court would have dealt with the case at the stage of merits, the case was finally removed from the Court's List at the joint request of the Parties on 10 September 2003.[265]

Alexander Orakhelashvili also examined the *Lockerbie* case and argued for the ICJ's competence to review SC conduct and considers that "the contention that the International Court cannot review Security Council resolutions necessarily equates to viewing the Court's powers as subordinated to the Council."[266] In fact, there is no provision in the UN Charter to subordinate the ICJ to the SC or vice versa. Moreover, each organ of the UN functions independently.[267] "The absence of a regular procedure to review Security Council acts does not prejudice the Court's existing […] jurisdiction to state the law in relation to underlying facts, actions, and positions, which includes

---

264 Lucius Caflisch, Is the International Court Entitled to Review Security Council Resolutions Adopted under Chapter VII of the United Nations Charter?, in: Najeeb Al-Nauimi and Richard Meese (eds.), International Legal Issues Arising under the United Nations Decade of International Law (1995), Martinus Nijhoff Publishers, 646.

265 Press Release on 10 September 2003 (http://www.icj-cij.org/docket/index.php?pr=168&code=lus&p1=3&p2=3&p3=6&case=89&k=82).

266 Alexander Orakhelashvili, Collective Security (2011), Oxford University Press, 347.

267 Ibid.

the Council's decision."[268] Regarding the incidental review, it is also agreed that "the Court, provided it possesses jurisdiction in the matter submitted to it, is the proper authority to make a statement on whether an action by the Security Council remains within the bounds of law", but this is not strictly what is called judicial review in the sense of domestic law.[269]

Where the Court considers that it flows from the proper exercise of its judicial function, the Court may assert the competence to thoroughly examine particular resolutions.[270] This may arise where the Court concludes that it has been expressly asked in a request for an advisory opinion to review the constitutionality of a resolution of the UN, as in the *Certain Expenses* case, or where this arises by necessary implication, as for example in the *Namibia* case. Where the Court takes the view that it cannot properly give a decision on the law in an independent and objective fashion in the light of the claims made by relevant parties without such an investigation, the investigation will so proceed.[271]

Theoretically there is plenty of room for the arguments for the competence of the ICJ to review the SC's binding resolutions. But in practice, to exercise the review by the ICJ in the present framework is impossible or highly incidental for the individuals and states in the circumstances of the SC's recent sanctions regime even though those pro-review arguments are accepted.

II. The ICJ to review SC conduct for individuals

---

268 Ibid.

269 K Skubiszewski, The International Court of Justice and the Security Council, Vaughan Lowe and Malgosia Fitzmaurice (eds.), Fifty years of the International Court of Justice: essays in honour of Sir Robert Jennings (1996), Cambridge University Press, 628.

270 Malcolm N. Shaw, The Security Council and the International Court of Justice: Judicial Drift and Judicial Function, in: A.S. Muller, D. Raic and J.M. Thuranszky (eds.), The International Court of Justice: Its Future Role After Fifty Years (1997), Matinus Nijhoff Publishers, 257.

271 Ibid.

Individuals have no chance for access to the ICJ to challenge the SC. For contentious proceedings, Article 34 of the ICJ Statute provides that *only States* may be parties in cases before the court. And for the advisory opinion proceedings, Article 96 of the UN Charter provides that the GA or the SC may request an advisory opinion on any legal question and other organs of the UN. Specialized agencies with authorization by the GA may request advisory opinion on legal questions within the scope of their activities. However, one may ask whether there are legal methods for the individuals to force a home country to bring a case before the ICJ against another country. The answer is basically no.[272]

However, the *Lockerbie* case in fact is relevant to two terrorist suspects. The case involved the issue of extradition of the two suspects required by SC Resolution 748 (1992) adopted under Chapter VII.[273] This is a special case which rarely happens: the home state of the suspects, Libya, was not willing to extradite the two suspects; and there was the Montreal Convention with membership of all the parties (Libya, the USA and the UK); the principle *aut dedere aut judicare* was incorporated in the Convention; and the Convention recognized the ICJ's jurisdiction in the dispute settlement clause.[274] Therefore, Libya could bring the case before the ICJ claiming violation of the Convention.

Seen from another aspect, although the result of the case might affect the fair trial for the two suspects, the case was not based on the rights of the two suspects but on the rights and obligations of the state parties under the Montreal Convention. Therefore, this kind of case is very rare and conditional.

---

272 Machiko Kanetake, Enhancing Community Accountability of the Security Council through Pluralistic Structure, 12 Max Planck Yearbook of United Nations Law (2008), 128.

273 Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v United States of America), Provisional Measures, Order of 14 April 1992, ICJ Reports 1992, para. 35.

274 Ibid, para. 6. Art. 5 (2) and Art. 14 of Convention for the suppression of Unlawful Acts Against the Saftety of Civil Aviation, Signed at Montreal, on 23 September 1971 (Montreal Convention 1971).

One may consider the issue from the perspective of diplomatic protection, but to bring the case before the ICJ is much less possible than the states' willingness to offer diplomatic protection to their nationals. Since to involve the ICJ in review of the legality of the SC's conduct depends on the willingness of the applicant state; the consent to the jurisdiction of the ICJ by the respondent state; the existence of international legal instruments binding on the parties which is arguably breached by the respondent state; an unavoidable link between the legality of an SC resolution and the subject matter of the dispute before the ICJ.

Although in order to clarify the legal hurdles, the state may start a motion in the GA to find a chance to request advisory opinion from the ICJ, the state has to secure non-objection from a majority of the UN Member States. Moreover, it is not compulsory for the state to seek the advisory opinion to dispute the legality of SC resolution.

Use of the ICJ for individuals is highly theoretical and until now there is no such case before the ICJ although many cases have been brought before national or regional or other international tribunals.[275]

III. The ICJ to review SC conduct for states

The ICJ is open for states, and "it is not inconceivable that two states at odds over their respective compliance with the Council's counter terrorism dictates might attempt to seek clarification from the Court, thereby raising incidentally the legality of the Council's decision".[276] However the ICJ is still restricted in different ways as well as its incidental nature. After the jurisdiction is established with the consent of both parties to the jurisdiction, there is still a

---

275 Review by domestic courts or other international tribunals are separately examined in Chapter Five to Seven.

276 Jose E. Alvarez, The Security Council's War on Terrorism: Problems and Policy Options, in: Erika de Wet & Andre Nollkaemper (eds.), Review of the Security Council by Member States (2003), Intersentia, 144.

question of admissibility. If the ICJ declares the case admissible, an unavoidable link between the legality of the SC resolution and the subject matter of the dispute must exist for incidentally reviewing the SC resolution in the merits.

The factors limiting the jurisdiction, the admissibility and the necessity of an incidental link between SC conduct and the subject matter of the dispute are examined in the following.

III.A. General limitations to the ICJ's jurisdiction

III.A.i. The limitations in contentious proceedings

Article 36 (1) of the Statute provides that: "[t]he jurisdiction of the Court comprises all cases which the parties refer to it and all matters specially provided for in the Charter of the United Nations or in treaties and conventions in force." The wording indicates that the parties must agree on recourse to the ICJ in order to settle their dispute. In other words, the consents of the parties are needed to secure the ICJ's jurisdiction. This principle, which has historical origins going back to the beginning of modern international law, is an outcome of the concept of sovereignty.[277]

An immediate consequence of the consensual basis of the Court's jurisdiction is that the Court has no power directly or indirectly to require or even to invite the participation of a third state in its proceedings.[278] In the *Certain Phosphate Lands in Nauru* case (Preliminary Objection), the ICJ stated that

> [n]ational courts, for their part, have more often than not the necessary power to order *proprio motu* the joinder of third parties who may be

[277] Shabtai Rosenne, 2 The Law and Practice of the International Court, 1920-2005 (2006), Martinus Nijhoff Publications, 549-550.

> affected by the decision to be rendered; that solution makes it possible to settle a dispute in the presence of all parties concerned. But on the international plane the Court has no such power. Its jurisdiction depends on the consent of States and, consequently, the Court may not compel a State to appear before it, even by way of intervention.[279]

Another consequence of the necessity for consent to establish the jurisdiction is that the nature of the rule concerned has nothing to do with the jurisdiction.[280] Even in the case of a right *erga omnes* concerned, the Court still cannot act without the consent of the states.[281] This is expressed by the Court in the judgment of the *East Timor* case.[282]

The requirement of consent to establish the Court's jurisdiction is firmly insisted by the Court. Therefore, even for the two countries, the jurisdiction of the Court cannot be established without the States' consent. Even if the jurisdiction of the Court is secured, the exercise of the jurisdiction (the admissibility) in a specific case could be disputed for different reasons and the unavoidable link is necessary to secure the incidental review of SC conduct by the ICJ, which are explained in III.B and III.C.

III.A.ii. The limitations in advisory proceedings

Article 96 of the Charter provides that

> 1. The General Assembly or the Security Council may request the International Court of Justice to give an advisory opinion on any legal

---

278 Ibid, 551.

279 Certain Phosphate Lands in Nauru (Nauru v Australia), Preliminary Objections, Judgment, ICJ Reports 1992, para. 53.

280 Shabtai Rosenne, 2 The Law and Practice of the International Court, 1920-2005 (2006), Martinus Nijhoff Publications, 552.

281 Ibid.

282 East Timor (Portugal v Australia), Judgment, ICJ Reports 1995, para. 29.

question.

2. Other organs of the United Nations and specialized agencies, which may at any time be so authorized by the General Assembly, may also request advisory opinions of the Court on legal questions arising within the scope of their activities.

Therefore, states are not entitled to request an advisory opinion. It is not likely that the SC would request advisory opinion from the ICJ about the legality of its own decisions.

As for the possibility for a state to motion the GA to start an advisory proceeding, this concerns the decision making process in the GA. According to Article 18 (2) of the UN Charter, a two-thirds majority of the members present and voting is needed for a decision on important questions. Article 18 (3) provides that a simple majority is needed for the other questions including whether a question is an important question other than those listed in 18 (1). From the list of important questions in 18 (2), the decision to request advisory opinion is not included. This is an unsettled issue.[283] Although this is not a question for this study to answer, it is enough to explain how difficult it is for a state whose national's human rights are affected by the SC decisions to pursue motion in the GA, because at least a majority should be secured.

Moreover, if the request is from the other organs of the UN or specialized agencies, the request should be within the scope of their activities. In the *Legality of the Threat or Use of Nuclear Weapons* case, the WHO asked the Court to answer the question: "[i]n view of the health and environmental effects, would the use of nuclear weapons by a State in war or other armed conflict be a breach of its obligations under international law including the WHO Constitution?"[284] The Court found that it was not able to give the opinion

283 Schweigman, David, The Authority of the Security Council under Chapter VII of the UN Charter: Legal Limits and the Role of the International Court of Justice (2001), Kluwer Law International, 214.

284 Legality of the Use by a State of Nuclear Weapons in Armed Conflict, Advisory

requested since the request did not relate to a question which arose within the scope of the activities of the organization.[285]

The possibility to use the advisory procedure to get the ICJ's opinion on the legality of SC conduct is limited by many factors such as the competence to request; the willingness of the competent organ to request; and the organ's scope of activities. To seek advisory opinion is not likely to be a method for judicial control over SC conduct.

III.B. Preliminary objection to the exercise of jurisdiction

III.B.i. The principle of litispendence

In case of the ICJ's review of SC conduct, it means that both the ICJ and the SC may be seized of the same dispute: the SC exercising its Chapter VII power to respond to threats to international peace and security; and the ICJ exercising its power as the principal judicial organ of the UN to review the legality of the SC's responses to the situation.

In the UN Charter, Article 12 provides that the GA shall abstain from making any recommendation and defer to the SC's competence while the SC is exercising in respect of any dispute or situation the functions assigned to it in the present Charter. However, this kind of deference is not provided for the ICJ. Moreover, Article 36 (3) provides that

> [i]n making recommendations under this Article the Security Council should also take into consideration that legal disputes should as a general rule be referred by the parties to the International Court of Justice in accordance with the provisions of the Statute of the Court.

Opinion, ICJ Reports 1996, para. 1.

285 Legality of the Use by a State of Nuclear Weapons in Armed Conflict, Advisory Opinion, ICJ Reports 1996, para. 21-32.

This article cannot be interpreted as deference of the SC to the ICJ's judicial competence because of the wording of "take into consideration" and the article only refers to the SC's Chapter VI power but the Chapter VII power is not included even for just "consideration".

The principle of *litispendence* deals with the problem of concurrent jurisdiction. The principle is from the domestic legal principle to avoid conflicting judgments or proliferation of pending cases on the same issue, but its applicability in the international sphere is seriously questionable.[286] At the domestic level, "there is *litispendence* when one has: (a) an identical matter, (b) pending between the same parties, (c) before organs possessing similar jurisdiction."[287] The determination of whether the three requirements are met has numerous problems if it applies on the international level analogous with its application on the domestic level. Ciobanu observed similarly that

> [i]n actual fact the doctrine of litispendence in international law assumed characteristics which sharply distinguish it from the same doctrine in the internal law of States. These characteristics are so fundamental that it is doubtful whether, *stricto jure*, it is proper to speak about litispendence in inter-State relations.[288]

In the cases before the ICJ, there are several cases seizing both the ICJ and the SC in the same matter. In the *Aegean Sea Continental Shelf* case (1976) (Interim Protection),[289] the decision remained silent on the issue of *litispendence*.

---

286 Schweigman, David, The Authority of the Security Council under Chapter VII of the UN Charter—Legal Limits and the Role of the International Court of Justice (2001), Kluwer Law International, 218.

287 D. Ciobanu, Preliminary Objections: Related to the Jurisdiction of the United Nations Political Organs (1975), Martinus Nijhoff, 103.

288 Ibid, 105.

289 Aegean Sea Continental Shelf, Interim Protection, Order of 11 September 1976, ICJ Reports 1976, 3.

In the *United States Diplomatic and Consular Staff in Tehran* (1980) case[290], the ICJ on its own initiative decided to examine the question whether prior action of the SC precluded it from exercising its jurisdiction. The Court concluded that with regard to the seizure of a dispute by both the SC and the ICJ, there does not appear to be anything irregular in the "simultaneous exercise of their respective functions".[291]

In the *Lockerbie* case, the ICJ and the SC were also involved simultaneously, but the respondents did not raise this matter as an argument for the inadmissibility of the case. The Court's rejection of the preliminary objections of the respondents implied the Court's confirmation that simultaneous proceedings before the SC do not deprive the ICJ of its jurisdiction.[292] It indicated that reference to a *litispendence*-like argument as an objection to the admissibility of a claim before the Court would not be successful.

The most extensive elaboration by the Court on its role in the settlement of disputes alongside the SC was made in the *Nicaragua* case (1984).[293] The US adopted the *litispendence* principle approach, although it did not specifically mention it. The Court cited the *United States Diplomatic and Consular Staff in Tehran* case to establish that the fact that a matter is before the SC should not prevent it from being dealt with by the Court and that both proceedings could be pursued *pari passu*.[294] And concerning the SC's primary responsibility for the maintenance of international peace and security, the Court further stated that

---

290 United States Diplomatic and Consular Staff in Tehran, Judgment, ICJ Reports 1980, 3.

291 Ibid, para. 40.

292 Bernd Martenczuk, The Security Council, the International Court and Judicial Review: What Lessons from Lockerbie?, 10(3) European Journal of International Law (1999), 532.

293 Schweigman, David, The Authority of the Security Council under Chapter VII of the UN Charter—Legal Limits and the Role of the International Court of Justice (2001), Kluwer Law International, 239.

294 Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America), Jurisdiction and Admissibility, Judgment, ICJ Reports 1984, para.

> [t]he Charter accordingly does not confer exclusive responsibility upon the Security Council for the purpose. […] The Council has functions of a political nature assigned to it, whereas the Court exercises purely judicial functions. Both organs can therefore perform their separate but complementary functions with respect to the same events.[295]

This observation of "separate but complementary functions" was confirmed again in the *Genocide* case.[296] These cases can well explain the ICJ's opinion on the issue of *litispendence*: a parallel seizure of a dispute by the ICJ and the SC does not preclude exercising of jurisdiction because they are not considered as organs possessing similar jurisdiction. The plea of *litispendence* will not be upheld by the Court.

However, the *Lockerbie* case[297] is different from the above-mentioned cases before the ICJ. Although the *Lockerbie* case was also a case pending before both the ICJ and the SC, it was the first case in which the ICJ and the SC were seized by different parties to the same dispute. In the Order for the provisional measures, the ICJ confirmed the *prima facie* validity of the SC resolution 748 (1992) and refused to indicate provisional measures, but the Court also noted that

> in order to pronounce on the present request for provisional measures, the Court is not called upon to determine any of the other questions which have been raised before it in the present proceedings, including

---

106.

295 Ibid, para. 95.

296 Application of the Convention on Prevention and Punishment of the Crime of Genocide, Provisional Measures, Order of 8 April 1993, ICJ Reports 1993, para. 33.

297 Questions of Interpretation and Application of the 1971 Montreal Convention Arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v United States of America), Provisional Measures, Order of 14 April 1992, ICJ Reports 1992, 114. And the same case was also brought against UK. The judgments on the preliminary objections was rendered on 27 February 1998.

> the question of its jurisdiction to entertain the merits of the case; and […] the decision given in these proceedings in no way prejudges any such question, and leaves unaffected the rights of the Government of Libya and the Government of the United States to submit arguments in respect of any of these questions.[298]

Therefore, the recognition of the *prima facie* validity of the disputed SC resolutions is only for the present stage of provisional measures and the Order refusing a request to indicate such a measure cannot be interpreted as deference to the SC's Chapter VII power. At the later stage, the judgment of 1998 rejected the preliminary objection. The judgement did not respond to the relationship between the ICJ and the SC on this matter directly but referred to its jurisdiction *ratione temporis*:

> [t]he date, 3 March 1992, on which Libya filed its Application, is in fact the only relevant date for determining the admissibility of the Application. Security Council resolution 748 (1992) and 883 (1993) cannot be taken into consideration in this regard, since they were adopted at a later date.[299]

There are different understandings of the ICJ's judgment. The judgement might suggest that if the case was instituted after the adoption of Resolution 748 (1992), the case would have been inadmissible because the supremacy of the obligation under the UN Charter according to Article 103 together with Article 25. But "it is unclear why the timing of the application should be crucial

---

298 Questions of Interpretation and Application of the 1971 Montreal Convention Arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v United States of America), Provisional Measures, Order of 14 April 1992, ICJ Reports 1992, para. 45.

299 Questions of Interpretation and Application of the 1971 Montreal Convention Arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v United States of America), Preliminary Objections, Judgment, ICJ, Reports 1998, para. 43.

if a resolution could in principle displace treaty rights and make a claim based on those rights inadmissible."[300] This understanding of the approach could be problematic because it implied a broader criterion of admissibility or mootness. The impact of this would recognize the principle of *litispendence* through the backdoor.[301]

However, there is another understanding of this judgment: the timing argument was the only admissibility submission framed in terms suitable for preliminary proceedings. The Court cannot adopt a defense which the respondent did not propose.[302] That is to say it is the preliminary nature of the proceeding and the limits of the submissions of the respondent that made the Court adopt this approach. The judgement did not indicate any opinion on the principle of *litispendence*. In fact, the Court affirmed the admissibility of the case without deference to the SC's Chapter VII resolution.

From the jurisprudence and practice of the ICJ, it can be concluded that the *litispendence* principle as an argument for the deference of the ICJ to the SC's Chapter VII decisions in case of concurrent jurisdiction is not acceptable for the Court. The *litispendence* principle can hardly be a barrier for the ICJ to review the SC's binding decisions.

III.B.ii. The political question doctrine

The "political question doctrine" means that the Court should not and could not pronounce on certain aspects of a case because these questions relate to the political sphere.[303] This used to be an argument about the justiciability of the case. In the *Tadić* case, the Trial Chamber of the ICTY confirmed the existence of the doctrine and applied it in relation to the SC's Chapter VII

---

300 Alexander Orakhelashvili, Collective Security (2011), Oxford University Press, 354.

301 Ibid, 347.

302 Ibid, 355.

303 Schweigman, David, The Authority of the Security Council under Chapter VII of the UN Charter: Legal Limits and the Role of the International Court of Justice (2001),

power. The Trial Chamber stated that

> [t]he making of a judgment as to whether there was such an emergency in the former Yugoslavia as would justify the setting up of the International Tribunal under Chapter VII is eminently one for the Security Council and only for it; it is certainly not a justiciable issue but one involving considerations of high policy and of a political nature. As to whether the particular measure of establishing the International Tribunal is, in fact, likely to be conducive to the restoration of peace and security is, again, pre-eminently a matter for the Security Council and for it alone and no judicial body, certainly not this Trial Chamber, can or should review that step.[304]

However, the Appeals Chamber rejected the political question doctrine by ruling that

> the doctrine of "political questions" and "non-justiciable disputes" are remnants of the reservations of "sovereignty", "national honour", etc. in very old arbitration treaties. They have receded from the horizon of contemporary international law, except for the occasional invocation of the "political question" argument before the International Court of Justice in advisory proceedings and, very rarely, in contentious proceedings as well.
>
> The Court has consistently rejected this argument as a bar to examining a case. It considered it unfounded in law. As long as the case before it or the request for an advisory opinion turns on a legal question capable of a legal answer, the Court considers that it is duty-bound to take jurisdiction over it, regardless of the political background or the

---

Kluwer Law International, 261-262.

304 Prosecutor v Tadić (Decision on the motion on jurisdiction) IT-94-1, 10 August

other political facets of the issue.[305]

As the ICTY Appeals Chamber observed in *Tadić* case, the ICJ has seldom abstained from exercising jurisdiction because of the political implications of its judgments or opinions.[306] In the *Border and Transborder Armed Actions* case, the Court ruled that

> political aspects may be present in any legal dispute brought before it. The Court, as a judicial organ, is however only concerned to establish, first, that the dispute before it is a legal dispute in the sense of a dispute capable of being settled by the application of principles and rules of international law and secondly, that the court has jurisdiction to deal with it, and that jurisdiction is not fettered by any circumstances rendering the application inadmissible.[307]

Furthermore, in the Preliminary Objection phase of the *Nuclear Weapons* case, the Court found that "the political nature of the motives which may be said to have inspired the request and the political implications that the opinion given might have are of no relevance in the establishment of its jurisdiction to give such an opinion."[308] Rather than considering the division of questions as political or legal, it is better to make distinction between a political and legal method of solving the dispute.[309]

1995, para. 23 (http://www.icty.org/case/tadic/4#tdec).

305 Ibid, para. 24.

306 Schweigman, David, The Authority of the Security Council under Chapter VII of the UN Charter—Legal Limits and the Role of the International Court of Justice (2001), Kluwer Law International, 263.

307 Border and Transborder Armed Actions (Nicaragua v Honduras), Jurisdiction and Admissibility, Judgment, ICJ Report 1988, para. 52.

308 Legality of the Use by a State of Nuclear Weapons in Armed Conflict (Preliminary Objections), Judgment of 8 July 1996, para. 17. And the Advisory Opinion, para. 13.

309 V. Gowlland-Debbas, The Relationship between the International Court of Justice and the Security Council in the Light of the Lockerbie Case, 88 American Journal of

However, there still may be room for the doctrine to play a role in barring the ICJ from exercising jurisdiction. It was suggested that the powers of the SC under Chapter VII could be one category of decisions that is not suitable for judicial scrutiny by Schweigman's quoting of Malanczuk, Kooijmans and Akande to argue that Article 39 decision is not properly suited to determinations by a judicial body.[310] However, besides the Article 39 decision on whether there is a threat to international peace and security, the new implications concerning the individuals' human rights in SC's Chapter VII resolutions for the purpose of restoring the international peace and security pose a new perspective for judicial scrutiny: it is not to review the Article 39 decision but to review the method of restoration in light of human rights. This is not what those authors addressed to when they were talking about the propriety of judicial view of the Article 39 decision. It can hardly be said that the political question doctrine is still applicable in such a situation. The ICJ's own jurisprudence shows that "any dispute brought before the Court is justiciable, regardless of what political overtone it may have."[311]

III.B.iii. The mootness of the dispute

From the ICJ's jurisprudence, "the Court can exercise its jurisdiction in contentious proceedings only when a dispute genuinely exists between the parties."[312] The Court considered that "the dispute brought before the Court cannot be separated from the situation in which it has arisen, and from further developments which may have affected."[313] In the *Nuclear Test* case, the Court

---

International Law (1994), 652.

310 Schweigman, David, The Authority of the Security Council under Chapter VII of the UN Charter: Legal Limits and the Role of the International Court of Justice (2001), Kluwer Law International, 265.

311 Bernd Martenczuk, The Security Council, the International Court and Judicial Review: What Lessons from Lockerbie?, 10 Eurpean Journal of International Law (1999), 529.

312 Nuclear Test (New Zealand v France), Judgment, ICJ Reports 1974, para. 60.

313 Ibid, para. 31.

considered itself as being faced with a situation in which the objective of the Applicant had in effect been accomplished by France undertaking the obligation not to hold further nuclear tests in the atmosphere in the South Pacific.[314] ICJ concluded that "the dispute having disappeared, the claim advanced by New Zealand no longer has any object".[315]

Therefore, a question could be asked whether the Security Council's binding decision could render the dispute without object or moot. The *Lockerbie* case judgment on the preliminary objection[316] can provide an answer to this question by the ICJ itself.

In *Lockerbie* case, three days after the close of the hearing of the request for indication of preliminary measures, the SC made a Chapter VII Resolution 748 (1992) on 31 March 1992 to support the US and UK's stance against Libya on the basis of counter-terrorism.[317]

Regarding the admissibility of the Libyan application, the respondents argued that the dispute was now governed by decisions of the SC which superseded any rights that Libya might have enjoyed under the Montreal Convention, and that as a consequence the Libyan application had been rendered moot as a consequence of the resolution.[318]

Concerning the issue of mootness, the Court did not decide on the substance of this objection. However, the Court found the case admissible from the argument of the time of determining the issue, that is the date of filing the application. This reasoning may not be consistent with its

---

314 Ibid, para. 55.

315 Ibid, para. 65.

316 Question of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v United Kingdom), Preliminary Objections, Judgment, ICJ Reports 1998, 9.

317 Question of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v United Kingdom), Provisional Measures, Order of 14 April 1992, ICJ Reports 1992, para. 32.

318 Question of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v United Kingdom), Preliminary Objections, Judgment, ICJ Reports 1998, para. 41.

jurisprudence in the *Nuclear Test* case, in which the Court took the "further development" of the case into consideration. However, the Court made it clear that the UK's arguments for the objection based on the SC resolutions has the character of a defense on the merits.[319] This reasoning shows the differences between the *Nuclear Test* case and *Lockerbie* case that the effects of the SC's Chapter VII resolution on the case was considered as part of a merit of the dispute which is different from the fact of a unilateral declaration of France which rendered the *Nuclear Test* case without object. In other words, the Court did not consider the SC's Chapter VII resolutions as decisive on the matters concerned and its lawfulness was open to dispute although the Court upheld its *prima facie* legality. Therefore, the SC's Chapter VII resolution on a certain issue cannot render the dispute on this same issue moot before the ICJ.

III.C. The unavoidable link

If the ICJ confirmed its jurisdiction on the case and declared the case admissible, an unavoidable link between the legality of SC conduct and the subject matter of the dispute must exist for incidentally reviewing the merits of SC conduct. As Judge Onyeama stated in his separate opinion in the *Namibia* case that although the ICJ had no judicial review power,

> when […] such decisions bear upon a case properly before the Court, and a correct judgment or opinion could not be rendered without determining the validity of such decisions, the Court could not possibly avoid such determination without abdicating its role of a judicial organ.[320]

While the necessity for review of the legality of SC conduct in certain cases

---

319 Ibid, para. 50.

320 Legal Consequence for States of the Continued Presence of South Africa in Namibia (Southwest Africa) Notwithstanding Security Council Resolution 276(1970), Advisory Opinion (1971), ICJ Reports (1970), 143-144.

was stressed in the statement, it also implied that in order to realize the legality review, the case should engage the ICJ in situations where review cannot be avoided. The unavoidable link is highly incidental because the issue of the legality of SC conduct must depend on the main case and decision on the main case must happen to be unavoidably connected to the issue.

Moreover, it is necessary to explain how the link can be regarded unavoidable for the ICJ to review SC conduct for the purpose of deciding the whole case. To explain this matter, the *Lockerbie* case is a good example.

In the *Lockerbie* case, Libya alleged that the US and the UK breached their legal obligations under the Montreal Convention by coercing Libya to surrender the accused individuals to jurisdiction outside Libya.[321] However, these coercing measures and requests were ordered by the SC Resolution 748 (1992).[322] That is why the ICJ had to recognize the *prima facie* validity of the Resolution at least at the stage of the provisional measures.

This case was withdrawn before it could go to the assessment of the merits stage by the ICJ. However, to decide whether the US and the UK's breach of the Montreal Convention could be justified by the SC Resolution depends on the validity of the Resolution. This is the unavoidable link between the SC resolution and the subject matter of the case.

Analogously, the *Tadić* case (Appeal on jurisdiction) can also be taken as an example to disclose the unavoidable link. In this case, the ICTY was faced with the challenge of the Court's jurisdiction on the basis of the validity of the establishment of the Court because the establishment of the Court was based on the SC Resolution 827 (1993).[323] The Court realized that the legality of its establishment by the SC was an unavoidable question for the Court to

---

321 Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libya Arab Jamahiriya v United Kingdom), Provisional Measures, Order of 14 April 1992, ICJ Reports 1992, para. 7.

322 Ibid, para. 39-41.

323 Prosecutor v Tadić (Appeal on Jurisdiction) IT-94-1-AR72, 2 October 1995, para. 10.

decide.[324] After that, the Court struggled to justify its competence to examine such a question in terms of incidental jurisdiction.

From the assessment of the above cases, the unavoidable link can be explained like this: SC conduct forms the necessary legal basis of the conduct of the party and the legality of the conduct of the party is under dispute by the parties to the case. In such a situation, the necessary legal justifications of the party's conduct, the SC conduct (SC decisions), unavoidably fall into the scope of review of the ICJ for the purpose of exercising its judicial function in the case.

The link is highly incidental, which renders the situation very rare, and the ICJ is hardly involved in incidentally deciding on the legality of SC conduct let alone the other factors limiting the ICJ in deciding such matters as explained in the above Sections.

IV. Interim conclusion

This Chapter has been an examination of the ICJ as a principal judicial organ of the UN from the perspective of its competence of judicial review of SC conduct. From the examinations of the limits of the ICJ mechanism for individuals and states, it is clear that its availability is extremely limited if it seeks to take the SC under judicial control although the ICJ is the principal judicial organ in the UN system because the limits, which it is subjected to, cannot be conquered without amendments to its Statute or the UN Charter.

The ICJ basically is not considered as an organ which can exert judicial control over the SC's conduct. However, if all the legal conditions and the incidental link are satisfied, the ICJ has the competence in deciding such a matter. Therefore, in incidental cases, the ICJ could contribute as an organ exercising judicial function.

---

[324] Ibid, para. 18-20.

CHAPTER FOUR: Review by the EU Courts: the *Kadi* case

The Treaty on the Functioning of the European Union provides that "[a]ny natural or legal person may […] institute proceedings [before the EU judicature] against an act addressed to that person or which is of direct and individual concern to them, and against a regulatory act which is of direct concern to them and does not entail implementing measures".[325] Therefore the EU regulations implementing the SC binding decisions imposing a list of persons under sanctions, which are directly applicable to the EU MS and concern the listed individuals directly, entitle the affected individuals to bring the cases before the EU judicature.

The *Kadi* case is the case which triggered the most discussions on the issues covered by the present topic. This chapter focuses on the analysis of the judgments of this case to examine the difficulties and possibilities in exercising control under the EU judicatures.

Mr. Kadi is one of the people listed by SC Resolution 1333 (2000) which extends the assets freezes, travel bans and arms embargoes to individuals and entities associated with Osama bin Laden or the Al-Qaeda organization as designated by the Sanctions Committee ("the 1267 Committee") established by SC Resolution 1267 (1999)—together with its relevant resolutions, which is called the 1267 Regime.[326] Mr. Kadi's funds and other economic resources were frozen by Commission Regulation (EC) No 2062/2001 on 19 October 2001, which gave effect to the UN Security Council Resolutions.[327]

Mr. Kadi denied any association with Osama bin Laden or the Al-Qaeda organization and claimed that he was sanctioned without his fundamental human rights being guaranteed. The case was brought before the Court of First

---

325 Article 263 of the Consolidated Version of the Treaty on European Union, 55 Official Journal of the European Union (2012), 26 October 2012.

326 Case T-315/01 Yassin Abudullah Kadi v Council and Commission, Court of First Instance, 21 September 2005, para. 14.

327 Ibid, para. 24.

Instance ("CFI") which is "General Court" from 1 December 2009, on 18 December 2001.[328] The CFI dismissed all of the applicants' claims in September 2005.[329] Mr. Kadi appealed to the Court of Justice of the European Communities (the "ECJ" which on 1 December 2009 became "Court of Justice of the European Union") and the ECJ set aside the CFI judgment. The Court assessed the regulation and found that the fundamental rights of the appellant were breached.[330] After the judgment of the Court of Justice, the Commission communicated a summary of reasons to Mr. Kadi about the listing and still kept him on the list.[331] Mr. Kadi then brought the Commission before the General Court of the European Union on 26 February 2009 (the "*Kadi II*[332] case").[333] The General Court delivered judgment in September 2010 finding breach of fundamental rights by using the *solange* rationale.[334] On 5 October 2012, the 1267 Committee removed the name of Mr. Kadi from the Al-Qaida Sanctions List.[335]

In the following, the reasonings of the cases are explained in Section I, and the legal issues are discussed in Section II.

I. The reasoning of the *Kadi* cases

I.A. The *Kadi I*[336] case

---

328 Ibid, para. 37.

329 Ibid, para. 292.

330 Joint Cases C-402/05P and C-415/05P Yassin Abdullah Kadi and Al Barakaat International Foundation v Council and Commission, European Court of Justice (Grand Chamber), 3 September 2008, para. 370.

331 Ibid, paras. 49-62.

332 Kadi II case, in this research, refers to the case brought before the General Court in 2009: Case T-85/09 Yassin Abdullah Kadi v European Commission, General Court, 30 September 2010.

333 Ibid, para. 63.

334 Ibid, para. 90.

335 Press Release of the 1267 Committee on 5 October 2012, SC/10782 (http://www.un.org/News/Press/docs//2012/sc10785.doc.htm).

336 Kadi I case, in this research, refers to the case brought before CFI in 2001 and its

I.A.i. The CFI judgment on Kadi I

In the case, the applicant claimed that the measures imposed by EC regulations implementing the 1267 Regime constituted a breach of his right to a fair hearing, the fundamental rights of respect for property, the principle of proportionality and the right to effective judicial review.[337] The applicant contended that the EC regulations were adopted *ultra vires*.[338]

The Court found that the obligations of the Member States of the UN under the UN Charter prevailed over every other obligations of domestic law or of international treaty law including obligations under ECHR on the basis of principles of customary international law crystalized in Article 27 of the Vienna Convention on the Law of Treaties and the rule of primacy laid down in Article 103 of the UN Charter. The primacy extends to decisions contained in the SC resolutions in accordance with Article 25 of the UN Charter.[339] Then by confirming that there is no autonomous discretion left to the Member States, the CFI ruled that

> [a]ny review of the internal lawfulness of the contested regulation, especially having regard to the provisions or general principles of Community law regarding to the protection of fundamental rights, would therefore imply that the Court is to consider, indirectly, the lawfulness of those resolutions. In that hypothetical situation, in fact,

---

appeal before ICJ: Case T-315/01 Yassin Abudullah Kadi v Council and Commission, Court of First Instance, 21 September 2005; and Joint Cases C-402/05P and C-415/05P Yassin Abdullah Kadi and Al Barakaat International Foundation v Council and Commission, European Court of Justice (Grand Chamber), 3 September 2008.

337 Case T-315/01 Yassin Abudullah Kadi v Council and Commission, Court of First Instance, 21 September 2005, para. 59, 139.

338 Ibid, para. 60.

339 Ibid, para. 181-184.

> the origin of the illegality alleged by the applicant would have to be sought, not in the adoption of the contested regulation but in the resolutions of the Security Council which imposed the sanctions.[340]

Consequently the CFI concluded that the resolutions of the SC fell outside the scope of the Court's judicial review and the Court had no competence to question even indirectly their lawfulness on the basis of Community law.[341] However, the Court considered itself empowered to check, indirectly, the lawfulness of the resolutions with regard to *jus cogens*.[342] Accordingly, the Court checked the compatibility of the implementing measures with the right to property, the right to be heard and the right to effective judicial review one by one by qualifying those rights as *jus cogens* on one hand; and on the other hand, it considered the restrictions proper and found no violation because it was a non-arbitrary "temporary precautionary measure" and with the purpose of maintenance of international peace and security.[343]

In the part of the judgment on the right to be heard, the CFI confirmed the UK's suggestion that it was open to the persons to bring an action for judicial review based on domestic law, indeed even directly on the contested regulation and the relevant resolutions of the SC which is put into effect, against any wrongful refusal by the competent national authority to submit their cases to the Sanctions Committee for re-examination.[344]

There is another point in the reasoning of the judgment which is worthy of notice—for example, for the right to be heard, the Court first stated the Community standard that

---

340 Ibid, para. 215.

341 Ibid, para. 225, 283.

342 Ibid, para. 226, 282.

343 Ibid, para. 247-251 for right to respect for property and the principle of proportionality; para. 274 for right to be heard; and para. 289 for right to effective judicial review.

> observance of the right to a fair hearing is […] a fundamental principle of Community law which must be guaranteed even in the absence of any rules governing the proceedings at issue. That principle requires that any person on whom a penalty may be imposed must be placed in a position in which he can effectively make known his views on the evidence on the basis of which the sanction is imposed.[345]

After the statement of the Community standard of the rights, the Court began to consider the lack of discretion in implementation and concluded that

> Community institutions had no power of investigation, no opportunity to check the matters […] no discretion with regard to those matters […] The principle of Community law relating to the right to be heard cannot apply in such circumstances.[346]

The Court confessed that "[i]n any case, the fact remains that any opportunity for the applicant effectively to make known his views on the correctness and on the evidence adduced against him appears to be definitively excluded."[347] This implies that if the Community standard would apply, the result of the case could turn out to be the opposite. The Court followed the same logic of reasoning concerning the other rights claimed.

In its judgment on 21 September 2005, the Court of First Instance rejected those complaints and confirmed the lawfulness of the regulations.

The Court had tried hard to accommodate all parties involved[348]—deference to the SC's decisions; declaration of impropriety of the SC 1267 Regime if it

---

344 Ibid, para. 270.

345 Ibid, para. 255.

346 Ibid, para. 258.

347 Ibid, para. 273.

348 Peter Hilpold, UN Sanctions Before the ECJ: the Kadi Case, in: August Reinisch (ed.), Challenging Acts of International Organizations before National Courts (2010),

were examined according to EC standards; and recognition of the disputed rights as *jus cogens*. As is commented, "[o]n one hand, it carried out a full investigation into the compatibility of the UN sanctions with EU fundamental rights; on the other hand, this investigation was rather indulgent."[349] Although the Court chose a very loose standard to check the SC measures on whether there is an arbitrary limitation to the fundamental rights, it in fact exercised jurisdiction as a competent forum to review SC conduct in light of *jus cogens* as the Court interpreted by itself.

However, the Court did not identify if the legal basis on the Court was a proper forum to give authoritative interpretation of *jus cogens* and check the legality of SC conduct based on the *jus cogens* as the Court interpreted.[350] In fact, from the opinion of the Permanent Court of International Justice ("PCIJ") in the *Question of Jaworzina* case, "it is an established principle that the right of giving an authoritative interpretation of a legal rule belongs solely to the person or body who has power to modify or suppress it."[351] The authoritative interpretation is the one with decisive value.[352] However, in the *Kadi I* case the CFI completely missed these issues before it applied the *jus cogens* to the case at hand.

I.A.ii The ECJ judgment in the appeal on Kadi I

Mr. Kadi filed an appeal to the European Court of Justice in 2005. In its

---

Oxford University Press, 29.

349 Ibid.

350 This argument against the ECJ's competence to check the lawfulness of the SC resolutions according to jus cogens was also raised by the French Republic, the Kingdom of Netherlands, the United Kingdom and the Council in the appeal. And the arguments are also raised against the CFI's interpretation of the concerned fundamental rights as within the scope of jus cogens. (para. 264 and 265 of the judgment rendered on 3 September 2008)

351 Question of Jaworzina (Polish-Czechoslovakian Frontier), PCIJ, Series B, No. 8 (Advisory Opinion of 6 December 1923), 37.

352 Ibid, 38.

judgment of 3 September 2008, the ECJ put the case together with the appeal of another case *Al Barakaat International Foundation v the Council* and used a different approach from the CFI judgment—a dualist approach.

The Court firstly emphasized that

> the Community is based on the rule of law, inasmuch as neither its Member States nor its institutions can avoid review of the conformity of their acts with the basic constitutional charter […] which established a complete system of legal remedies and procedures designed to enable the Court of Justice to review the legality of acts of the institutions.[353]

It confirmed that the autonomy of the Community legal system and the respect for human rights constituted the condition of the lawfulness of Community acts.[354] Therefore, the obligations imposed by an international agreement cannot have the effect of prejudicing the constitutional principles of the EC Treaty which include the respect of fundamental rights.[355] However, the Court also ruled that it was not for the Community judicature to review lawfulness of the SC resolution, even if that review were to be limited to examination of the compatibility of that resolution with *jus cogens*.[356]

Moreover, the Court explicitly stated that any judgment against the Community measure implementing SC resolutions for the reason of its incompatibility to Community Law would not entail any challenge to the primacy of the SC resolution in international law,[357] and the Court also emphasized the Community's obligation to observe the undertakings in the

---

353 Joint Cases C-402/05P and C-415/05P Yassin Abdullah Kadi and Al Barakaat International Foundation v Council and Commission, European Court of Justice (Grand Chamber), 3 September 2008, para. 281.

354 Ibid, para. 282-284.

355 Ibid, para. 285.

356 Ibid, para. 287.

357 Ibid, para. 288.

context of the UN and other IOs.[358]

However, the UN Charter does not impose the choice of a particular model for the implementation of resolutions adopted by the SC under Chapter VII, and the Member States are given a free choice among the various models for implementing those resolutions in their domestic legal order.[359] Therefore, the contested regulation cannot be considered as action of the SC exercising its Chapter VII powers.[360] Moreover, if the sanctions regime provided a review of the implementing measures in light of the fundamental rights, the Court thought that it should forgo its jurisdiction to show deference.[361] However, the Court considered the mechanism of Focal Point in essence diplomatic and intergovernmental.[362] Therefore, the Court asserted its competence of full review of the contested regulation, and considered it unnecessary to examine the issues concerning the *jus cogens* including the competence to review on the basis of *jus cogens* and its recognition of the concerned fundamental rights as of in the scope of *jus cogens*.

Finally, the ECJ assessed the regulation according to the EC standard and found the fundamental rights of the appellant were breached[363] and annulled the contested regulation but maintained its effect for a period not exceeding three months taking into consideration the effectiveness of the restrictive measures.[364]

To conclude, as for the margin of appreciation, the ECJ is different from the CFI by confirming the free choice of method of implementation. However in reality, in view of the design of the 1267 Regime it is not possible to see where the area of discretion should lie at least concerning who should be sanctioned under the 1267 Regime. This reality was confirmed again by the

358 Ibid, para. 292.
359 Ibid, para. 298.
360 Ibid, para. 314.
361 Ibid, para. 318.
362 Ibid, para. 323.
363 Ibid, para. 370.

General Court in *Kadi II*. As for its competence to review SC conduct, the ECJ also considered it not competent to review conduct either directly or indirectly. Therefore, the ECJ's reasoning is logically plausible, but contradictory to the reality.

I.B. The *Kadi II* case

I.B.i. The General Court judgment on Kadi II

After a series of measures after the ECJ's decision, Mr. Kadi challenged again the new regulation and the *Kadi II* case was brought before the General Court. The General Court explicitly recognized that the SC has inherent competence to adopt sanctions targeted at individuals rather than at States or their governments (smart sanctions), and that "such judicial review is liable to encroach on the Security Council's prerogatives".[365] The Court also confirmed the fact that

> a review of the legality of a Community act which merely implements, at Community level, a resolution affording no latitude in that respect necessarily amounts to a review, in light of the rules and principles of the Community legal order, of the legality of the resolution thereby implemented.[366]
>
> […] it has been pointed out that the necessary consequence of such a judgment – by virtue of which the Community measure in question is annulled – would be to render that primacy [of the SC resolution in international law] ineffective in the Community legal order.[367]

---

364 Ibid, para. 373-376.

365 Case T-85/09 Yassin Abdullah Kadi v European Commission, General Court, 30 September 2010, para. 114.

366 Ibid, para. 116.

367 Ibid, para. 118.

Although it recognized the above points, the General Court grudgingly followed the ECJ to do the review. It considered that it must

> ensure […] the full review of the lawfulness of the contested regulation in the light of fundamental rights, without affording the regulation any immunity from jurisdiction on the ground that it gives effect to resolutions adopted by the Security Council under Chapter VII of the Charter of the United Nations […] at the very least, *so long as*[368] the re-examination procedure operated by the Sanctions Committee clearly fails to offer guarantees of effective judicial protection.[369]

This is the so called *solange* rationale. In fact, in *Kadi I*, Advocate General Poiares Maduro seemed to make reference to *Solange* when he declared that the existence of a "genuine and effective mechanism of judicial control by an independent tribunal at the level of the United Nations […] might have released the Community from the obligation to provide for judicial control of implementing measures that apply within the Community legal order".[370] This part of his opinion was not fully adopted by the ECJ. However, in the *Kadi II* case, the General Court turned to this approach to deny the immunity of the regulations from the EU judicature and assume the Court's jurisdiction.

Besides, the Court also took considerations of the new development of the regime—the Office of Ombudsperson introduced by the SC Resolution 1904 (2009). However, the Court was still not satisfied with it, stating that

> [i]n essence, the Security Council has still not deemed it appropriate to establish an independent and impartial body responsible for hearing

---

368 Italicized by the author.

369 Case T-85/09 Yassin Abdullah Kadi v European Commission, General Court, 30 September 2010, para. 126-127.

370 Opinion of Advocate General Poiares Maduro, 16 January 2008 (Case C-402/05P), para. 54.

> and determining, as regards matters of law and fact, actions against individual decisions taken by the Sanctions Committee. Furthermore, neither the focal point mechanism nor the Office of the Ombudsperson affects the principle that removal of a person from the Sanctions Committee's list requires consensus within the committee. […] the creation of the focal point and the Office of Ombudsperson cannot be equated with the provision of an effective judicial procedure for review of decisions of the Sanctions Committee.[371]

As a consequence, the contested regulation was annulled according to the Community standard. The comment said that "it was nonetheless an acknowledgement that whether legally bound by them or not, the SC's failure to abide by human rights standards, might lead national and regional courts to decline to give its sanctions resolutions, within their respective jurisdiction, legally binding effect."[372]

I.B.ii. The judgment of the Court of Justice in the appeal on Kadi II

The European Commission, the Council of the European Union and the UK appealed the General Court's judgment on the *Kadi II* case to the Court of Justice of European Union on 10 December 2010.[373] The appeal came just after Mr. Kadi was delisted in October 2012. The appellants wanted a decision on the serious issues raised in *Kadi II*, in particular the question of the standard of review that EU courts will apply in reviewing the anti-terrorist sanctions

---

371 Case T-85/09 Yassin Abdullah Kadi v European Commission, General Court, 30 September 2010, para. 128.

372 Daphna Shraga, The Security Council and Human Rights—from Discretion to Promote to Obligation to Protect, in: Bardo Fassbender (ed.), Securing Human Rights?—Achievements and Challenges of the UN Security Council (2011), Oxford University Press, 35.

373 Joined Cases C-584/10 P, C-593/10 P and C-595/10 P, European Commission, Council of Europe and the UK v Yassin Abdullah Kadi, Court of Justice of European

imposed by the SC on private persons.[374] The judgment was delivered on 18 July 2013. The judgment upheld the decision of the General Court's striking down of the Regulation relisting Kadi, even if it overturned part of the General Court's reasoning on *Kadi II*.

As for the first ground of appeal about the error of law in that the contested regulation was not recognized as having immunity from jurisdiction, the Grand Chamber confirmed again that the contested regulations could not be afforded any immunity from jurisdiction on the ground that the objective was to implement Chapter VII resolution of the SC.[375]

The second and third grounds of appeal disputed the intensity of judicial review and error committed by the General Court in the examination of the pleas for annulment based on infringement of the rights of the defense and the right to effective judicial protection and the principle of proportionality. The Court accepted that the EU institutions could not meaningfully be required to adduce evidence they did not have.[376] But the Court did not consider it as a justification for exemption from obligations under EU law.[377] It is the obligation of the competent authority to seek assistance of the Sanctions Committee and, through that committee, the MS of the UN which proposed the listing of the individual concerned if it appears that further information is required to allow the authority to discharge its duty of stating the specific and concrete reasons which justify subjection to restrictive measures.[378] This indicated that the intensity of review is so enhanced that the Court will review whether reasons transmitted to the listed persons are sufficiently detailed and

---

Union, 18 July 2013, para. 1.

374 Antonios Tzanakopoulos, *Kadi* Showdown: Substantive Review of (UN) Sanctions by the ECJ, EJIL: Talk! (http://www.ejiltalk.org/kadi-showdown/).

375 Joined Cases C-584/10 P, C-593/10 P and C-595/10 P, European Commission, Council of Europe and the UK v Yassin Abdullah Kadi, Court of Justice of European Union, 18 July 2013, para. 65-68.

376 Ibid, para. 111.

377 Ibid, para. 114.

378 Ibid, para. 115.

specific.[379] If not even one reason is substantiated for the listing, the Court will annul the contested decision.[380]

Moreover, the Court commented again on the improvements of the Office of Ombudsperson saying that it still did not prove the guarantees of "effective judicial protection".[381] Further, the Court stated that

> [t]he essence of effective judicial protection must be that it should enable the person concerned to obtain a declaration from a court, by means of a judgment ordering annulment whereby the contested measure is retroactively erased from the legal order and is deemed never to have existed […][382]

Furthermore, The Court did not agree with the General Court that the non-disclosure of evidence by the EU institution of evidence they did not have was enough to violate Kadi's rights.[383] The reasons transmitted to the person should be reviewed separately and in substance.[384]

This judgment is very significant in enhancing the judicial review and emphasis on the state's efforts to protect human rights. The EU Courts insisted on and increased intensity of the judicial review of the implementation measures, and consequently increased its pressure on the 1267 Sanctions Regime.

II. The issues involved in the *Kadi* case

379 Ibid, para. 118-119.

380 Ibid, para. 130.

381 Ibid, para. 133.

382 Ibid, para. 134.

383 Joined Cases C-584/10 P, C-593/10 P and C-595/10 P, European Commission, Council of Europe and the UK v Yassin Abdullah Kadi, Court of Justice of European Union, 18 July 2013, para. 138-139.

384 Ibid, para. 140.

II.A. The dualist approach to justify the review

As pointed out in the CFI's judgment of the *Kadi I* case, the Court did not identify its legal basis of whether the Court was a proper forum to give authoritative interpretation of *jus cogens* and check the legality of the SC's conduct based on the *jus cogens* as the Court interpreted. In fact, the Court should have to justify its competence to review SC conduct first and then go into the review. The lack of reasoning about such justification was one factor which rendered the judgment problematic. The binding force of *jus cogens* on SC conduct does not necessarily entail that any judicial body has competence to review SC conduct according to *jus cogens*.[385] Therefore, as the lack of a centralized institution to decide on the lawfulness of the SC Resolutions, it is crucial that when judicial institutions intend to be involved in direct review of SC conduct, the judicial institution has to first justify its competence to do so.

However, if the Court adopts the dualist approach to review national or regional implementation measures, the competence problem would be reduced in theory. As with the ECJ's judgment in the appeal of *Kadi I*, the Court adopted the dualist approach to address only EU regulations not to SC resolutions. From such an approach, the Court was not faced with the question on its own competence to do such a review.

To adopt the dualist approach, the ECJ was based on two factors: the "autonomy of the Community system"[386] and a free choice to transposition of SC Resolutions.[387] As for the autonomy of the Community legal system, it can

---

385 Peter Hilpold, UN Sanctions before the ECJ: the *Kadi* case, in: August Reinisch (ed.), Challenging Acts of International Organizations before National Courts (2010), Oxford University Press, 28.

386 Joint Cases C-402/05P and C-415/05P Yassin Abdullah Kadi and Al Barakaat International Foundation v Council and Commission, European Court of Justice (Grand Chamber), 3 September 2008, para. 282.

387 Dapo Akande, ECHR Grand Chamber to Hear Case Challenging Legality of UN Security Council Sanctions, EJIL Talk! (http://www.ejiltalk.org/echr-grand-chamber-to-hear-case-challenging-legality-of-un-security-council-sanctions/).

be explained as being emblematic of the thinking of domestic public lawyers of the US that individual rights under the US Constitution cannot be overridden by the UNSC as a matter of US law and that Article 103 of the Charter does not even claim that type of direct effect and primacy.[388] Of course, as far as international law is concerned, domestic law cannot be an excuse for failing to comply with an international obligation, but that does not mean that the international obligation prevails over the domestic one in a hierarchical sense. The law simply operates in two independent legal orders.[389]

However, are the so-called "independent orders" really independent from each other? This question is not very certain and it is doubted that the EU is also a system created by treaties between sovereign states, from which independence cannot be persuasively justified merely by declaration of the autonomy of the system.[390]

As for the margin of appreciation on the choice of modes for implementation, the fake margin of appreciation is the same as declared in the *Nada* case, which is discussed in detailed in Chapter Five, II.B.i. If there is any choice for the states, it is only up to them to choose between the administrative or legislative, but there is no choice of who should be subject to sanctions or what sanctions should be imposed, etc.

Therefore, although theoretical recognition of independence and convenient confirmation of the margin of appreciation may justify the review of national or regional implementing measures, the result of the review is either to endorse the legality of the implementing measure by loose examination or invalidate the implementing measures with the SC resolutions remaining binding on the State. For the former (to endorse the legality), it is to use the judicial convenience to avoid the dilemma of the States. For the latter (to

---

388 Marko Milanvic, More on Nada v Switzerland, EJIL Talk! (http://www.ejiltalk.org/more-on-nada-v-switzerland/).

389 Ibid.

390 Marko Milanvic, The Human Rights Committee's View in *Sayadi v Belgium*: A Missed Opportunity, 1(3) Goettingen Journal of International Law (2009), 525.

invalidate the measure), it would absolutely render the States into a hard situation contradictorily bound by both the decisions of judiciary of its own and the obligation imposed by the SC Resolutions according to the UN Charter.

The *Kadi I* case followed the latter situation, but the Court fully realized the embarrassing situation and decided to maintain the effect of the contested implementing regulation for a period that may not exceed three months.[391]

The fact turned out that the compromised considerations of the ECJ in *Kadi I* did not solve the problem. That is why *Kadi II* appeared before the General Court. Although the General Court confessed that there was no margin of appreciation and the review on the implementing measure would encroach the prerogative of the SC,[392] the General Court also followed the dualist approach for the review. The regulations were annulled again but the SC resolutions remained intact. Mr. Kadi's name was removed from the 1267 Sanction Regime's blacklist on 5 October 2012, which is more than two years after the decision of *Kadi II*.

II.B. The effect of the judgments towards the SC

Although the *Kadi* case judgments are problematic in different aspects, the effects of these judicial rulings are worthy of studying. On one hand, the decisions of the Courts are binding on the EC institutions. On the other hand, those decisions hardly have legal binding force on the SC or the UN in general. To address the issue of the effect of Courts' judgments, it is necessary to expand the scope of judgments from EU legal system to general domestic courts' judgments.

---

391 Joint Cases C-402/05P and C-415/05P Yassin Abdullah Kadi and Al Barakaat International Foundation v Council and Commission, European Court of Justice (Grand Chamber), 3 September 2008, para. 376.

392 Case T-85/09 Yassin Abdullah Kadi v European Commission, General Court, 30 September 2010, para. 114.

As the decisions of the domestic courts are binding in the domestic jurisdiction and the acts of the judicial organs of states are attributed to the respective states.[393] The announcement of violation of human rights norms of SC decisions by domestic courts constitutes the MS's announcement of such violation. Karl Doehring explained it by "duty of loyal cooperation".[394] He pointed out that the duty of MS imposed by SC decisions can be used to demand an unlimited subordination under the organization's goal.

> However, this loyalty excludes behavior which tends to hamper the commonly accepted purposes. […] it seems appropriate that a state, before acting autonomously and unilaterally against a resolution of the Security Council, arguing that it violates peremptory norms of international law, should inform the Council about its refusal and its intention not to act in conformity with the resolution.
>
> The duty to loyal cooperation […] would be accomplished when the Security Council seriously investigates the arguments of the protesting state and the invoked facts, and when the Security Council seriously considers whether its decisions could be annulled, modified or maintained so far as they entail obligations of the states.[395]

Although Karl Doehring talked in the context of *jus cogens*, it also can be comparatively applied to other applicable rules limiting SC conduct and even human rights norms. For example, the *Nada v Switzerland* before ECtHR mentioned in the part of the circumstances of the case that

> by motion passed on 1 March 2010, the Foreign Policy Commission of

---

393 Draft Articles on Responsibility of States for Internationally Wrongful Acts (2001), art. 4 (1).

394 Karl Doehring, Unlawful Resolutions of the Security Council and their Legal Consequences, 1 Max Planck Yearbook of International Law, 106.

395 Ibid.

> the Swiss National Council (lower house of the federal parliament) requested the Federal Council to inform the UN Security Council that from the end of 2010 it would no longer unconditionally be applying the sanctions prescribed against individuals under the counter-terrorism resolutions.[396]

In fact, a letter dated 22 March 2010 was sent to the Chair of the 1267 Sanctions Committee from the Permanent Representative of Switzerland to the United Nations. It informed the Chair of a motion passed by the Parliament, which was an instrument to instruct the government to take some action. This letter transcribed the motion and explained its effect:

> "1. The Federal Council is asked to notify the UN Security Council that, from the end of this year, it will no longer apply the sanctions imposed against any physical individuals on the basis of the resolutions adopted in the name of the fight against terrorism, since
> [Four due process problems of the 1267 sanctions regime]
> 2. […] it is not acceptable for a democratic country founded on the rule of law that sanctions imposed by the Sanctions committee, excluded from any procedural guarantee, result in the suspension, for years and without any democratic legitimacy, of the most elementary fundamental rights, rights that are justly proclaimed and promoted by the United Nations Organization."
>
> The granting of the motion will not cause any imminent changes in the application […] Those sanctions will remain applicable in Switzerland as long as the four cumulative conditions stipulated in the motion are not

396 Nada v Switzerland, Application No. 10593/08, ECtHR, 12 September 2012, para. 63.

found to characterise a given case.[397]

The motion of the Swiss National Parliament can be seen as a corresponding practice of Karl Doehring's term of "duty of loyal cooperation". The motion indicates that the Parliament of Switzerland will not cooperate with the sanctions regime on a case by case basis if it is found that any of the stated four situations of derogations to the due process rights[398] are characterized. In other words, the "duty of loyal cooperation" is not established in such a case as "to hamper the commonly accepted purposes" of protecting fundamental human rights.

Although it is not a general defiance but defiance in certain specific cases, Switzerland still faced the risk of misinterpretation. In fact, the Security Council responded in vague terms. In the letter dated 21 May 2010, the Chairman of the 1267 Sanctions Committee replied to the Permanent Representative of Switzerland saying that

> the Committee expresses its concern that this motion by the Swiss Parliament brings into question the ability of the Government of Switzerland to fulfill its obligation to apply measures adopted by the Security Council under Chapter VII […]
>
> Relatedly, the Committee wishes to recall the obligation of all members of the United Nations to carry out the decision of the Security Council adopted under Chapter VII [… pursuant to Article 25, 48 and 103 of the UN Charter].[399]

---

397 A letter to the Chair of the 1267 Sanctions Committee Mr. Thomas Mayr-Harting from Permanent Representative Ambassador of Switzerland Peter Maurer, 22 March 2010 (http://assembly.coe.int/CommitteeDocs/2010/07122010_blacklists.pdf).

398 Ibid. The four situations are: the individuals concerned have been "blacklisted" for over three years and have still not been brought before a court; they have not been allowed to appeal to an independent authority; no charges have been brought against them by a judicial authority; and no new evidence against them has been put forward since they were blacklisted.

399 A letter from the Chair of the 1267 Sanctions Committee Mr. Thomas Mayr-Harting

The reply can be understood as the SC respected the separation of powers in the national constitution and recognized the difficult position of the government. But on the other hand, the SC insisted on the obligations and supremacy of the obligations imposed by the UN Charter on all the MS.

Therefore, this cannot be interpreted as a general tolerance of defiance in such a manner. It indicates that the decision by the national democratic organ cannot relieve the government of the legal obligation to abide by the SC's decisions. The separation of powers at the national level may be detrimental to the full implementation of the sanctions. The refusal to give the sanctions effectiveness in a specific case is not necessarily communicated from the legislative branch and is more possibly from the judiciary.

There is significant pressure on the SC because the operational effectiveness of the sanctions regime may be significantly undermined.[400] Karl Doehring elaborates it as "[t]he risk of a misinterpretation of international law rests with the state; the risk of an ineffectiveness of its machinery rests with the United Nations."[401]

Actually, the *Kadi* case can be considered as an announcement of human rights challenge to the legality of the 1267 Regime expressed by a judicial organ. Peter Hilpold expressed his worry about a fierce confrontation between the EU and the UN in the sphere of human rights.[402] He answered himself that this may not necessarily be the case as the UN has already evidenced some willingness to reform and to take into account several points of criticism with

---

to Permanent Representative Ambassador of Switzerland Peter Maurer, 21 May 2010 (http://assembly.coe.int/CommitteeDocs/2010/07122010_blacklists.pdf).

400 That the negative reactions from MS would undermine the operation effectiveness of the particular SC-led activities is also noticed by Machiko Kanetake from the perspective of community accountability, see n. 42, 126, 127.

401 Karl Doehring, Unlawful Resolutions of the Security Council and their Legal Consequences, 1 Max Planck Yearbook of International Law, 109.

402 Peter Hilpold, UN Sanctions Before the ECJ: the *Kadi* Case, in: August Reinisch (ed.), Challenging Acts of International Organizations before National Courts (2010), Oxford University Press, 48.

regard to the sanctions mechanism. It can clearly be seen in the example of SC Resolution 1904 (2009) that it encouraged MS and relevant IOs to inform the Committee of any relevant court decisions and proceedings,[403] established the Office of Ombudsperson[404] and encouraged the Committee to continue to ensure that fair and clear procedures exist for placing individuals and entities on the Consolidated List and for removing them as well as for granting humanitarian exceptions.[405] Although this progress did not satisfy the General Court in *Kadi II*, it still indicates the influence from domestic assessments of the sanctions regime.

III. Interim conclusion

The *Kadi* case clearly initiates the question on the legality of SC conduct and also shows us different angles to see the issues involving review of SC conduct.

Kadi I was a bold direct review according to *jus cogens*. But the CFI failed to justify its competence to review SC conduct in light of *jus cogens* as the Court interpreted by itself. The EU Courts in the latter two judgments on the appeal of *Kadi I* and *Kadi II* seemed to insist on the human rights standard of the EU system and therefore applied the rules of human rights in the EU context to do the review without compromise with the prerogative of the SC except with respect to some lip service.

This kind of review was justified by the dualist approach of the Courts. That is why the Court did not bother to involve the question of the scope of the SC's human rights obligations.

Indicated by the fact that some lip service to the SC's prerogative was necessary, the SC's prerogative in the administration of the targeted sanctions regime was not changed in a legal sense. The de-listing of Mr. Kadi still had to

403 S/RES/1904, 17 December 2009, para. 15.

404 Ibid, para. 21.

405 Ibid, para. 34.

go through the procedures in the Sanctions Committee. Otherwise, Mr. Kadi could not be removed from the list according only to the judgments.

However, we cannot say that the judgments had no effect on Mr. Kadi's final de-listing from sanctions. As for to what extent the judgments facilitated the de-listing, at least the individuals get a chance to engage State parties of the UN in the process of de-listing, who must have more resources and access to the information in solving their embarrassing situation. Furthermore, it is a way to engage the state parties in advancing the evolution of the quality of the rule of law governing the sanctions regime.

CHAPTER FIVE: Review by other judicial or quasi-judicial institutions established under International Law

As for the control by the other judicial or quasi-judicial institutions established under international law, the Human Rights Committee ("HRC") and the ECtHR are taken as examples to explain the approaches in dealing with the legality of SC Resolutions. Before entering the examination of the approaches, it is necessary to point out that availability of the treaty bodies are limited to their members, so are far from being universal. Bearing in mind the limitations, the approaches adopted will show the other limitations apart from the narrow availability of the mechanisms to the individuals. However, this study also considers these mechanisms as promising for those able to access and for clarification of the stance towards the human rights problems of SC conduct.

I. The *Sayadi* case[406] approach of the HRC

The competence of the HRC to receive and consider individual communications is provided by the First Optional Protocol to ICCPR. However, the mechanism is only available to the State Parties of the Protocol and only 114 out of 167 Parties of the ICCPR ratified the Protocol.[407] Moreover, the decisions of the HRC are not considered as binding.

Against this background, the approach of the HRC is examined in the example of the *Sayadi* case because this case is considered as the HRC's *Kadi*[408]

---

406 Sayadi and Vink v Belgium, CCPR/C/94/D/1472/2006, Human Rights Committee, 22 October 2008.

407 The ratification status (http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-5&chapter=4&lang=en), last visited on 28 August 2013.

408 Marko Milanovic, Sayadi: The Human Rights Committee's Kadi (http://www.ejiltalk.org/sayadi-the-human-rights-committee's-kadi-or-a-pretty-poor-excuse-for-one…/).

which touches upon the legality of the SC's conduct.

I.A. The reasoning of the case

The *Sayadi* case was decided on 22 October 2008, which was communicated to the HRC on 14 March 2006 by Belgian nationals Mr. Nabil Sayadi and Ms. Patricia Vink, whose names were appended to the 1267 Sanctions Regime's Consolidated List on 23 January 2003. Their names were also appended to EU Council Regulation and Belgian Ministerial Order accordingly.[409] A criminal investigation of Sayadi and Vink was initiated on 3 September 2002 at the request of the Belgian Public Prosecutor's Office.[410] On 11 February 2005, they obtained from the Brussels Court of First Instance an order requiring the Belgium State to initiate the procedure to have their names removed from the Sanctions Committee's list. For the inaction of the Belgian State, a daily fine for delay in performance was imposed by the Court on the state. The state started the de-listing procedure in the Sanctions Committee on 25 January 2005. After that Sayadi and Vink were found innocent by the Judge's Chambers of the Brussels Court of First Instance on 19 December 2005.[411] However, the de-listing decision had not been delivered at the time of this case being brought before the HRC.

Before the HRC, the authors alleged Belgium's violations of several articles of the ICCPR, basically claiming violations of their right to an effective remedy, right to travel freely, right not to be subjected to unlawful attacks on their honor and reputation, the principle of legality of penalties, respect for the presumption of innocence and the right to proceedings that afford procedural and structural guarantees.[412]

---

409 Sayadi and Vink v Belgium, CCPR/C/94/D/1472/2006, Human Rights Committee, 22 October 2008, para. 1 and 2.3.

410 Ibid, para. 2.1.

411 Ibid, para. 2.5 and 2.6.

412 Ibid, para. 3.1-3.13. and para. 10.4.

In this case, the HRC was faced with the problem of possible review of the SC resolution according to the human rights principles of the ICCPR. The HRC avoided review of the SC resolution, but chose to review on the compatibility between the domestic implementing measures and human rights principles.[413] Concerning the admissibility of the case, the HCR stated that

> [w]hile the Committee could not consider alleged violations of other instruments such as the Charter of the United Nations, or allegations that challenged United Nations rules concerning the fight against terrorism, the Committee was competent to admit a communication alleging that a State party had violated rights set forth in the Covenant, regardless of the source of the obligations implemented by the State party.[414]

Besides, in the part of consideration of the merits on the possible conflict of rules between the UN rules and the ICCPR, the HRC considered that

> there is nothing in this case that involves interpreting a provision of Covenant as impairing the provisions of the Charter of the United Nations. The case concerns the compatibility with the Covenant of national measures taken by the State party in implementation of a Security Council resolution.[415]

By this statement, the HRC avoided the problem of the possible violation of the human rights rules by the SC and avoided the interpretation of Article 103 of the UN Charter in solving the conflict. In other words, the HRC avoided the chance to reason on the question whether the SC Resolutions can prevail over human rights treaties by virtue of Article 103 of the UN Charter. Instead,

---

413 Ibid, para. 10.3.

414 Ibid, para. 7.2.

the object of the examination was the implementing measures of Belgium.

In consideration of the alleged violation of Article 12 about the right to travel freely, the HRC considered to what extent the obligations imposed by the SC Resolutions may justify the infringement of the right to travel freely.[416] Then, the HRC answered the question by examining whether the restriction to the right to travel freely is necessary to protect national security or public order according to Article 12(3).[417] Finally, the HRC held that the presence of the applicants' name on the blacklist of the SC is not necessary to protect national security or public order and constitute violation due to the fact that the applicants were found innocent and requested to be delisted by the Belgian authorities.

As for the alleged violations of Article 14(2) and (3) about the sanctions procedure, the HRC did not consider the sanctions as criminal in nature although the serious consequences were punitive in nature.[418] Therefore, there was no violation of Article 14(2), (3) or Article 15, all of which concerned criminal charges.

As for the Article 17 about the right of protection against arbitrary or unlawful interference with of privacy, and unlawful attack on honor and reputation, the HRC considered that the presence of the applicants' personal information to the Sanctions Committee before the criminal investigation finished was a violation of Article 17.

Concerning Article 2(3)a about the right to effective remedy, the HRC also considered the incapability of the state party to remove the names from the list. The HRC asserted that

> the State party has the duty to do all it can to have their names removed from the list as soon as possible, to provide the authors with some form

---

415 Ibid, para. 10.3.

416 Ibid, para. 10.6.

417 Ibid, para. 10.7.

418 Ibid, para. 10.11.

> of compensation and to make public the requests for removal. The State party also obliged to ensure that similar violations do not occur in the future.[419]

This statement is significant in the sense that it emphasized the state's efforts to help the specific individuals in their cases of de-listing and provide remedies.

I.B. The issues involved in the case

The HRC's opinion on the case has no binding force on the parties, however its authority depends on the quality of its legal reasoning. The following two issues may indicate some problems and some enlightenment from this case.

I.B.i The avoidance of considering Article 103 of the UN Charter

The problematic aspects of the reasoning of the HRC to avoid mentioning Article 103 of the UN Charter were indicated in the individual opinions. Mr. Ivan Shearer was against the opinion that the State Party was wrongful in transmitting the applicants' names to the Sanctions Committee before the conclusion of the criminal investigation. He pointed out that

> the Committee's reasoning […] appears to regard the Covenant as on a par with the United Nations Charter, and as not subordinate to it. Human rights law must be accommodated within, and harmonized with, the law of the Charter as well as the corpus of customary and general international law.[420]

---

419 Ibid, para. 12.

420 Ibid, Appendix B: Individual opinions on the Committee's decision on the merits—

The HRC failed to address Article 103 of the UN Charter which provides for the priority of the Charter obligations to other treaty obligations. The ICCPR is not an exception. Mr. Yuji Iwasawa, in his concurring opinion, did not consider that the HRC can sidestep the supremacy of the UN obligations provided by Article 103 of the UN Charter through the approach to review the national implementing measures.[421] The complete disregard of Article 103 of the UN Charter by the HRC's reasoning is obviously problematic.

In the assessment of the alleged violation of Article 12, the HRC considered the justifications prescribed by the same Article for the derogation in the implementation of the SC resolutions. However, if the mere implementation could be considered as a violation, the Article about the justifications for derogation should not be applicable as well according to Article 103 of the UN Charter.[422]

The issue can be characterized as a norm conflict between the UN Charter and the ICCPR. There are several options to solve the problems as suggested by Milanovic:

> First, it could obviously have been decided […] that the ICCPR was displaced or qualified by the UNSC resolutions, by virtue of Article 103 of the Charter.
>
> Second, the Committee could have tried to minimize the scope of the conflict, or avoid it by attempting to harmoniously interpret the relevant UNSC resolution and the ICCPR, [supported by a presumption that the UNSC did not intend to infringe on human rights in case of absence of a clear statement to the contrary.]

---

individual opinion of Committee member Mr. Ivan Shearer (dissenting).

421 Ibid, Appendix B: Individual opinions on the Committee's decision on the merits—individual opinion of Committee member Mr. Yuji Iwasawa (concurring).

422 Marko Milanovic, The Human Rights Committee's Views in *Sayadi v. Belgium*: A Missed Opportunity, 1(3) Gottingen Journal of International Law (2009), 526.

> Finally, […] the Committee could have directly engaged in the review of the relevant UNSC resolution.[423]

The first option was reflected in Mr. Ivan Shearer's dissenting opinion. However, for the purpose of finding ways to review or comment on SC conduct, this option is not preferred, because it completely disregards the possibility of illegality of SC conduct in light of human rights rules.

The second option about harmonious interpretation was reflected in the concurring opinion of Sir Nigel Rodley,[424] and can also be found in the ICJ's *Lockerbie* case, in which the SC's conduct was intended to be examined.

As for the third option to directly review the SC resolutions, the HRC may encounter the problem of competence to review the SC's conduct, and the problem of choosing the human rights standard applicable to the UN. In Sir Negel Rodley's opinion, although it was not the HRC's issue to assess the legality of the SC resolutions, he also suggested several criteria: (1) the *jus cogens*; (2) the non-derogable rights; (3) the principle of necessity and proportionality; and (4) State practice in relation to the SC decisions as an interpretative factor.[425]

The avoidance of addressing Article 103 of the UN Charter is a problem of reasoning, and the HRC missed the chance to give a well-reasoned case supporting the protection of individuals' rights against the SC's problematic targeted sanctions.

I.B.ii. The covered problem of attribution

Unlike the *Kadi* case or *Nada* case, the HCR in the *Sayadi* case did not

---

423 Ibid, 533-536.

424 Sayadi and Vink v Belgium, CCPR/C/94/D/1472/2006, Human Rights Committee, 22 October 2008, Individual opinion of Committee member Sir Nigel Rodley (concurring), 36.

425 Ibid, Individual opinion of Committee member Sir Nigel Rodley (concurring), 37.

mention the margin of appreciation of national authority as the basis to review of the implementation measures rather than the SC Resolutions themselves.

The individual opinions of Mr. Ivan Shearer and Ms. Iulia Antoanella Motoc pointed out that as the State Party has done what it could to secure the de-listing and was the only remedy within its power. Therefore,

> unless the Committee believes that the State party's mere compliance with the Security Council listing procedure (in the absence of bad faith by the State party or of manifest abuse of overstepping of the Security Council's powers) is capable of itself of violating the Covenant, it is not clear how the authors can still be considered victims, under article 1 of the Optional Protocol, of violations of the State party's obligations under Covenant.[426]

Unjust harms were imposed by the SC Resolutions. However, "the Security Council cannot be impeded under the Covenant, much less the Optional Protocol."[427] This view is shared by Mr. Ruth Wedgwood that the state should not be penalized for complying with the decisions of SC. The only actions taken by Belgium were in accordance with the binding mandate of the SC.[428]

From such statements comes the covered problem in the case of attribution of conduct—whether wrongful conduct could be attributed to the UN rather than the states which were merely implementing the SC's instructions.

Article 6(1) of Draft Articles on the Responsibility of International Organizations ("IOs' Responsibility Articles") provides that "[t]he conduct of an organ or agent of an international organization in the performance of

---

426 Ibid, Appendix A: Individual opinions on the Committee's decision on admissibility—Individual opinion (partly dissenting) by Committee members Sir Nigel Rodley, Mr. Ivan Shearer and Ms. Iulia Antoanella Motoc.

427 Ibid, Appendix A: Individual opinions on the Committee's decision on admissibility—Individual opinion (dissenting) of Ms. Ruth Wedgwood, 27.

428 Ibid, Appendix A: Individual opinions on the Committee's decision on admissibility—Individual opinion (dissenting) of Ms. Ruth Wedgwood.

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".

There is no doubt that the conduct of the SC is attributable to the UN according to the organic link recognized in Article 6(1) of IOs' Responsibility Articles. However, the key issue is to whom the MS's implementation of those SC binding resolutions which leave little discretion to MS could be attributed. In the context of this Article, the question can be phrased as whether the national implementing measures of the strict SC Resolutions can be regarded as conduct of the SC in the sense of an agent of the UN.

The Commentary of this Article explains the agent according to the ICJ's jurisprudence. The ICJ considered relevant only the fact that a person had been conferred functions by an organ of the UN and did not consider relevant the fact the person in question had or did not have an official status. Therefore it is understood "in the most liberal sense" as "any person through whom it acts".[429] Furthermore, the Commentary stated that "[t]his term is intended to refer […] also other persons acting for the United Nations on the basis of functions conferred by an organ of the organization." It is possible that the MS could be considered as an agent of the UN in implementing the measures directed by the Chapter VII SC Resolutions. However, this point needs further clarification.

Article 7 provides for the control link—effective control:

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

---

[429] Draft articles on the responsibility of international organizations, with commentaries, 2 Yearbook of the International Law Commission (2011), Part II, 17. Reparation case,

The Commentary pointed out the difference between Article 6 and Article 7. "[…] when an organ or agent of one international organization [or of a State] is fully seconded to another organization. In these cases, the general rule set out in article 6 would apply." If the "seconded organ or agent still acts to a certain extent as organ of the seconding State or as organ or agent of the seconding organization," the Article 7 would apply.[430] The Commentary takes the UN PKO as example to explain the Article 7 situation, in which the control link determines the attribution of the conduct—"whether a specific conduct of the seconded organ or agent is to be attributed to the receiving organization or to the seconding State or organization."[431]

This Article provides for "effective control". As for the MS's implementation of the strictly binding SC Resolutions, take the 1267 Regime as an example, there is no margin of appreciation which was recognized by CFI in *Kadi I* and *Kadi II* and also indirectly recognized by the *Nada* case.[432] The traditional implementation of SC Resolutions by achieving the result the SC Resolutions dictate with free choice of methods cannot be practicably applicable to new SC Resolutions as the 1267 Regime which dictates both the methods and results for the implementation.

As the listing and de-listing of person under sanctions list, and the measures imposed on those listed persons fall into the exclusive competence of SC through the Sanctions Committees, it is a question that whom the conduct should be attributed to. This question contributed to the present difficulties in the judicial practice that neither the implementing state nor the UN can be easily held responsible for the breach of the individuals' human rights guaranteed by either national constitutional documents or international human rights treaties. For the purpose of judicial control by the domestic courts over

177.

430 Ibid, Part II, 19-20.

431 Ibid, 20.

432 See the detailed explanation in Chapter Five.

the implementing measures, the courts should always recognize the margin of appreciation at first such as the ECJ in *Kadi I*. However, this argument is more a matter of convenience than stating the fact. The ILC Commentary of this Article is very cautious about the problem concerning an affected third party. It stated that

> [t]he agreement [between the seconding state or organization and receiving organization] appears to deal only with distribution of responsibility and not with attribution of conduct. At any event, this type of agreement is not conclusive because it governs only the relations between the contributing State or organization and the receiving organization and could thus not have the effect of depriving a third party of any right that party may have towards the State or organization which is responsible under the general rules.[433]

In the situation of the 1267 Regime, neither the problems of distribution of responsibility nor the attribution of conduct can be solved according to the Charter or the relevant SC Resolutions. Gaja in his report pointed out from the perspective of distribution of responsibility that

> [w]hen an international organization is entitled to take decisions that bind member states, implementation of the decision on the part of member states may result in a wrongful act. Should the Member States be given discretion so that they may comply with the decision without breaching an international organization, the organization could not be held responsible.[434]

A different scenario would exist if the mandated conduct necessarily

---

433 Draft articles on the responsibility of international organizations, with commentaries, 2 Yearbook of the International Law Commission (2011), Part II, 20.

434 Giorgio Gaja, Special Rapporteur, Third report on responsibility of international organizations, A/CN.4/553, 13 May 2005, para. 30.

> implied the commission of a wrongful act. In this case the organization's responsibility would also be involved.[435]

Gaja examined the ECtHR jurisprudence in the *Bosphorus* case and noted that the Court only envisaged exoneration from responsibility for the state concerned and did not address the question of the responsibility of an IO due to the lack of jurisdiction *ratione personae*.[436] However, he still considers it important to address the problem and proposed a solution to hold the IO responsible by introducing the term "normative" control.[437]

Normative control is the pertinent term addressing the situation in which the SC adopts Chapter VII resolutions imposing strict obligations on MS and affecting individuals' rights directly. However, the term is not mutually exclusive to the term "factual control". As Gaja pointed out,

> [t]here may be cases in which the organization's power to bind member states through its decisions is accompanied by elements that ensure enforcement of those decisions, so that normative control would correspond in substance to factual control.[438]

These cases are exactly which the 1267 Sanctions Regime represents. Therefore, those situations can be characterized as both factual and normative control by the SC. Although the ILC adopts only the effective control in the IOs' Responsibility Articles, the attribution of the conduct to the SC in terms of normative control as effective control in the situations pointed out and understood by Gaja in the Report cannot be ruled out.[439]

---

435 Ibid, para. 31.

436 Ibid, para. 33.

437 Ibid, para. 35.

438 Ibid.

439 Antonios Tzanakopoulos, Disobeying the Security Council: Countermeasures against Wrongful Sanctions (2011), Oxford University Press, 40.

Therefore, there are possibilities to attribute the conduct of MS in their implementation of strict SC Resolutions to the UN and hold the UN responsible for wrongful conduct according to the elaboration of the IOs' Responsibility Articles provisions and the theoretical understandings. However, the situations are more complicated in practice than the already complicated principled view.

First, the understanding of the control link by the courts and the UN may be different. In the *Behrami and Behrami* case, the ECtHR adopted the ultimate control link. The Court determined whether the impugned action can be attributed to KFOR by ruling that

> the key question is whether the UNSC retained ultimate authority and control so that operational command only was delegated. […][440]
>
> That the UNSC retained such ultimate authority and control, in delegating its security powers by UNSC Resolution 1244, […][441]
>
> KFOR was exercising lawfully delegated Chapter VII powers of the UNSC so that the impugned action was, in principle, "attributable" to the UN […][442]

However, the UN took another opinion about the determining control link. The Secretary-General stated that

> The European Union will perform an enhanced operational role in the area of the rule of law under the framework of resolution 1244 (1999) and the overall authority of the United Nations. […] It is understood that the international responsibility of the United Nations will be limited

---

440 The Admissibility of Application no. 71412/01 by Agim BEHRAMI and Bekir BEHRAMI v France and Application no. 78166/01 by Ruzhdi SARAMITI v France, Germany and Norway, 2 May 2007, para. 133.

441 Ibid, para. 134.

442 Ibid, para. 141.

in the extent of its effective operational control.[443]

Therefore, neither ultimate control nor overall control but the effective operational control link is supported by the UN in determining the attribution issue. Furthermore, the attribution issue may be different between the eyes of the courts entertaining the case and the UN, which may result in the situation that neither the States nor the UN could be held responsible.

Second, the conduct of the organ(s) of states is usually attributed to the state according to Article 4 of the Draft Articles on Responsibility of States for Internationally Wrongful Acts ("State Responsibility Articles")[444] and usually without the issue of normative control as effective factual control under Article 7 of the IOs' Responsibility Articles. It provides that the conduct of an organ of a state be attributable to that state, and allows very few exceptions to that general rule, namely the state organ placed at the disposal of another state according to Article 6. However, this kind of attribution is sometimes based on a fake declaration of existence of margin of appreciation as in the *Kadi* case for the purpose of upholding the attribution of the conduct to the implementing state and enabling the review on the conduct.

Third, as it is shown in the *Mothers of Srebrenica* case, the absolute immunity of the UN will bar the domestic courts from reviewing conduct attributable to the UN before going into the merits. The jurisprudence of "reasonable alternative means" in *Waite and Kennedy* were refused to be applied to the case with the UN involved.

Fourth, in many cases before international tribunals unlike the *Mothers of Srebrenica* case, it is not the UN which is brought before a court but the implementing state which was a party to the case like the *Kadi* case and *Nada* case, in which the lack of *ratione personae* of the specific court would strike down

---

443 Report of the Secretary-General on the United Nations Interim Administration Mission in Kosova, S/2008/354, 12 June 2008, para. 16.

444 Antonios Tzanakopoulos, Disobeying the Security Council: Countermeasures against Wrongful Sanctions (2011), Oxford University Press, 35.

the case if the UN would have been brought. It is understandable that the Courts declared the margin of appreciation even though not for the purpose of upholding the jurisdiction of the Courts and give a indirect review or a comment on the conduct of the SC. For example, in the *Kadi* case, the Courts were not faced with the problem of attribution, but considered the case on the presumption that the adoption of the relevant EC Regulations attributes to the Communities without any dispute on this issue. Moreover, the ECJ also recognized the margin of appreciation before going on to review the implementing measures of EU. Although the CFI in *Kadi I* and the General Court in *Kadi II* considered there was no margin of appreciation left to the MS, the Courts did not tend to attribute conduct to the UN. Instead, the Courts focused on review of the legality of the implementing measures although the CFI examined the SC Resolutions in light of the *jus cogens* with a lax standard. It is hardly imagined how the CFI would conclude the decisions if it could hold the SC in breach of *jus cogens* because the UN is not a party to the case and the decision of the Court cannot affect the legal effect of the SC Resolutions. It is commented as acceptance of the review by the court but not by reviewing in effect.[445]

Fifth, even though the approach of just reviewing the implementation measures solved the problem of jurisdiction of the domestic or certain human rights institutions entertaining the case and rendered the implementing measures invalid, it does not mean that the state then is free to derogate from what the SC has dictated in its strict SC Resolutions. The non-abidance is legal in the internal sense and not so sure in the international sense if the SC insists that the non-abidance is a breach of its obligations under the UN Charter which are superior to the other treaty obligations.

Sixth, the problem of attribution of conduct is even more complicated if it is considered together with the division of responsibility as ILA's Committee

---

445 Ibid, 44.

of Accountability ("ILA Committee") did in the 2004 final report.[446] In ILA Committee's opinion,

> [t]here will be concurrent responsibility of a member state for an act of implementation of an unlawful measure adopted by an IO if the State is under an obligation to implement such a measure. There will be joint responsibility of both the international organization and a state in case of an authorization given to the state by the organization to adopt unlawful measures with respect to third parties.[447]

The separate or concurrent responsibility of MS may be incurred from the participation, aiding or assisting wrongful acts even though the conduct should be attributed to the IO.[448] Therefore from this understanding, it is not necessary for the courts to declare the fake margin of appreciation to avoid the normative control as effective factual control and then attribute the conduct to the state instead of the UN. However, the introduction of the concurrent responsibility of the state in this case still cannot justify the state's defiance of the strict SC Resolutions according to the domestic courts or human rights institution's rulings which intend to invalidate the implementing measures.

To summarize this issue, the complications caused by the attribution issue which is a substantial legal problem cannot be solved if there is no centralized international mechanism to deal with those problems in light of international law. However, the possibilities seen in different arguments where the UN is or is not a party to a case or where the parties or the courts would like to involve or to avoid seizing the case are still valuable when faced with a case in practice. However, there was a chance for the HRC in the *Sayadi* case to address to such a question, but was totally missed in the reasoning of the HRC.

---

446 Accountability of International Organizations, Berlin Conference (2004), Final Report, Section two (http://www.ila-hq.org/en/committees/index.cfm/cid/9).

447 Ibid, 30.

448 Ibid, Section two (4), 28.

II. The *Nada* case[449] approach of the ECtHR

II.A. The reasoning of the case

The *Nada* case was before the ECtHR, and dealt with a Swiss ordinance implementing the UN sanctions regime against Al-Qaida and the Taliban banning on entry into and transit through Switzerland for individuals and entities listed in the Sanctions Committee's blacklist. The applicant Mr. Nada, an Italian national, was on the list of persons subject to the 1267 Sanctions Regime and lived in an Italian municipality that was an enclave within Switzerland. He was unable to leave the place as Switzerland would not allow him to enter or pass through the country.

Relying on Article 8 of the ECHR, the applicant alleged that the travel ban imposed on him from entering or transiting through Switzerland, had breached his right to respect for his private, professional, and family life. Relying on Article 13, the applicant also claimed that there had been no effective remedy to examine his claims. Furthermore, the applicant argued that by preventing him from entering or transiting through Switzerland and by failing to review the lawfulness of the restrictions on his freedom of movement, the Swiss authorities had deprived him of his liberty, thus violating his Article 5 right of the Convention.

Concerning the Article 8 right to respect for private and family life, the Court confirmed the principle of systematic interpretation in order to construe the obligations in a coordinated way[450] and then acknowledged that SC resolutions adopted under Chapter VII of the UN Charter imposes obligations on states, but

---

449 In the contents, Nada case refers to Nada v Switzerland, Application No. 10593/08, ECtHR, 12 September 2012.

450 Nada v Switzerland, Application No. 10593/08, ECtHR, 12 September 2012, para. 170.

> without prejudice to the binding nature of such resolutions, the Charter in principle leaves to UN member states a free choice among the various possible models for transposes on states an obligation of result, leaving them to choose the means by which they give effect to the resolutions.[451]

The Court found that "Switzerland enjoyed some latitude, which was admittedly limited but nevertheless real, in implementing the relevant binding resolutions of the UN Security Council."[452] Then the Court considered it necessary to examine

> whether the Swiss authorities took sufficient account of the particular nature of his case and whether they adopted, in the context of their margin of appreciation, the measures that were called for in order to adapt the sanctions regime to the applicant's individual situation.[453]

Then the Court found the Swiss government's late information to the Sanctions Committee about its investigation on the applicant which told the listing of the applicant unfounded,[454] and the Swiss authorities failed to offer any assistance to seek broader exemption according to Resolution 1390 (2002).[455] Moreover, they neither sought to encourage Italy to initiate the de-listing procedure nor to offer assistance to the applicant for de-listing.[456] The Court ruled that Switzerland "could not validly confine to relying on the binding nature of Security Council resolution" to avoid its Convention

---

451 Ibid, para. 176.

452 Ibid, para. 180.

453 Ibid, para. 185.

454 Ibid, para. 187-188.

455 Ibid, para. 193.

456 Ibid, para. 194.

obligations, but "should have persuaded the Court that it had taken – or at least had attempted to take – all possible measures to adapt the sanctions regime to the applicant's individual situation".[457] The Court thus found that the interference of the applicant's right was deemed unnecessary although it was based on law and with legitimate aims and it constituted a violation of his right to private and family life.

The Court turned down the invitation by Switzerland and several intervening governments to rule on "the hierarchy between the obligations of the States Parties to the Convention under that instrument, on the one hand, and those arising from the United Nations Charter, on the other." Instead, the Court emphasized that "the important point is that the respondent governments have failed to show that they attempted, as far as possible, to harmonize the obligations that they regarded as divergent."[458]

As for the right to effective remedy (Article 13), the Court followed the reasoning of ECJ's decision on the *Kadi* case, that "there was nothing in the Security Council resolutions to prevent the Swiss authorities from introducing mechanisms to verify the measures taken at national level pursuant to those resolutions".[459] According to this dualist approach, the Court reviewed the Ordinance and found a violation.

II.B. The issues involved in the case

II.B.i. A fake margin of appreciation

The *Nada* case approach also was limited to examine the national implementation but not the lawfulness of SC Resolutions on the basis of finding that there was some margin of appreciation in the implementation of

457 Ibid, para. 196.

458 Ibid, para. 197.

459 Ibid, para. 212.

the SC Resolutions. However, this argument is very dubious. The joint concurring opinion of Judges Bratza, Nicaloau and Yudkivska doubted this conclusion of the majority:

> the obligation imposed on the State under Resolution 1390 (2002) was a binding one which, subject exceptions or exemptions expressly contained in the Resolution itself, allowed no flexibility or discretion to the States as to whether to give full effect to the sanctions imposed but required them to prohibit the entry into or transit through their territories of all persons included in the Sanctions Committee list.[460]

Moreover, the only latitude the Resolution gives to the states is to choose between legislative or administrative measures in the enforcement. However, it does "not suggest any latitude was granted so far as concerned the obligations on States to give full effect to" the travel ban.[461]

In fact, the General Court in *Kadi II* had denied the margin of appreciation in the reasoning.[462] In the *Nada* case, the Court still mentioned the existence of the margin of appreciation as the basis of the review of the implementation measures. However, the Court did not mention whether the ECHR was an independent legal order from the general international law including the UN Charter. Without the autonomous nature of the legal order, it is difficult for the Court to examine only the implementation measure on the basis of the ECHR rules.[463] The two elements, the margin of appreciation and the autonomous nature of the legal order, were the basis for the ECJ to adopt a pure dualist approach in the *Kadi I* case.

---

460 Ibid, Joint concurring opinion of Judges Bratza, Nicolaou and Yudkivska, para. 5.

461 Ibid, Joint concurring opinion of Judges Bratza, Nicolaou and Yudkivska, para. 6.

462 See Chapter Four, I.B.

463 Danpo Akande, ECHR Grand Chamber to Hear Case Challenging Legality of UN Security Council Sanctions (http://www.ejiltalk.org/echr-grand-chamber-to-hear-case-challenging-legality-of-un-security-council-sanctions/).

If the margin of appreciation is untrue and the independence of the legal order is not supported, it is reasonable to take into consideration Article 103 of the UN Charter and subject the obligations under ECHR to the obligations under the UN. Then it is unavoidable to examine whether the SC Resolutions have validly created obligations, that is whether the SC acted *ultra vires* in adopting the resolutions. Furthermore, it is unavoidable to clarify whether the SC is bound by human rights obligations and its scope. This kind of approach may engage the ECtHR to give legal reasoning on the legality or illegality of SC Resolutions, which may be considered as another kind of incidental review of SC conduct. However, this approach had not been adopted.

II.B.ii. The emphasis on the state's efforts

Presuming the validity of SC Resolutions, the ECtHR emphasized whether the MS has taken or attempted to take all possible measures to adapt the sanctions regime to the individual situation.[464] For example, Switzerland should have transmitted the lack of findings of its investigation to the Sanctions Committee and should have supported Mr. Nada in his undertakings.[465]

In fact, the Guidelines of the Committee for the Conduct of Its Work for the 1267 Sanctions Regime does not provide such an obligation on the state(s) of nationality or residence. One may consider it as a method of diplomatic protection. Traditionally, a claim brought in the exercise of diplomatic protection is an inter-state claim, but no principle prevents one from applying the same concept in the context of a claim between a State and an international organization. One can thus consider that diplomatic protection can be exercised in relation to an international wrongful act of an international organization, with a view to the implementation of the responsibility of the

464 Nada v Switzerland, Application No. 10593/08, ECtHR, 12 September 2012, para. 196.

465 Ibid, 51-52.

latter.[466]

However, it is at the state's discretion to exercise diplomatic protection rather than being obliged to do so. From the *Nada* case decision, it should be understood that taking or attempt to take all possible measures to adapt to the individual's situation is an obligation for the state if facing a possible conflict of obligations. Although the diplomatic protection taken by the state might be an option, it is not a proper interpretation of the Court's ruling on this matter.

It is reasonable to understand the emphasis on the state's efforts as a consequence of the presumption that the SC does not intend to impose any obligation on MS to breach fundamental principles of human rights. With the approach of harmonious interpretation of the conflict obligations adopted in the *Nada* case, the state is under the obligation to try every effort to harmonize the obligations.

This reasoning is considered important for individuals seeking de-listing, for the state's ability to get information is much better than individual's ability, especially if the state has conducted a criminal investigation on the individual's case such as in the situation of the *Sayadi* case. Reading this obligation into the state's obligation to protect human rights would somehow compensate for the soft provision in the Sanction Committee's Guidelines.

III. Interim conclusion

The examining of the *Sayadi* case and *Nada* case shows the possibility to entertain the cases concerning the indirect review of SC conduct through the review of the implementation measures of the States.

As explained in Chapter Five about the dualist approach used in the *Kadi* case, the use of the approach in the two cases share the same problems in reasoning (the necessity of both autonomy of the legal system and the margin

466 Annalisa Ciampi, Security Council Targeted Sanctions and Human Rights, in: Bardo Fassbender (ed.), Securing Human Rights?—Achievements and Challenges of the UN

of appreciation) and its practical deadlock (abidance to the opinion or decision). For the two cases, it is more problematic than the EU judicatures or the national courts in using the approach as the autonomy of the legal system is more difficult to justify as for autonomy of the ICCPR and the ECHR from the international law.

Moreover, the HRC in the *Sayadi* case missed the chance to deliver a well-reasoned opinion addressing the legal issues involved in a targeted sanctions regime towards the human rights of individuals. Both the two cases indicate their emphasis on human rights rather than mere implementation of the SC Resolutions. This may to some extent push the evolution of SC conduct from the perspective of human rights concerns.

The most significant point is that the state's efforts in helping the individuals in proceeding their case before the sanctions committee are considered as a factor to assess the state's consistence with their human rights obligations. Although it is not addressed to the SC, it brings states in addition to the counterpart to the SC, which are much stronger parties than the original counterparts, i.e. the individuals.

Security Council, 112.

CHAPTER SIX: Review by the UN Member States' Courts

When an individual is restricted by the measures implementing the SC Resolutions by the states, national remedies must be the first consideration by the affected persons. As there are varieties of national legal systems in the world, it is not possible to exhaust the relevant cases concerning the review of SC conduct. This Chapter aims to explain the situations and some common issues faced by the states concerning the legality of SC conduct.

I. General description of the situation

In the imagination of the utopia of the future international law, Luigi Condorelli asserted in his final observation that

> until the hoped-for mechanism for monitoring compliance of Security Council decisions with the principle of the Charter (including *jus cogens*) has been organized, that is, until such review fall within the exclusive jurisdiction of an appropriate mechanism set up within the UN system, it is perfectly legitimate to infer that any court (domestic or international) called on to apply any such decision is to be considered entitled to satisfy itself, incidentally (*incidenter tantum*) whether or not that decision is valid: that is, to make sure that the decision does not contradict the principles that the Security Council is bound to respect under the Charter.[467]

Condorelli also admitted that these kinds of control mechanisms of SC acts have serious drawbacks such as different courts could take different lines and state responsibility may arise. Therefore, the utopia imagined is to set up "a

[467] Luigi Condorelli, Customary International Law: The Yesterday, Today, and Tomorrow of General International Law, in: Antonio Cassese (ed.), Realizing Utopia: The Future of International Law (2012), Oxford University Press, 156-157.

centralized control system that is reliable and accessible".[468]

The reality is far from utopia, and it is also not clear whether the control by the domestic courts in incidental cases is adopted by the states. We have to at first admit the fact that it is not true that every state has a system of judicial review to guarantee the constitutionalism of domestic rules. Moreover, the judicial review systems are different among countries. Therefore, the control by domestic courts in this study only concerns those countries which have judicial review systems domestically or regionally such as in the EU[469].

In a broader sense, there is a trend in the domestic courts' practice to interpret the applicable laws, domestic law and international law, in a consistent manner according to the domestic principle of consistent interpretation and the international principle of systemic interpretation (Article 31 of Vienna Convention on the Law of Treaties).[470] The domestic judges are

> in charge of the twofold task of construing domestic law in a manner consistent with international law and, at the same time, reconciling conflicts between international obligations of the state and other existing international rules.[471]

The conflict among international obligations (from the Chapter VII SC Resolutions and the obligations to protect fundamental human rights) and between the constitutional requirements and international obligations give the domestic judges difficult cases to use the technique of consistent interpretation.

---

468 Ibid, 157.

469 See Chapter Four about the review by the EU Courts.

470 Jean D'Aspremont, The Systemic Integration of International Law by Domestic Courts: Domestic Judges as Architects of the Consistency of the International Legal Order, in: Ole Kristian Fauchald and Andre Nollkaemper (eds.), The Practice of International and National Courts and the (De-)fragmentation of International Law (2012), Oxford University Press, 152-154.

471 Ibid, 154.

According to data provided by the Council of Europe, 35 countries and EU submitted reports on their implementation of the UN sanctions and respect for human rights. The following table is made on the basis of national and EU reports to show the challenges before domestic courts or EU Courts about the act incorporating sanctions in the domestic legal order for being in violation of human rights.[472]

States[473]	**Possibility**	**Case(s)**
Albania	N/A[474]	None as of March 2006
Armenia	N/A	None as of March 2006
Austria	N/A	None as of March 2006
Azerbaijan	N/A	None as of March 2006
Bulgaria	N/A	N/A
Czech Republic	N/A	None as of March 2006
Denmark	N/A	None as of March 2008
Estonia	N/A	None as of March 2011
Finland	N/A	None as of March 2006
Germany	Yes	The number of cases was under survey as of March 2006
Greece	Yes	None
Hungary	N/A	None as of March 2013
Ireland	Yes	2 cases as of September 2012:

472 The reports (http://www.coe.int/t/dlapil/cahdi/un_sanctions.asp), visited on 9 April 2013. As there are 4 reports written only in French (Belgium, France, Romania and Switzerland), they are not examined in the Table because the language limits of the author. However, the rest of the reports are enough to show a general picture of the situation. Besides, the reports were submitted on different times including the earliest ones submitted in March 2006 and the most recent adopted one in March 2013 (Hungary).

473 EU is also included in the column besides the states.

474 N/A means the information is not available in the report. It does not indicate that it is not possible to challenge the act in national courts.

States[473]	Possibility	Case(s)
		(1) Bosphorus Hava Yollari Turizem Ve Ticaret Anonim Sirketi v Minister for Transport, Energy and Communication, Ireland and the Attorney General (1993) (2) Chafiq Ben Mohamed al Ayadi v Minister for Foreign Affairs, Ireland and the Attorney General (2010)
Italy	Yes	None as of March 2006
Latvia	N/A	None as of March 2007
Lithuania	N/A	None as of September 2010
Netherlands	Yes	None as of March 2006
Norway	N/A	None as of March 2006
Poland	Yes	None as of March 2006
Portugal	N/A	None as of March 2006
Russian Federation	Yes	None as of March 2006
Serbia	N/A	None as of March 2011
Slovak Republic	N/A	None as of March 2006
Spain	N/A	None as of September 2012
Sweden	N/A	None as of March 2006
The Former Yugoslav Republic of Macedonia	N/A	None as of February 2008
Turkey	Yes	2 cases as of March 2006.
United Kingdom	Yes	Many cases as of September 2010, e.g.: R (on the application of M) (FC) v HM Treasury (2008); and HM Treasury v A, K,

States[473]	Possibility	Case(s)
		M, Q and G (2010)
European Union	Yes	More than 120 cases were pending before EU Courts by mid-March 2012
Japan	Yes	None as of March 2006
Mexico	N/A	None as of March 2006
United States	Yes	Cases for example: Global Relief Foundation v O'Neill; Al Haramain Islamic Foundation

From the table above, there is no state among those countries that expressively rules out the possibility to challenge the act incorporating sanctions by a domestic court. Moreover, there are many cases brought before the domestic courts or EU courts on this matter.

In the cases concerning the challenge of the anti-terrorism acts from the perspective of human rights, the courts faced "hard cases" in which judicial creativities are needed to be exercised in order to adjust existing doctrines to fit new situations or policies.[475] The judicial creativities in the real cases may provide us some options or perspectives for solving the problems.

The *A, K, M, Q & G v Her Majesty's Treasury* and its appeal case are proposed as a typical case by the UK report to the Council of Europe.[476] Alexander Orakhelashvili understood this case as that

> a Chapter VII resolution that is *ultra vires* because of its conflict with *jus cogens* does not command the effect that accrues to Security Council

475 Eyal Benvenisti, National Courts and the 'War on Terrorism', in: Andrea Bianchi (ed.), Enforcing International Law Norms Against Terrorism (2005), Hart Publishing, 309.

476 UK reported contributed in September 2010 (http://www.coe.int/t/dlapil/cahdi/Source/un_sanctions/United%20Kingdom%20UN%20Sanctions%20Sept%202010%20E.pdf), visited on 9 April 2013.

> decisions in the English legal system on the basis of the 1946 UN Act. It is thus open to domestic courts in the UK to review the vires of Security Council resolutions.[477]

Orakhelashvili does not further explain this understanding which should have been elaborated. Therefore, this case is taken as an example to explain the possibility of judicial control over SC conduct by the national courts.

II. A, K, M, Q & G v Her Majesty's Treasury

This is a case brought by five applicants against the Treasury of the UK. Among the five applicants, G was also subjected to an Order against him by virtue of the Al-Qaida and Taliban (UN Measures) Order 2006 ("AQO"). The case was first brought before the High Court of Justice of the UK.

The judge firstly rejected the argument that the UN Act 1946 should not apply to sanctions imposed on individuals and confirmed that the resolutions in question focused on individuals were not *ultra vires* Article 41 of the UN Charter.[478]

The judge noted that the de-listing procedure provided by the Sanctions Committee was not fair and there was a clash between the duty to restrain fundamental rights and the duty to protect the fundamental rights under ECHR. However, because of Article 103 of the UN Charter, "human rights under the ECHR cannot prevail over the obligations set out in the Resolutions."[479]

Although, G's right of access to court was not disputed, the respondent argued that the court cannot grant any relief which involve the setting aside of the freezing order, so long as G remains on the list maintained by the

---

477 Alexander Orakhelashvili, Collective Security (2011), Oxford University Press: Refusal by states to Implement Ultra Vires Decisions, 346.

478 A, K, M, Q & G v H.M. Treasury [2008] EWHC 869 (Admin), 24 April 2008, para. 15.

Sanctions Committee.[480]

However, the unfairness of the de-listing procedure or the harshness of the measures only was not enough to quash administrative decisions.[481] The judge decided to ww whether the context of the legislation provided a clear indication that the fundamental rights are overriden without express words.[482]

The attack on the AQO does not avail G unless he can show that he must have a right to challenge the freezing order under the EC Regulation.[483] At that stage, *Kadi* I was still pending before ECJ with CFI's judgment and Advocate General Maduro's opinion was delivered.

The judge was not satisfied with the CFI's judgment and hesitated to accept the Advocate General's opinion. As its own case laws show, in case of inevitable breach of a person's rights, the power has to be exercised in such a way as to minimize the infringements of the rights.[484] Therefore, while recognized and accepted as inevitable short-comings inherent in the de-listing procedure, the judge confirmed

> the ability of this court to consider the facts and to judge whether the necessary threshold has been met. If on considering all relevant material the court concluded that there was no evidence to justify listing, that conclusion would bind the Government to pursue a de-listing application to the Security Council.[485]

However the applicants argued the unlawfulness of the national implementation measures for the reason that it bypassed the Parliament.[486] To

---

479 Ibid, para. 18.
480 Ibid, para. 19.
481 Ibid, para. 23.
482 Ibid, para. 25.
483 Ibid, para. 26.
484 Ibid, para. 34-36.
485 Ibid, para. 36.
486 Ibid, para. 37.

bypass the Parliament is permissible only where it is necessary and expedient for enabling the measure to be effectively applied.

The judge found that a fair and just consideration of the question of whether the individual applicant is one who should be subjected to an order is impossible in most cases.[487] Therefore, it is impossible to say that the use of an Order in Council is expedient unless it can allow the examination of inculpatory materials.[488]

Concerning the principle of legal certainty, the judge quoted Lord Hoffmann's ruling in the *R v Jones* case that

> [n]ew domestic offenses should in my opinion be debated in Parliament, defined in a statute and come into force on a prescribed date. They should not creep into existence as a result of an international consensus to which only the executive of this country is a party.[489]

From the perspective of international law, it is not proper to say that it is only the executive which is a party to an international consensus. However, it also indicates that at the domestic level, the judiciary or the legislative is not necessarily consistent with the executive stance but acts as a checking power towards the use of executive power.

Finally the judge decided that both the Orders must be quashed. However, he also declared that "it is not to say that freezing orders cannot be made to comply with the UN resolutions. But in my view it is essential that Parliament considers the way in which what is required should be achieved."[490]

The High Court judgment on this case is also an examination of the

---

487 Ibid, para. 41.

488 Ibid, para. 41.1

489 R v Jones [2007] 1 A.C. 136, para. 62, in: A, K, M, Q & G v H.M. Treasury [2008] EWHC 869 (Admin), 24 April 2008, para. 44.

490 A, K, M, Q & G v H.M. Treasury [2008] EWHC 869 (Admin), 24 April 2008, para. 49.

national implementation method according to national rules. The judge in this judgment never dispute the legality of the SC resolutions. However, it is also important that the judge mentioned the judicial dealing with the situation of inevitable breach and the importance of the involvement of the diplomatic organ in the critical issue concerning the fundamental rights.

An appeal was lodged before the Court of Appeal by HM Treasury.[491] The appeal judge also did not touch upon the question of the legality of the SC resolutions because neither the provisions of the Charter nor those of any of the SC resolutions have direct effect in English law.[492] Therefore, it is a judicial review on the AQO in this case.

The judge reviewed the arguments which led the High Court Judge to quash the Order and overruled the judgment. The appeal judge considers that the key of the legality of AQO is that whether the court is powerless to achieve a solution whereby a person in the position of G can challenge the underlying basis of the case against him.[493] Finally, the appeal judge concluded that the AQO is lawful but that G is entitled to a merits based review of the kind indicated.[494] However, this judgment left the problem unsolved that in some cases the factual basis of designation is not available to realize a merits based review.[495] None of the judges who attached separate opinions doubted the legality of the SC resolutions.

This case was finally appealed to Supreme Court. In fact the case is about the legality of Terrorism (United Nations Measures) Order 2006 ("TO") and AQO. For the former, the persons are listed by UK's implementation measure, but for the latter, the listed persons are imposed by the 1267 Sanctions Committee's Consolidated List. Therefore, for this assessment, only the challenge to the latter are explained in the following.

---

491 A, K, M, Q & G v H.M. Treasury [2008] EWCA Civ 1187, 30 October 2008, para. 1.

492 Ibid, para. 109.

493 Ibid, para. 113.

494 Ibid, para. 124.

495 Ibid, para. 120.

Lord Hope, with whom Lord Walker and Lady Hale agree: the judge noticed that the avoidance of parliamentary scrutiny and the harshness of the sanction system raises fundamental questions about the relationship between Parliament and the executive and about judicial control over the power of the executive.[496] They think that the question which is common to both G and HAY is whether the AQO is *ultra vires* section 1 of 1946 Act because there is no effective judicial remedy against a listing by the 1267 Committee.[497]

The judge confirmed again that conferring an unlimited discretion on the executive conflicted to the basic rule in the democracy.[498] The rule of law requires that the actions of the administrative be subject to judicial scrutiny.[499]

The judge firstly checked the legality of the Order under Human Rights Act 1998.[500] The judge emphasized the reasoning provided by the ECJ in *Kadi I* considering the listing system administered by the 1267 Committee incompatible with the fundamental right that there should be an opportunity for a review by an independent tribunal of the lawfulness. This opinion was shared by the jurisprudence of Federal Court of Canada.[501] But in its own precedent in *Al-Jedda* case, the significance of Article 103 of the UN Charter is re-affirmed for ECHR.[502] The judge considered that the relationship between ECHR and obligations under the UN Charter should be up to ECtHR to assess. For this case, it is open for consideration how the position may be regarded under domestic law.[503]

The respondent contended that "the United Kingdom would be setting a bad example if it were to default on its obligation to give effect to the

---

496 H.M. Treasury v Mohammed Jabar Ahmed and others (FC); H.M. Treasury v Mohammed al-Ghabra (FC); R v H.M. Treasury [2010] UKSC 2, 27 January 2010, para. 5.

497 Ibid, 40, 41.

498 Ibid, para. 45.

499 Ibid, para. 53.

500 Ibid, para. 63.

501 Ibid, 69.

502 Ibid, para. 72.

503 Ibid, para. 74-75.

resolutions that had this effect. It was not open to Member States to go behind the system that had been set up to meet the global challenge that was presented by terrorism."[504] The Judges did not accept this excuse. They emphasized the problem that the Order avoided Parliamentary scrutiny, which was directed to the dangers that lie in the uncontrolled power of the executive.[505]

Finally the Judges concluded that "G is entitled to succeed on the point that the regime […] has deprived him of access to an effective remedy. […] What he needs if he is to be afforded an effective remedy is a means of subjecting that listing to judicial review." [506] Therefore, the relevant Article in the AQO is *ultra vires* under the 1946 Act.

Lord Phillips said that by accepting that "access to a court to protect one's rights is the foundation of the rule of law", the respondent agreed that "if the AQO purported to exclude access to a court it would be ultra vires".[507] However, the respondent contended that AQO was not purported to do so, because the applicant could challenge the validity of the Order, but he could not do challenge the basis upon which the Sanctions Committee had placed him on the list, for that question had no relevance to his rights under English law.[508]

The Judge did not accept the respondent's contention.[509] The Judge considered G and HAY's challenge to the legitimacy of AQO as challenging the list.[510] After examining the process of listing and de-listing, the Judge considered that

> these provisions fall far short of access to a court for the purpose of

504 Ibid, para. 79.
505 Ibid, para. 80.
506 Ibid, para. 81.
507 Ibid, para. 146.
508 Ibid.
509 Ibid, para. 147.
510 Ibid, para. 149.

> challenging the inclusion of a name on the Consolidated List, and far short of ensuring that a listed individual receives sufficient information of the reasons why he has been placed on the list to enable him to make an effective challenge to the listing.[511]

The Judge then started to examine whether there is implied limitation to Section 1 of the United Nations Act 1946. The Judge ruled that

> at the very least the powers conferred by section 1 must be limited to measures imposed by the Security Council that are *intra vires*. The general, albeit not universal view, is that this would exclude measures that violated *jus cogens* […] The implication of this would seem to be that it must be open to the domestic courts in this country to review the *vires* of Security Council Resolutions in order to rule on the validity of Orders made under the 1946 Act.[512]

Therefore, the Judge considers the Resolution to which the AQO relates, insofar as they call for measures to be applied to those on the Consolidated List, fall outside the scope of section 1 of the 1946 Act.

This passage of ruling is the basis of the understanding of Alexander Orakhelashivili. However, the review power of a domestic court on the SC Resolutions according to *jus cogens* is only expressively stated by Lord Phillips although they got the same conclusion concerning the validity of AQO.

Lord Rodger, with whom Lady Hale agrees, says that assuming that the Human Rights Act is not in play, Parliament can pass legislation to give effect in the domestic law to the obligations imposed on the UK by the SC Resolutions however grave the interference with rights of property and even

511 Ibid, para. 149.

512 Ibid, para. 151.

though there is no effective remedy against an unjustified listing.[513] This competence should not fall into the scope of the Council to do so with an Order.[514] The essential point is that

> these matters should not pass unnoticed in the domestic process and that the democratically elected Parliament, rather than the executive, should make the final decision that this system, with its inherent problems, should indeed be introduced into our law. The need for Parliamentary endorsement is all the more important if the ordinary human rights restraints do not apply.[515]

This judgment emphasized the serious limitation to the persons' human rights imposed by SC resolutions and the importance of the Parliamentary endorsement. It may imply that the Parliament can decide whether to abide by the SC Resolutions.

Lord Brown adopted a different position to the AQO from the other Judges. He suggested the AQO should stand.[516] He expressed that

> where, as here, those to be designated under the proposed measure will suffer very considerable restrictions under the regime, I would hold that it can only properly be introduced by executive Order in Council if the measure is in all important respects clearly and categorically mandated by the UN resolution which it is purporting to implement.[517]

Therefore, he differentiated the TO and AQO and considered AQO did

---

513 Ibid, para. 183.

514 Ibid, para. 185.

515 Ibid, para. 186.

516 Ibid, para. 192.

517 Ibid, para. 196.

faithfully implement SC resolutions.[518] This opinion is similar to recognize the non-existence of the margin of appreciation and showed sympathy to the executives of their obligation to abide by the obligation under the UN Charter. But this is not the majority view.

Lord Mance is of the opinion that

> there is a relevant distinction between […] measures directed at states or non-state actors such as Al-Qaida identified by the Security Council […] or at their acknowledged heads or alter egos, and […] measures directed in entirely general terms at anyone associated with such non-state actors.[519]

According to the *Al-Jedda* case jurisprudence, an extreme form of restriction of individual liberty, if it were possible at all, at least requires primary legislation. Designation as an "associate" of a rogue state or non-state organization under Resolution 1267 fell into this scope which required the involvement of Parliament legislation.[520]

The seven-judge Court held that the Order made was unlawful. Lord Brown dissented in relation to AQO. The judgments affirmed the judicial review on the exercise of executive power and disclose the emphasis of fundamental rights, and the importance of the parliamentary process, in the face of repressive executive action supposedly required by the international fight against terrorism.

In this case, the judicial review on the legality of SC resolutions had never been involved. But it is still important to note that from the judgments: (1) under the Parliamentary sovereignty, the legislative (Parliament) is not necessary needed to be consistent with the executive's international

---

518 Ibid, para. 197.

519 Ibid, para. 248.

520 Ibid, para. 249.

commitments in theory; and (2) the judiciary is entitled to review the executive acts implementing the SC resolutions according to domestic laws.

The national court is unlikely to involve itself in the direct review of SC conduct. It is also true that Article 3 of the State Responsibility Articles provides that "such characterization [of an act of a state as internationally wrongful] is not affected by the characterization of the same act as lawful by internal law." We can say *vice versa* that the characterization of unlawful by internal law does not affect characterization of the same act as lawful by international law.

The Commentary of this Article pointed out two elements:

> first, an act of a State cannot be characterized as international wrongful unless it constitutes a breach of an international obligation, even if it violations a provision of the State's own law. Secondly and most importantly, a State cannot, by pleading that its conduct conforms to the provisions of its internal law, escape the characterization of that conduct as wrongful by international law. An act of a State must be characterized as internationally wrongful if it constitutes a breach of an international obligation, even if the act does not contravene the State's internal law—even if, under that law, the State was actually bound to act in that way.[521]

The dualist approach adopted by the domestic courts does not affect the lawfulness of the SC Resolutions. To defy the SC Resolutions has never been suggested by those Courts. It is correct to see it from the perspective of the different jurisdictions of the courts. However, the real problem is always faced by the States how to harmonize the obligations which are not able to be harmonized. As the emphasis of the parliamentary participation in the implementation, it opens the possibility that the parliament may decide to defy

---

[521] Draft Articles on Responsibility of States for Internationally Wrongful Acts, with Commentaries, Article 3, 2 Yearbook of the International Law (2001), Part II, 36.

the SC decisions.

III. Interim conclusion

The situation of judicial control over SC conduct by the national courts of MS also shows possibilities in the sense of indirect review. But individuals face the same problems as the situation being before the EU judicature or the human rights treaty bodies, i.e. the national court's decision does not have binding effect on the SC in order to de-list the person from the Consolidated List.

But for the sovereign states themselves, there is a possible way of defiance by exercising the sovereign power of the state. As it is shown in the opinions of the judges of UK in the above cases, they reasserted the protection of the fundamental rights of individuals and the importance of parliamentary process in the situation of possible derogating those rights. It indicates the possibility that the parliament (the democratic organ of a state) may decide to protect the fundamental human rights and not to strictly follow the SC's binding resolution, which may resulted into *de facto* de-list. In fact, this kind of practice is not just fictional. The motion of partial defiance of the Parliament of Switzerland towards the 1267 Sanctions Regime explained in Chapter Four is an example.

The defiance in the domestic level is double-bladed. It brings about a tension between the lawfulness in the domestic level and international level faced by the state of defiance. On the other hand, there is also a tension between the effectiveness of the sanctions regime and defects of human rights protection in the targeted sanctions faced by the SC. There is no way to solve those tensions at the present. For the present study, the tensions are regarded as a positive pressure to engage both the states and the SC to refine the targeted sanctions for the protection of fundamental human rights.

General Conclusion

The whole study follows a pragmatic approach to show the difficulties and possibilities in exerting certain judicial control over SC conduct through different mechanisms and approaches. The judicial control problem of SC conduct involves tangled relationships among the individuals, the states and the UN. In fact, the direct involvement of the individuals in the targeted sanctions regimes is the reason that refreshed the judicial control problem of the SC, which existed before the rise of the targeted sanctions.

The ideal model of control over the SC's conduct needs reforms of the whole UN system, which is not the object of this study. The present judicial organ of the UN, the ICJ is not capable in doing the work of judicial control although it is competent to do incidental review. The aim is not to discuss how to fundamentally change the UN or the ICJ to meet the present problems triggered by the targeted sanctions regimes. The ways to control SC conduct in the context of the present problematic system is the question for this study.

In a case where the IO is a respondent party, the immunity of the IO is the first barrier that the applicant or the court should encounter if a substantial review of the case is intended. The most enlightening trend in this issue is the "reasonable alternative means" jurisprudence. In the two-fold examinations (legality of the purpose and the proportionality of the limits) on the propriety of granting immunity to the IO in a certain case, whether there is equivalent protection provided by the IO is a determinative element to judge the proportionality of the limitations to right to court. However, the prevalence of this jurisprudence is limited to the scope of the ECHR membership and even in those countries, a substantial check on the quality of the alternative means is still rare. Moreover, the jurisprudence has its origin from the employment cases. Therefore, its applicability to the other cases of different nature (such as the targeted sanctions cases) is still uncertain.

In fact, the immunity issue only arises when an IO is directly brought

before a judicial institution. The mechanisms provided to the individuals or the states directly disputing an IO's conduct are very few apart from employment cases.

For the targeted sanctions regime, there are sanctions committees established by the respective SC Resolutions to manage the regime. The 1267 Sanctions Committee has a developing history from monitoring implementation to doing self-revision, and now the Office of Ombudsperson is the most recent mechanism that the targeted persons can directly have access to. The progress the Office of Ombudsperson has to be recognized as a promising signal for individuals to pursue their case directly. Taking into consideration the *Nada* judgment which considers that the states are obliged to support the individuals' case in the sanctions committee's de-listing procedures if the individual is found innocent by the domestic judicatures, the case in this sense can be pushed forward by the initiatives of the individuals or states.

Apart from the sanctions committee inside the sanctions regimes, there is no settled mechanism through which individuals can access and directly dispute the decision of the SC. If *Mothers of Srebrenica* case could be one example that the UN was directly sued before the national courts, the case was declined because of the immunity of the IO without considering the reasonable alternative means. As the ECtHR pointed out that there was just a random connection between the UN and the state in that case, which could not justify the jurisdiction. The same can be said about the case concerning the targeted sanctions if the affected persons bring the case before national courts directly disputing the SC's conduct.

From the examination of the possible mechanisms, refuting the implementing measures is the most adopted approach in cases before the EU Courts, ECtHR, the HRC and the national courts. This approach releases these institutions from the problem of justifying their jurisdiction in reviewing SC conduct and then the question of the human rights obligations of the SC. However, the use of the approach is problematic because of the lack of margin

of appreciation.

The developing process of the self-revision procedure inside the sanctions committee shows that judicial review exercised by the national courts on their implementing measures is an important driving force for the establishment of the Focal Point and the Office of Ombudsperson. Refusal of giving effectiveness at the domestic level would be substantially detrimental to the SC's sanction regime. This refusal is happening in many cases domestically and internationally.

Moreover, the decisions or views delivered from the judicial or quasi-judicial institutions of states, regional organizations or human rights treaty-bodies can offer good arguments on the problem of legality of the SC's conduct and serve as the driving force to refine its conduct from the perspective of human rights, which is an indispensable part of the rule of law.

Bibliography

Ahlborn, Christiane, The Use of Analogies in Drafting the Articles on the Responsibility of International Organizations An Appraisal of the 'Copy-Paste Approach', 9(1) International Organizations Law Review (2012), 53-66.

Akande, Dapo, The International Court of Justice and the Security Council: Is There Room for Judicial Control of Decisions of the Political Organs of the United Nations?, 46 International and Comparative Law Quarterly (Apr. 1997), 309-343.

—— ECHR Grand Chamber to Hear Case Challenging Legality of UN Security Council Sanctions, EJIL Talk! (http://www.ejiltalk.org/echr-grand-chamber-to-hear-case-challenging-legality-of-un-security-council-sanctions/).

Alvarez, Jose E., Judging the Security Council, 90 (1) American Journal of International Law (Jan. 1996), 1-39.

—— International Organizations: Then and Now, 100 (2) American Journal of International Law (Apr. 2006), 324-347.

Amerasinghe, C.F., Comments on the ILC's Draft Articles on the Responsibility of International Organizations, 9(1) International Organizations Law Review (2012), 29-32.

Angelet, N., Protest Against Security Council Decisions, in: Karel Wellens (ed.), International Law: Theory and Practice—Essays in Honour of Eric Suy (1998), Martinus Nijhoff Publishers, 277-286.

Aust, Anthony, The Role of Human Rights in Limiting the Enforcement Powers of the Security Council: A Practitioner's View, in: Erika de Wet and André Nollkaemper (eds.), Review of the Security Council by Member States (2003), Intersentia, 31-38.

Bederman, David J. (ed.), International Decisions: Western European Union v Siedler; General Secretariat of the ACP Group v Lutchmaya; General Secretariat of the ACP Group v B.D.: Belgian Supreme Court decisions on the immunity of international institutions in labor and employment matters, 105 American Journal of International Law (July, 2011), 560-567.

Bedjaoui, Mohammed, The New World Order and the Security Council: Testing the Legality of Its Acts (1994), Martinus Nijhoff Publishers.

Benvernisti, Eyal, Judicial Misgivings Regarding the Application of International Law: An Analysis of Attitudes of National Courts, 4 European Journal of International Law (1993), 159-183.

—— National Courts and the 'War on Terrorism', in: Andrea Bianchi (ed.), Enforcing International Law Norms Against Terrorism (2004), Hart Publishing, 307-330.

Bernstorff, Jochen von, Procedures of Decision-Making and the Role of Law in International Organizations, 9 (11) German Law Journal (2008), 1939-1964.

Bianchi, Andrea, Enforcing International Law Norms Against Terrorism: Achievements and Prospects, in: Andrea Bianchi (ed.), Enforcing International

Law Norms Against Terrorism (2004), Hart Publishing, 491-534.

——— Assessing the Effectiveness of the UN Security Council's Anti-terrorism Measures: The Quest for Legitimacy and Cohesion, 17 (5) European Journal of International Law (2007), 881-919.

——— Human Rights and the Magic of jus cogens, 19 (3) European Journal of International Law (2008), 491-508.

Biersteker, Thomas and Eckert Sue, Addressing Challenges to Targeted Sanctions: An Update of the "Watson Report", (http://www.watsoninstitute.org/pub/2009_10_targeted_sanctions.pdf).

Blokker, Niels and Wessel, Ramses A., Introduction: First Views at the Articles on The Responsibility of International Organizations, 9(1) International Organizations Law Review (2012), 1-6.

Bogdandy, Armin von, General Principles of International Public Authority: Sketching a Research Field, 9 (11) German Law Journal (2008), 1909-1939.

Bogdandy, Armin von and Dann, Philipp, International Composite Administration: Conceptualizing Multi-Level and Network Aspects in the Exercise of International Public Authority, 9 (11) German Law Journal (2008), 2013-2039.

Bogdandy, Armin von and Platise, Mateja Steinbrück, ARIO and Human Rights Protection: Leaving the Individual in the Cold, 9(1) International Organizations Law Review (2012), 67-76.

Bowett, Derek, The Impact of Security Council Decisions on Dispute Settlement Procedures, 5 European Journal of International Law (1994), 89-101.

——— The Court's Role in Relation to International Organizations, in: Vaughan Lowe and Malgosia Fitzmaurice (ed.), Fifty Years of the International Court of Justice: Essays in Honour of Sir Robert Jennings (1996), Cambridge University Press, 181-192.

——— Judicial and Political Functions of the Security Council and the International Court of Justice, in: Hazel Fox (ed.), The Changing Constitution of the United Nations (1997), The British Institute of International and Comparative Law, 73-90.

Brichambaut, Marc Perrin de, The Role of the United Nations Security Council in the International Legal System, in: Michael Byers (ed.), The Role of Law in International Politics: Essays in International Relations and International Law (2000), Oxford University Press, 269-276.

Brockman-Hawe, Benjamin E., Questioning the UN's immunity in the Dutch Courts: Unresolved Issues in the Mothers of Srebrenica Litigation, 10(4) Washington University Global Studies Law Review (2011), 727-748.

Brownlie, Ian, The Decisions of Political Organs of the United Nations and the Rule of Law, in: Ronald St. John Macdonald (ed.), Essays in Honour of Wang Tieya (1994), Martinus Nijhoff Publishers, 91-102.

Brozolo, Luca G Radicati di and Megliani, Mauro, Freezing the Assets of International Terrorist Organizations, in: Andrea Bianchi (ed.), Enforcing

International Law Norms Against Terrorism (2004), Hart Publishing, 377-414.
Bulterman, Mielle, Fundamental Rights and the United Nations Financial Sanction Regime: The Kadi and Yusuf Judgments of the Court of First Instance of the European Communities, 19 (3) Leiden Journal of International Law (Oct. 2006), 753-772.
Caflisch, Lucius, Is the International Court Entitled to Review Security Council Resolutions Adopted Under Chapter VII of the United Nations Charter?, in: Najeeb Al-Nauimi and Richard Meese (ed.), International Legal Issues Arising under the United Nations Decade of International Law (1995), Martinus Nijhoff Publishers, 633-662.
Cameron, Iain, The European Convention on Human Rights, Due Process and United Nations Security Council Counter-Terrorism Sanctions, www.coe.int.
Cannizzaro, Enzo, A Machiavellian Moment? The UN Security Council and the Rule of Law, 3 International Organizations Law Review (2006), 189-224.
Caron, David D., The Legitimacy of the Collective Authority of the Security Council, 87 The American Journal of International Law (1993), 552-588.
Casanovas, Oriol, Unity and Pluralism in Public International Law (2001), Martinus Nijhoff Publishers.
Chesterman, Simon, The UN Security Council and the Rule of Law, Final Report and Recommendations from the Austrian Initiative, 2004-2008.
Chesterman, Simon and Jordan, David A., The Security Council as World Executive? The Implementation and Enforcement of Rules by the Security Council, (http://www.iilj.org/research/documents/panel_4_report.pdf).
Chesterman, Simon and Frank, Thomas M. and Malone, David M., Law and Practice of the United Nations: Documents and Commentary (2008), Oxford University Press.
Ciampi, Annalisa, Security Council Targeted Sanctions and Human Rights, in: Bardo Fassbender (ed.), Security Human Rights?—Achievements and Challenges of the UN Security Council (2011), 98-140.
Ciobanu, Dan, Preliminary Objections Related to the Jurisdiction of the United Nations Political Organs (1975), Martinus Nijhoff.
Condorelli, Luigi, Customary International Law: The Yesterday, Today, and Tomorrow of General International Law, in: Antonio Cassese (ed.), Realizing Utopia: The Future of International Law (2012), Oxford University Press, 147-157.
Conforti, Benedetto, The Legal Effect of Non-Compliance with Rules of Procedure in the U.N. General Assembly and Security Council, 63 The American Journal of International Law (Jul. 1969), 479-489.
Crawford, James, Counter-measures as Interim Measures, 5 (1) European Journal of International Law (1994), 77-88.
D'Aspremont, Jean, The Systemic Integration of International Law by Domestic Courts: Domestic Judges as Architects of the Consistency of the International Legal Order, in: Fauchald, Ole Kristian and Nollkaemper, André (eds.), The

practice of international and national courts and the (de-)fragmentation of international law (2012), Oxford University Press, 141-165.
Davidsson, Elias, Legal Boundaries to UN Sanctions, 7 (4) The International Journal of Human Rights (Winter 2003), 1-50.
Dekker, Guido den, Immunity of the United Nations before the Dutch Courts, Guido den Dekker, Immunity of United Nations before the Dutch Courts, 3(2) Hague Justice Journal (2008), 15-24.
Dekker, Guido den and Schechinger, Jessica, The Immunity of the United Nations before the Dutch Courts Revisited, Guido den Dekker & Jessica Schechinger, The Immunity of the United Nations before the Dutch Courts Revisited, 6 (http://www.haguejusticeportal.net/index.php?id=11748).
Doehring, Karl, Unlawful Resolutions of the Security Council and their Legal Consequences, 1 Max Planck Yearbook of International Law, 91-109.
Draghici, Carmen, Trading Justice for Security? UN Anti-terrorism, Due Process Rights and the Role of the Judiciary, Centre on Human Rights in Conflict (2009),
(http://www.uel.ac.uk/wwwmedia/microsites/chrc/TradingJusticeforSecurityReport2009.pdf).
Dupuy, Pieere-Marie, The Constitutional Dimension of the Charter of the United Nations Revisited, 1 Max Planck Yearbook of International Law (1997), 1-33.
Eitel, Tono, The UN Security Council and its Future Contribution in the Field of International Law, in: J.A. Frowein and R. Wolfrum (eds.), Max Planck Yearbook of International Law (2000), Kluwer Law International, 53-71.
Elberling, Björn, The *Ultra Vires* Character of Legislative Actions by the Security Council, 2 International Organizations Law Review (2005), 337-360.
Erika de Wet, The Role of Human Rights in Limiting the Enforcement Power of the Security Council: A Principled View, in: Erika de Wet and André Nollkaemper (eds.), Review of the Security Council by Member States (2003), Intersentia, 7-31.
——— Holding International Institutions Accountable: The Complementary Role of Non-Judicial Oversight Mechanisms and Judicial Review, 9 (11) German Law Journal (2008), 1989-2012.
——— Human Rights Considerations and the Enforcement of Targeted Sanctions in Europe: The Emergence of Core Standards of Judicial Protection, in: Bardo Fassbender (ed.), Security Human Rights?—Achievements and Challenges of the UN Security Council (2011), 141-171.
Evans, Malcolm D., International Wrongs and National Jurisdiction, in: Malcolm E. Evans, Remedies in International Law: The Institutional Dilemma, Hart Publishing.
Farrall, Jeremy, United Nations Sanctions and the Rule of Law (2007), Cambridge University Press.
——— The World Summit Process and UN Sanctions Reform: between Rhetoric and Force, in: Peter G. Danchin and Horst Fischer (ed.), United Nations Reform

and the New Collective Security (2010), Cambridge University Press.
Fasoli, Elena, Declaratory Judgments and Official Apologies as Forms of Reparation for the Non-Material Damage Suffered by the State: the Djibouti-France Case, 7 The Law and Practice of International Courts and Tribunals (2008), 177-192.
Fassbender, Bardo, Quis Judicabit? The Security Council, Its Power and Its Legal Control, 11 European Journal of International Law 2000, 219-232.
——— The Meaning of International Constitutional Law, in: Ronald St. John Macdonald and Douglas M. Johnston (ed.), Towards World Constitutionalism: Issues in the Legal Ordering of the World Community (2005), Martinus Nijhoff Publishers, 837-852.
——— The UN Security Council and International Terrorism, in: Andrea Bianchi (ed.), Enforcing International Law Norms Against Terrorism (2004), Hart Publishing, 83-102.
——— Targeted Sanctions Imposed by the UN Security Council and Due Process, 3 International Organizations Law Review (2006), 437-485.
——— 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, (http://www.un.org/law/counsel/Fassbender_study.pdf).
——— The Role of Human Rights in the Decision-making Process of the Security Council, in: Bardo Fassbender (ed.), Security Human Rights?—Achievements and Challenges of the UN Security Council (2011), 74-97.
Feinäugle, Clemens A., The UN Security Council Al-Qaida and Taliban Sanctions Committee: Emerging Principles of International Institutional Law for the Protection of Individuals?, 9 (11) German Law Journal (2008), 1513-1539.
Foqué, R., Global Governance and the Rule of Law: Human Rights and General Principles of Good Global Governance, in: Karel Wellens (ed.), International Law: Theory and Practice—Essays in Honour of Eric Suy (1998), Martinus Nijhoff Publishers, 25-44.
Fowler, Michael and Kuyama, Sumihiro, Accountability and the United Nations System, 8 Policy Brief (2007), (http://i.unu.edu/media/unu.edu/publication/758/pb08-07-accountability-and-the-united-nations-system-.pdf).
Franck, Thomas M., Legitimacy in the International System, 82 The American Journal of International Law (Oct. 1988), 705-759.
——— The "Powers of Appreciation": Who Is the Ultimate Guardian of UN Legality?, 86 The American Journal of International Law (Jul. 1992), 519-523.
Frowein, Jochen Abr., Issues of Legitimacy around the United Nations Security Council, in: Jochen Abr. Frowein, Klaus Scharioth, Ingo Winkelmann, Rüdiger Wolfrum (eds.), Negotiating for Peace—Liber Amicorum Tono Eitel (2003), Springer, 121-140.
Gaillard, Emmanuel and Pingel-Lenuzza, Isabelle, International Organizations and

Immunity from Jurisdiction: To Restrict or to Bypass, 51 (1) The International and Comparative Law Quarterly (Jan. 2002), 1-15.

Gardam, Judith Gail, Proportionality and Force in International Law, 87 The American Journal of International Law (Jul. 1993), 391-413.

Genugten, Willem J.M. van and Scharf, Michael P. and Radin Sasha E. (ed.), Criminal Jurisdiction 100 Years after the 1907 Hague Peace Conference: Proceedings of the Eighth Hague Joint Conference held in The Hague, The Netherlands 28-30 June 2007 (2009), T. M. C. Asser Press, 138-169.

Gill, T.D., Legal and Some Political Limitations on the Power of the UN Security Council to Exercise its Enforcement Powers under Chapter VII of the Charter, 26 Netherlands Yearbook of International Law (Dec. 1995), 33-138.

Gordon, Joy, Smart Sanctions Revisited, 25(3) Ethics and International Affairs (2011), 315-335.

Gowlland-Debbas, Vera, Security Council Enforcement Action and Issues of State Responsibility, 43 International and Comparative Law Quarterly (1994), 55-98.

——— The Relationship Between the International Court of Justice and the Security Council in the Light of the Lockerbie Case, 88 (4) The American Journal of International Law (Oct. 1994), 643-677.

——— The Functions of the United Nations Security Council in the International Legal System, in: Michael Byers (ed.), The Role of Law in International Politics: Essays in International Relations and International Law (2000), 277-314.

——— The Security Council as Enforcer of Human Rights, in: Bardo Fassbender (ed.), Security Human Rights?—Achievements and Challenges of the UN Security Council (2011), 36-73.

Graefrath, Bernhard, Leave to the Court What Belongs to the Court: The Libyan Case, 4 European Journal of International Law (1993), 184-205.

Gráinne de Búrca, The European Court of Justice and the International Legal Order After *Kadi*, 51 (1) Harvard International Law Journal (2010), 1-49.

Griller, Stefan, International Law, Human Rights and the Community's Autonomous Legal Order, 4 (3) European Constitutional Law Review (Oct. 2008), 528-553.

Gross, Leo, Selected Essays on International Law and Organization (1984), Transnational Publishers, 167-200.

Guggisberg, Solène, The Nada Case Before the ECHR: A New Milestone in the European Debate on Security Council Targeted Sanctions and Human Rights Obligations, 8 Croatian Yearbook of European Law and Policy (2012), 411-435.

Hafner, Gerhard, Accountability of International Organizations – A Critical View, in: Ronald St. John Macdonald and Douglas M. Johnston (ed.), Towards World Constitutionalism: Issues in the Legal Ordering of the World Community (2005), Martinus Nijhoff Publishers, 585-630.

Hagedorn, Axel, UN-immunity Disregards Fundamental Human Rights: A Decision by the Court of Appeal at The Hague in the Case of the Mothers of Srebrenica, Axel Hagedorn, UN-Immunity Disregards Fundamental Human Rights: A

Decision by the Court of Appeal at the Hague in the Case of the Mothers of Srebrenica, 2 (http://www.haguejusticeportal.net/index.php?id=11659).

Harbo, Tor-Inge, Legal Integration through Judicial Dialogue, in: Fauchald, Ole Kristian and Nollkaemper, André (eds.), The practice of international and national courts and the (de-)fragmentation of international law (2012), Oxford University Press, 167-183.

Henquet, Thomas, Book Review: August Reinisch (ed.), Challenging Acts of International Organizations Before National Courts, 9 International Organizations Law Review (2012), 497-510.

Herik, Larissa van den and Schrijver, Nico, Eroding the Primacy of the UN System of Collective Security: The Judgment of the European Court of Justice in the Cases of Kadi and Al Barakaat, 5 International Organizations Law Review (2008), 329-338.

Higgins R., The International Court of Justice and Human Rights, in: Karel Wellens (ed.), International Law: Theory and Practice—Essays in Honour of Eric Suy (1998), Martinus Nijhoff Publishers, 691-706.

——— The UN Security Council and the Individual State, in: Hazel Fox (ed.), The Changing Constitution of the United Nations (1997), The British Institute of International and Comparative Law, 43-54.

Hilpold, Peter, UN Sanctions Before the ECJ: the *Kadi* Case, in: August Reinisch (ed.), Challenging Acts of International Organizations before National Courts (2010), Oxford University Press, 18-53.

Hurrell, Andrew, International Law and the Changing Constitution of International Society, in: in: Michael Byers (ed.), The Role of Law in International Politics: Essays in International Relations and International Law (2000), 327-347.

Ida, Ryuuichi, 国連大学事件[The UN University Case], in: Matsui Yoshio (ed.), 判例国際法[Cases of International Law] (2006), Toshindo, 113-115.

Janis, M.W., Individuals and the International Court, in: A.S. Muller, D. Raič and J.M. Thuránszky (ed.), The International Court of Justice: Its Future Role after Fifty Years (1997), Martinus Nijhoff Publishers, 205-218.

Kaikobad, Kaiyan Homi, The Court, the Council and Interim Protection: A Commentary on the *Lockerbie* Order of 14 April 1992, 17 Australian Yearbook of International Law (1996), 87-186.

Kanetake, Machiko, Enhancing Community Accountability of the Security Council through Pluralistic Structure: The Case of the 1267 Committee, 12 Max Planck Yearbook of United Nations Law (2008), 113-175.

Keller, Helen and Fischer, Andreas, The UN Anti-terror Sanctions Regime under Pressure, 9 (2) Human Rights Law Review (2009), 257-266.

Kelsen, Hans, The Law of the United Nations: A Critical Analysis of Its Fundamental Problems (2000), The Lawbook Exchange.

Klabbers, Jan, International Organizations (2005), Ashgate.

——— Stradding Law and Politics: Judicial Review in International Law, in: Ronald St.

John Macdonald and Douglas M. Johnston (ed.), Towards World Constitutionalism: Issues in the Legal Ordering of the World Community (2005), Martinus Nijhoff Publishers, 809-836.

—— Kadi Justice at the Security Council?, 4 (2) International Organizations Law Review (2007), 293-304.

Klein, Eckart, International Sanctions from a Human Rights Law Perspective: Some Observations on the *Kadi* Judgment of the European Court of Justice, 4 Intercultural Human Rights Law Review (2009), 111-122.

Kirgis, Frederic L., The Security Council's First Fifty Years, 89 (3) The American Journal of International Law (Jul. 1995), 506-539.

Kooijmans, P, The Security Council and Non-State Entities as Party to a Conflict, in: Karel Wellens (ed.), International Law: Theory and Practice—Essays in Honour of Eric Suy (1998), Martinus Nijhoff Publishers, 333-346.

Kreczko, Alan J., The Unilateral Termination of U.N. Sanctions Against Southern Rhodesia by the United Kingdom, 21 Virginia Journal of International Law (1980-1981), 97-130.

Krisch, Nico, The Pluralism of Global Administrative Law, 17 The European Journal of International Law (2006), 247-278.

Lamb, Susan, Legal Limits to United Nations Security Council Powers, in: Guy S. Goodwin-Gill and Stefan Talmon (ed.), The Reality of International Law Essays in Honour of Ian Brownlie (1999), Clarendon Press, 361-388.

Lauterpacht, E., The Legal Effect of Illegal Acts of International Organizations, in: Cambridge Essays in International Law: Essays in Honour of Lord McNair (1965), Steven and Sons (London) and Oceana Publications (New York), 88-121.

—— The Juridical and the Meta-Juridical in International Law, in: Jerzy Makarczyk (ed.), Theory of International Law at the Threshold of the 21st Century: Essays in Honour of Krzysztof Skubiszewski (1996), Kluwer Law International, 215-234.

Lavranos, Nikolaos, UN Sanctions and Judicial Review, 76 Nordic Journal of International Law (2007), 1-17.

—— Judicial Review of UN Sanctions by the European Court of Justice, 78 Nordic Journal of International Law (2009), 343-359.

Lowe, A.V. and Warbrick, Colin and Cheyne, Ilona, The International Tin Council, 38(2) International and Comparative Law Quarterly (April 1989), 417-423.

Lysen, Göran, Targeted UN Sanctions: Applicating of Legal Sources and Procedural Matters, 72 Nordic Journal of International Law (2003), 291-304.

Martínez, Luis M. Hinojosa, Bad Law for Good Reasons: The Contradictions of the *Kadi* Judgment, 5 International Organizations Law Review (2008), 339-357.

Martenczuk, Bernd, The Security Council, the International Court and Judicial Review: What Lessons from Lockerbie?, 10(3) European Journal of International Law (1999), 517-547.

Matsuda Takeo, 安保理の暴走？（一）[Runaway of the Security Council], 法学雑誌、第五十六巻、第一号、平成二一（２００９）年[56(1) Journal of Law 2009 (http://dlisv03.media.osaka-cu.ac.jp/infolib/user_contents/kiyo/DBc0560101.pdf).

Michaelsen, Christopher, Kadi and Al Barakaat v. Council of the European Union and Commission of the European Communities – The Incompatibility of the United Nations Security Council's 1267 Sanctions Regime with European Due Process Guarantees, 10 Melbourne Journal of International Law (2009), 329-345.

Milanović, Marko, The Human Rights Committee's Views in *Sayadi v. Belgium*: A Missed Opportunity, 1(3) Goettingen Journal of International Law (2009), 519-538.

―― Sayadi: The Human Rights Committee's Kadi (or Pretty Poor Excuse for One …), Marko Milanovic, Sayadi: The Human Rights Committee's Kadi (http://www.ejiltalk.org/sayadi-the-human-rights-committee's-kadi-or-a-pretty-poor-excuse-for-one…/).

―― More on Nada v Switzerland, EJIL Talk! (http://www.ejiltalk.org/more-on-nada-v-switzerland/).

Mizushima, Tomonori, Waite and Kennedy v. Germany, in: Matsui Yoshio (ed.), 判例国際法[Cases of International Law] (2006), Toshindo, 116-118.

―― Denying Foreign State Immunity on the Grounds of the Unavailability of Alternative Means, 71(5) The Modern Law Review (2008), 734-752.

Nolte, George, The Limits of the Security Council's Power and its Functions in the International Legal System: Some Reflections, in: Michael Byers (ed.), The Role of Law in International Politics: Essays in International Relations and International Law (2000), 315-326.

Obata, Kaoru, 個人に対する国連安保理の強制措置と人権法によるその統制：アルカイダ•タリバン制裁をめぐる最近の動向 [Security Council Sanctions on individuals and Control of Human Rights Law: Recent Trend about the Al-Qaida and Taliban Sanctions], 592 国際問題（２０１０年６月）、５－１５。[592 International Issues (June 2010), 5-15.]

O'Donnell Therese, Naming and Shaming: The Sorry Tale of Security Council Resolution 1530 (2004), 17 European Journal of International Law (2007), 945-968.

Oosthuizen, Gabriël H., Playing the Devil's Advocate: the United Nations Security Council is Unbound by Law, 12 Leiden Journal of International Law (1999), 549-563.

Orakhelashvili, Alexander, The Impact of Peremptory Norms on the Interpretation and Application of United Nations Security Council Resolutions, 16 (1) The

European Journal of International Law (2005), 59-88.

——— The Acts of the Security Council: Meaning and Standards of Review, 11 Max Planck Yearbook of United Nations Law (2007), 143-195.

——— Collective Security (2011), Oxford University Press.

Osieke, Ebere, The Legal Validity of Ultra Vires Decisions of International Organizations, 77 (2) The American Journal of International Law (Apr. 1983), 239-256.

Petculescu, Ioana, The Review of the United Nations Security Council Decisions by the International Court of Justice, 52 Netherlands International Law Review (2005), 167-195.

Recker, Sebastian, European Court of Justice Secures Fundamental Rights from UN Security Council Resolutions, 1 Göttingen Journal of International Law (2009), 159-178.

Reinisch, August, International Decision: Waite and Kennedy v. Germany; Beer and Regan v. Germany, 93 American Journal of International Law (Oct. 1999), 933-938.

——— International Organizations Before National Courts (2000), Cambridge University Press.

——— Developing Human Rights and Humanitarian Law Accountability of the Security Council for the Imposition of Economic Sanctions, 95 (4) American Journal of International Law (Oct. 2001), 851-872.

——— Governance Without Accountability?, 44 German Yearbook of International Law (2002), 270-306.

——— Accountability of International Organizations according to National Law, 36 Netherlands Yearbook of International Law (2005), 119-167.

——— Should Judges Second-Guess the UN Security Council?, 6 International Organizations Law Review (2009), 251-291.

Reinisch, August and Weber, Ulf Andreas, In the Shadow of Waite and Kennedy: The Jurisdictional Immunity of International Organizations, the Individual's Right of Access to the Courts and Administrative Tribunals as Alternative Means of Dispute Settlement, 1 International Organizations Law Review (2004), 59-110.

Röben, Volker, The Enforcement Authority of International Institutions, 9 (11) German Law Journal (2008), 1965-1986.

Roberts, Ken, Second-Guessing the Security Council: The International Court of Justice and Its Powers of Judicial Review, 7 Pace International Law Review (1995), 281-327.

Ryngaert, Cedric, The Immunity of International Organizations Before Domestic Courts: Recent Trends, 7 International Organizations Law Review (2010), 121-148.

Sarooshi, Danesh, The Legal Framework Governing United Nations Subsidiary Organs, 67(1) British Yearbook of International Law (1996), 413-478.

—— International Organizations and Their Exercise of Sovereign Powers (2005), Oxford University Press.
Schermers, Henry G. and Blokker, Niels M., International Institutional Law (2003), Matinus Nijhoff Publishers.
Schweigman, David, The Authority of the Security Council under Chapter VII of the UN Charter: Legal Limits and the Role of the International Court of Justice (2001), Kluwer Law International.
Schwelb, Egon, The International Court of Justice and the Human Rights Clauses of the Charter, 66 American Journal of International Law (1972), 337-351.
Scott, Colin, Accountability in the Regulatory State, 27(1) Journal of Law and Society (Mar. 2000), 38-60.
Seyersted, Finn, Common Law of International Organizations (2008), Matinus Nijhoff Publishers.
Shany, Yuval, National Courts as International Actors: Jurisdictional Implications, http://ssrn.com/abstract=1292056.
—— One Law to Rule Them All: Should International Courts Be Viewed as Guardians of Procedural Order and Legal Uniformity?, in: Fauchald, Ole Kristian and Nollkaemper, André (eds.), The practice of international and national courts and the (de-)fragmentation of international law (2012), Oxford University Press, 15-33.
Shaw, M.N., The Security Council and the International Court of Justice: Judicial Drift and Judicial Function, in: A.S. Muller, D. Raič and J.M. Thuránszky (ed.), The International Court of Justice: Its Future Role after Fifty Years (1997), Martinus Nijhoff Publishers, 219-259.
Shraga, Daphna, The Security Council and Human Rights—from Discretion to Promote to Obligation to Protect, in: Bardo Fassbender (ed.), Security Human Rights?—Achievements and Challenges of the UN Security Council (2011), 8-35.
Simma, Bruno and Others (ed.), The Charter of the United Nations: A Commentary (2012), Oxford University Press.
Skubiszewski, Krzysztof, The International Court of Justice and the Security Council, in: in: Vaughan Lowe and Malgosia Fitzmaurice (ed.), Fifty Years of the International Court of Justice: Essays in Honour of Sir Robert Jennings (1996), Cambridge University Press, 606-629.
Tamanaha, Brian Z., On the Rule of Law: History, Politics, Theory (2004), Cambridge University Press.
Tomuschat, Christian, Human Rights: Between Idealism and Realism (2008), Oxford University Press.
Tzanakopoulos, Antonios, United Nations Sanctions in Domestic Courts: From Interpretation to Defiance in *Abdelrazik v. Canada*, 8 Journal of International Criminal Justice (2010), 249-267.
—— Domestic Court Reactions to UN Security Council Sanctions, in: August Reinisch (ed.), Challenging Acts of International Organizations before National

Courts (2010), Oxford University Press, 54-76.

—— Judicial Dialogue in Multi-level Governance: The Impact of the *Solange* Argument, in: OK Fauchald and A Nollkaemper (eds.), Unity or Fragmentation of International Law: The Role of International Law and National Tribunals (2011). (http://www.ssrn.com)

—— Disobeying the Security Council: Countermeasures against Wrongful Sanctions (2011), Oxford University Press.

—— Collective Security and Human Rights, in: Erika de Wet and Jure Vidmar (ed.), Hierarchy in International Law: The Place of Human Rights (2012), Oxford University Press, 42-70.

—— Judicial Dialogue in Muti-level Governance: The Impact of the Solange Argument, in: Fauchald, Ole Kristian and Nollkaemper, André (eds.), The practice of international and national courts and the (de-)fragmentation of international law (2012), Oxford University Press, 185-265.

Vidmar, Jure, Norm Conflicts and Hierarchy in International Law: Towards a Vertical International Legal System?, in: Erika de Wet and Jure Vidmar (ed.), Hierarchy in International Law: The Place of Human Rights (2012), Oxford University Press, 13-41.

Wasilkowski, Andrzej, Monism and Dualism at Present, in: Jerzy Makarczyk (ed.), Theory of International Law at the Threshold of the 21st Century: Essays in Honour of Krzysztof Skubiszewski (1996), Kluwer Law International, 323-336.

Weema, Christopher, *Kadi v Council*: Putting the United Nations in Its Place, 17 Tulane Journal of International and Comparative Law (2008-2009), 571-584.

Wellens, Karel, Remedies against International Organizations (2002), Cambridge University Press.

—— Fragmentation of International Law and Establishing an Accountability Regime for International Organizations: the Role of the Judiciary in Closing the Gap, 25 Michigan Journal of International Law (2003-2004), 1159-1181.

Wessel, Ramses A., The *Kadi* Case: Towards a More Substantive Hierarchy in International law?, 5 International Organizations Law Review (2008), 323-327.

Wouters, Jan and Odermatt, Jed, Are All International Organizations Created Equals?, 9(1) of International Organizations Law Review (2012), 7-14.

Zappalà, Salvatore, Reviewing Security Council Measures in the Light of International Human Rights Principles, in: in: Bardo Fassbender (ed.), Security Human Rights?—Achievements and Challenges of the UN Security Council (2011), 172-194.

Ziegler, Katja, Strengthening the Rule of Law, but Fragmenting International Law: The *Kadi* Decision of the ECJ from the Perspective of Human Rights, 9 (2) Human Rights Law Review (2009), in: University of Oxford Legal Research Paper Series (http://www.ssrn.com/link/oxford-legal-studies.html).

Zimmermann, Andreas, "Acting under Chapter VII (…)" – Resolution 1422 and Possible Limits of the Powers of the Security Council, Jochen Abr. Frowein,

Klaus Scharioth, Ingo Winkelmann, Rüdiger Wolfrum (eds.), Negotiating for Peace—Liber Amicorum Tono Eitel (2003), Springer, 253-280.

Table of Cases

INTERNATIONAL COURT OF JUSTICE (including the cases of PCIJ)

Kingdom, Preliminary Objections, Judgment, ICJ Reports 1998, 9
Reparation for injuries suffered in the service of the United Nations, ICJ Reports 1949, 174
United States Diplomatic and Consular Staff in Tehran, Judgment, ICJ Reports 1980, 3
Western Sahara, Advisory Opinion, ICJ Reports 1975, 12

INTERNATIONAL CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA

Prosecutor v Tadić (Decision on the motion on jurisdiction) IT-94-1, 10 August 1995
Prosecutor v Tadić (Decision on the defence motion for interlocutory appeal on jurisdiction) IT-94-1, 2 October 1995

EUROPEAN COURT OF HUMAN RIGHTS

Beer and Regan v Germany, Application No. 28934/95, 18 February 1999
Behrami and Behrami v France and Saramati v France, Germany and Norway (Admissibility), Application No. 71412/01 and 78166/01, 2 May 2007
Graham Dyer v the United Kingdom, Application No. 10575/83, European Commission of Human Rights, 9 October 1984
Nada v Switzerland, Application No. 10593/08, ECtHR, 12 September 2012
Stichting Mothers of Srebrenica and Others v The Netherlands, Application No. 65542/12, 11 June 2013
Waite and Kennedy v Germany, Application No. 26083/94, 18 February 1999

HUMAN RIGHTS COMMITTEE

Sayadi and Vink v Belgium, CCPR/C/94/D/1472/2006, Human Rights Committee, 22 October 2008

EUROPEAN COURT OF JUSTICE

Case T-315/01 Yassin Abudullah Kadi v Council and Commission, Court of First Instance, 21 September 2005
Case T-85/09 Yassin Abdullah Kadi v European Commission, General Court, 30 September 2010
Joined Cases C-402/05P and C-415/05P Yassin Abdullah Kadi and Al Barakaat International Foundation v Council and Commission, European Court of Justice (Grand Chamber), 3 September 2008
Joined Cases C-584/10 P, C-593/10 P and C-595/10 P, European Commission, Council of Europe and the UK v Yassin Abdullah Kadi, Court of Justice of

European Union, 18 July 2013

NATIONAL COURTS

Netherlands

[A] et al. and the Mothers of Srebrenica v The State of The Netherlands & UN, 295247/HA ZA 07-2973, District Court in Hague, 10 July 2008

—— 07-2973, District Court in Hague, 30 March 2010

—— 10/04437, Supreme Court of Netherlands, 13 April 2012

A.S. v Iran-United States Claims Tribunal, Supreme Court, 20 December 1985

UK

A, K, M, Q & G v H.M. Treasury [2008] EWHC 869 (Admin), 24 April 2008

A, K, M, Q & G v H.M. Treasury [2008] EWCA Civ 1187, 30 October 2008

H.M. Treasury v Mohammed Jabar Ahmed and others (FC); H.M. Treasury v Mohammed al-Ghabra (FC); R v H.M. Treasury [2010] UKSC 2, 27 January 2010

Table of Other Primary Authorities

UNITED NATIONS INTERNATIONAL LAW COMMISSION

Documents

Responsibility of international organizations: Comments and observations received from international organizations (2011), UN Doc A/CN.4/636

Responsibility of international organizations: Comments and observations received from international organizations (2011), UN Doc A/CN.4/637

Special Rapporteurs

Gaja, Giorgio, First report on responsibility of international organizations, UN Doc A/CN.4/532, 26 March 2003

—— Second report on responsibility of international organizations, UN Doc A/CN.4/541, 2 April 2004

—— Third report on responsibility of international organizations, UN Doc A/CN.4/553, 13 May 2005

—— Fourth report on responsibility of international organizations, UN Doc A/CN.4/564, 28 February 2006

—— Fifth report on responsibility of international organizations, UN Doc A/CN.4/583, 2 May 2007

—— Sixth report on responsibility of international organizations, UN Doc A/CN.4/597, 1 April 2008

—— Seventh report on responsibility of international organizations, UN Doc A/CN.4/610, 27 March 2009

—— Eighth report on responsibility of international organizations, UN Doc A/CN.4/640, 14 March 2011

Annual Reports

Report of the International Law Commission on the Work of its 52nd Session (2000), UN Doc A/55/10

Report of the International Law Commission of its 54th Session (2002), UN Doc A/57/10

Report of the International Law Commission of its 55th Session (2003), UN Doc A/58/10

Report of the International Law Commission of its 56th Session (2004), UN Doc A/59/10

Report of the International Law Commission of its 57th Session (2005), UN Doc A/60/10

Report of the International Law Commission of its 58th Session (2006), UN Doc A/61/10

Report of the International Law Commission of its 63rd Session (2011), UN Doc A/66/10

Yearbook

Yearbook of the International Law Commission (1963), Vol. 2

Yearbook of the International Law Commission (1971), Vol. 1, Part I

Yearbook of the International Law Commission (1973), Vol. 2, Part II

Yearbook of the International Law Commission (1974), Vol. 1, Part II

Yearbook of the International Law Commission (1975), Vol. 2, Part II

INTERNATIONAL LAW ASSOCIATION

Report of the Committee on the Accountability of International Organizations, Taipei Conference (1998)

Report of the Committee on the Accountability of International Organizations, London Conference (2000)

Report of the Committee on the Accountability of International Organizations, New Delhi Conference (2002)

Report of the Committee on the Accountability of International Organizations, Berlin Conference (2004)

Report of Study Group on the Responsibility of International Organizations, Sofia

Conference (2012)

ORGANIZATION OF AFRICAN UNITY/UNION

CM/DEC.416 (LXVIII) adopted by the Sixty-eighth Ordinary Session of the [OAU] Council of Ministers (4-7 June 1998)

AHG/DEC.127 (XXXIV) adopted by the Thirty-fourth Ordinary Session of the Assembly of Heads of States and Government (8-10 June 1