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FORUM

Should Judges Second-Guess the UN Security Council?

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1. Introduction

The question of judicial review of United Nations Security Council (UN Security Council) resolutions is not new.[1] It has received particular attention

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1) See, among others, José E. Alvarez, "Judging the Security Council", 90 *American Journal of International Law* (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 and Comparative Law Quarterly* (1997) 309–343; Mohammed Bedjaoui, *The New World Order and the Security Council: Testing the Legality of its Acts* (1994); Thomas Bruha/Markus Krajewski, "Gerichtliche Kontrolle des UN-Sicherheitsrates?", 16 *S+F* (1998) 93–97; Bardo Fassbender, "Quis judicabit? The Security Council, Its Powers and Its Legal Control", 11 *European Journal of International Law* (2000) 219–232; Michael Fraas, *Sicherheitsrat der Vereinten Nationen und Internationaler Gerichtshof* (1998); Helmut Freudenschuß, "Article 39 of the UN Charter Revisited: Threats to the Peace and the Recent Practice of the UN Security Council", 46 *Austrian Journal of Public and International Law* (1993) 1–39; Thomas Franck, "The 'Power of Appreciation': Who Is the Ultimate Guardian of UN Legality?", 86 *American Journal of International Law*

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by international lawyers some fifteen years ago when the International Court of Justice (ICJ) had to decide whether or not to exercise jurisdiction over cases brought by Libya against the US and the UK concerning the application of the Montreal Convention to consequences of the Lockerbie bombing in 1989.[2] While the Court upheld its implicit power to decide the dispute including the question whether the imposition of UN Security Council trade sanctions were lawful, it never had to rule on those issues because the case was settled out of court and struck from its docket.[3] Since then the international law community has become used to watching closely any pronouncements of the World Court that could give an indication whether it would review the legality of Security Council acts.

(1992) 519–523; Terry D. Gill, "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* (1995) 33–138; Jochen Herbst, *Rechtskontrolle des UN-Sicherheitsrates* (1999); Matthias Herdegen, *Die Befugnisse des UN-Sicherheitsrates* (1998); Peter H. Kooijmans, "The Enlargement of the Concept 'Threat to the Peace'", in René-Jean Dupuy (ed.), *Académie de droit international de la Haye: Le développement du rôle du Conseil de Sécurité. Colloque, La Haye, 21–23 Juillet 1992* (1993) 111–121; Martti Koskenniemi, "The Place of Law in Collective Security", 17 *Michigan Journal of International Law* (1996) 455–490; Susan Lamb, "Legal Limits to United Nations Security Council Powers", in Guy S. Goodwin-Gill (eds), *The Reality of International Law* (1999) 361–388; Bernd Martenczuk, "The Security Council, the International Court and Judicial Review", 10 *European Journal of International Law* (1999) 517–547; Bernd Martenczuk, *Rechtsbindung und Rechtskontrolle des Weltsicherheitsrates* (1996); Nils Meyer-Ohlendorf, *Gerichtliche Kontrolle des Sicherheitsrates der Vereinten Nationen durch den Internationalen Gerichtshof* (2000); Ioana Petculescu, "The Review of the United Nations Security Council Decisions by the International Court of Justice", 52 *Netherlands International Law Review* (2005) 167–195; Karl Zemanek, "Is the Security Council the Sole Judge of its Own Legality?" in E. Yakpo and T. Boumedra (eds), *Liber Amicorum Judge Mohammed Bedjaoui* (1999) 629–645; Karl Zemanek, "Is the Security Council the Sole Judge of its Own Legality? A Re-Examination", in A. Reinisch and U. Kriebaum (eds), *The Law of International Relations – Liber Amicorum Hanspeter Neuhold* (2007) 483–505.

2) *Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie, (Libyan Arab Jamahiriya* v. *United Kingdom)*, Provisional Measures, ICJ Reports (1992), 3; *Questions of Interpretation and Application of the 1971 Montreal Convention Arising from Aerial Incident at Lockerbie (Libyan Arab Jamahiriya* v. *United States of America)*, Provisional Measures ICJ Reports (1992), 114.

3) *Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie, (Libyan Arab Jamahiriya* v. *United Kingdom)*, Order, 10 September 2003, available at <www.icj-cij.org/docket/files/89/7247.pdf>.

What is sometimes overlooked is the fact that the Court had done exactly that in a number of older cases. The ICJ did not refrain from deciding on the lawfulness of the establishment of the UN Administrative Tribunal,[4] nor on the legality of UN peacekeeping,[5] nor on the lawfulness of the UN resolutions terminating South Africa's League of Nations mandate over South-West Africa.[6] Surely, by concluding that all of these acts of political organs of the UN had been within the (implied) powers of such organs, the ICJ avoided open confrontation. Nevertheless, it clearly affirmed its own jurisdiction to decide such matters. The question, of course, remains: what would be the consequence of a judicial finding that certain acts exceeded the General Assembly's or the Security Council's powers? In the absence of anything like an annulment action as it is available in the supranational legal order of the European Community (EC),[7] it is unclear what the consequences of such a finding would be. While some scholars have suggested that UN Security Council resolutions manifestly *ultra vires* or in open violation of *jus cogens* norms are void or not legally binding,[8] practitioners and politicians tend to stress the UN Security Council's sole

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4) *Effect of Awards of Compensation Made by the United Nations Administrative Tribunal*, ICJ Reports (1954), 47.

5) *Certain Expenses of the United Nations*, ICJ Reports (1962), 151.

6) *Legal Consequence for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (Advisory Opinion),* ICJ Reports (1971), 16.

7) According to Article 230(1) Treaty establishing the European Community (TEC) "[t]he Court of Justice shall review the legality of acts adopted [by the Community institutions]". If it is found that a Community act is vitiated by any of the annulment grounds listed in Article 230(2) TEC, such as "lack of competence, infringement of an essential procedural requirement, infringement of this Treaty or of any rule of law relating to its application, or misuse of powers" the "Court of Justice shall declare the act concerned to be void." Article 231(1) TEC. Under these quasi-constitutional judicial review powers the European Court of Justice (ECJ) has developed a case-law broadly reviewing the legality of Community legislation.

8) See Karl Doehring, "Unlawful Resolutions of the Security Council and their Legal Consequences", 1 *Max Planck Yearbook of United Nations Law* (1997) 91–109; Jochen A. Frowein, "The UN Anti-Terrorism Administration and the Rule of Law", in Pierre-Marie Dupuy *et al.* (eds), *Common Values in International Law: Essays in Honour of Christian Tomuschat* 785–795 (2006); Jochen A. Frowein/Nico Krisch, "Introduction to Chapter VII", in B. Simma, *The Charter of the United Nations: A Commentary* (2nd edn, 2002), para. 29.

responsibility to determine the legality if its own acts in order to avoid the perceived threat of fragmentation and disobedience.[9]

In the more recent past, the attention of UN scholars has shifted to domestic *fora*.[10] UN Security Council resolutions have become the direct or indirect subject-matter of a number of legal disputes fought before national or quasi-national courts. In the well-publicized *Kadi* cases,[11] the Community courts in Luxembourg had to rule on the legality of financial sanctions imposed against Al-Qaeda and the Taliban.[12] The same type of sanctions

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9) Anthony Aust, "The Role of Human Rights in Limiting the Enforcement Powers of the Security Council: A Practitioners View", in Erika de Wet and André Nollkaemper (eds), *Review of the Security Council by Member States* (2003) 31–38, at 34; See also critically Karl Zemanek, "Is the Security Council the Sole Judge of its Own Legality?", *supra* note 1.

10) See, among others, Erika de Wet and André Nollkaemper, "Review of the Security Council Decisions by National Courts", 45 *German Yearbook of International Law* (2002) 166–202; Helmut Aust and Nina Naske, "Rechtsschutz gegen den UN-Sicherheitsrat durch europäische Gerichte?", 61 *ZÖR* (2006) 587–623; Mehrdad Payandeh, "Rechtskontrolle des UN SR durch staatliche und überstaatliche Gerichte", 66 *ZaöRV* (2006) 41–71.

11) See *infra* note 61.

12) See on these cases, *inter alia*, Jessica Almquist, "A Human Rights Critique of European Judicial Review: Counter-Terrorism Sanctions", 57 *International & Comparative Law Quarterly* (2008) 303–331; Mielle Bulterman, "Fundamental Rights and the United Nations Financial Sanctions Regime: The Kadi and Yusuf Judgments of the Court of First Instance of the European Communities", 19 *Leiden Journal of International Law* (2006) 753–772; Gráinne de Búrca, "The European Court of Justice and the International Legal Order after Kadi", *Jean Monnet Working Paper* 01/09, available at <www.jeanmonnetprogram.org/papers/09/090101.html>; Enzo Cannizzaro, "A Machiavellian Moment? The UN Security Council and the Rule of Law", 3 *International Organizations Law Review* (2006) 189–224; Piet Eeckhout, "Community Terrorism Listings, Fundamental Rights, and the UN SC Resolutions. In Search of the Right Fit", 3 *European Constitutional Law Review* (2007) 183–206; Christina Eckes, "Judicial Review of European Anti-Terrorism Measures – The Yusuf and Kadi Judgments of the Court of First Instance", 14 *European Law Journal* (2008) 74–92; Clemens Feinäugle, "Die Terrorlisten des SR – Endlich Rechtsschutz des Einzelnen gegen die Vereinten Nationen", *Zeitschrift für Rechtspolitik* (2007) 75–78; Marco Gestri, "Legal Remedies Against Security Council Targeted Sanctions: *De Lege Lata* and *De Lege Ferenda* Options for Enhancing the Protection of the Individual", 17 *Italian Yearbook of International Law* (2007) 25–53; Stefan Griller, "International Law, Human Rights and the European Community's Autonomous Legal Order: Notes on the European Court of Justice Decision in *Kadi*", 4 *European Constitutional Law Review* (2008) 528–553; Jan Klabbers, "Kadi Justice at the Security Council?", 4 *International Organizations Law Review* (2007) 293–304; Alexander Orakhelashvili, "The Acts of the Security Council: Meaning and Standards of Review", 11 *Max Planck Yearbook of United Nations Law* (2007) 143–195; Mehrdad Payandeh, "Rechtskontrolle des UN SR durch staatliche und überstaatliche Gerichte", 66 *ZaöRV* (2006)

was also addressed by the Swiss Supreme Court in the *Nada* case.[13] Other cases equally involved the legality of blacklisting procedures.[14]

This article will not only analyze the powers and limits of national and supranational courts to question the legality of UN Security Council resolutions, but also address the underlying policy issue whether such decentralized judicial review will be harmful to the coherence of the UN system or may have a positive impact on its further development.

2. The Increased Relevance of Judicial Review as a Result of UN Security Council Resolutions Directly Affecting Individuals

The perceptible increase in the number of challenges raised against UN Security Council resolutions is, to some extent, the result of the UN Security Council's own success. Following growing criticism concerning comprehensive economic sanctions as "blunt instruments"[15] which often hurt the civilian population at large instead of the ruling elite,[16] the UN

41–71; Johannes Reich, "Due Process and Sanctions Targeted Against Individuals Pursuant to Resolution 1267 (1999)", 33 *Yale Journal of International Law* (2008) 555, available at <papers.ssrn.com/sol3/papers.cfm?abstract_id=1268163#>; Ramses A. Wessel, "The UN, the EU and Jus Cogens", 3 *International Organizations Law Review* (2006) 1–6; Andrea Gattini, "Joined Cases C-402/05 P & 415/05 P, *Yassin Abdullah Kadi, Al Barakaat International Foundation* v. *Council and Commission*, Judgment of the Grand Chamber of 3 September 2008", 46 *CMLR* (2009) 213–239; August Reinisch, "Introductory Note to Court of First Instance of the European Communities: Yassin Abdullah Kadi v. Council of the European Union and Commission of the European Communities", 45 ILM (2006) 77–80; August Reinisch, "Introductory Note to European Court of Justice: Yassin Abdullah Kadi and Al Barakaat International Foundation v. Council of the European Union and Commission of the European Communities", 47 *ILM* (2008) 923–926; Maria Tzanou, "Case-Note on Joined Cases C-402/05 P & C-415/05 P *Yassin Abdullah Kadi & Al Barakaat International Foundation* v. *Council of European Union & Commission of European Communities*", 10 *German Law Journal* (2009) 123–154.

13) See *Nada* v. *State Secretariat for Economic Affairs and Federal Department of Economic Affairs*, *infra* note 92.

14) See *Sayadi and Vinck* v. *Belgium*, *infra* note 101.

15) UN Secretary General, *Supplement to an Agenda for Peace*, 3 January 1995, A/50/60-S/1995/1, para. 70.

16) See Erika de Wet, "Human Rights Limitations to Economic Enforcement Measures Under Article 41 of the United Nations Charter and the Iraqi Sanctions Regime", 14 *Leiden Journal of International Law* (2001) 277–300; Hans-Peter Gasser, "Collective Economic Sanctions and International Humanitarian Law: An Enforcement Measure Under the United Nations

Security Council started to resort to "smart sanctions" targeting individuals in order to force them to change their behavior.[17] While this approach may often be more effective, it also carries additional risks. The higher specificity and intensity of targeted sanctions may directly affect individual's human rights, such as the right to a fair trial, the right to privacy, the right to property, etc.[18] It is thus not surprising that individuals targeted by UN

Charter and the Right of Civilians to Immunity: An Unavoidable Clash of Policy Goals?", 56 *ZaöRV (Heidelberg J. Int'l L.)* (1996) 871–904; René Provost, "Starvation as a Weapon: Legal Implications of the United Nations Food Blockade Against Iraq and Kuwait", 30 *Col. J. Transnat'l L.* (1992) 577–639; W. Michael Reisman & Douglas L. Stevick, "The Applicability of International Law Standards to United Nations Economic Sanctions Programmes", 9 *European Journal of International Law* (1998) 86–141; August Reinisch, "Developing a Human Rights Accountability of the UN Security Council", 95 *American Journal of International Law* (2001) 851–872; Anna Segall, "Economic Sanctions: Legal and Policy Constraints", 81 *Int'l Rev. Red Cross* (1999) 763–784; Dorothee Starck, *Die Rechtmäßigkeit von UNO-Wirtschaftssanktionen in Anbetracht ihrer Auswirkungen auf die Zivilbevölkerung* (2000).

17) See George A. Lopez and David Cortright, "Financial Sanctions: The Key to a 'Smart' Sanctions Strategy", 72 *Die Friedens-Warte* (1997) 327–336.

18) See Watson Institute for International Studies, Brown University, *Strengthening Targeted Sanctions Through Fair and Clear Procedures* (March 2006), available at <watsoninstitute.org/pub/Strengthening_Targeted_Sanctions.pdf>; Iain Cameron, "UN Targeted Sanctions, Legal Safeguards and the European Convention on Human Rights", 72 *Nordic Journal of International Law* (2003) 1–56; Iain Cameron, *The European Convention on Human Rights, Due Process and United Nations Security Council Counter-Terrorism Sanctions*, 6 February 2006, available at <www.coe.int/t/e/legal_affairs/legal_co-operation/public_international_law/Texts_&_Documents/Docs%202006/I.%20Cameron%20Report%2006.pdf>; Bardo Fassbender, *Targeted Sanctions and Due Process*, Study commissioned by the United Nations Office of Legal Affairs (2006), available at <www.un.org/law/counsel/Fassbender_study.pdf>; Larissa van den Herik, "The Security Council's Targeted Sanctions Regimes: in Need of Better Protection for the Individual", 20 *Leiden Journal for International Law* (2007), 69–79; Finnur Magnusson, *Targeted Sanctions and Accountability of the UN Security Council* (LL.M Thesis Vienna 2008); Luis Martinez, "The Legislative Role of the Security Council in its Fight against Terrorism: Legal, Political and Practical Limits", 57 *International and Comparative Law Quarterly* (2008) 333–359; August Reinisch, "Some Problematic Aspects of Recent EU Financial Anti-Terrorism Measures", 7 *Austrian Review of International and European Law* (2002) 111–146; Ramses Wessel, "Debating the 'Smartness' of Anti-Terrorism Sanctions: The UN Security Council and the Individual Citizen", in C. Fijnaut, J. Wouters and F. Naert (eds), *Legal Instruments in the Fight against International Terrorism: A Transatlantic Dialogue* (2004) 633–660; Peter Gutherie, "Security Council Sanctions and the Protection of Individual Rights", 60 *N.Y.U. Ann. Surv. Am. L.* (2005) 491–541; Daniel Halberstam/Eric Stein, "The United Nations, the European Union, and the King of Sweden: Economic Sanctions and Individual Rights in a Plural World Order", 46 *CMLR* (2009) 13–72; Andrew Hudson, "Not

Security Council resolutions, be it in the form of travel bans or asset freezes, have attempted to raise fundamental rights complaints in different *fora* in order to have such resolutions invalidated or declared inapplicable or otherwise ineffective.

3. The Prelude of the *ad hoc* International Criminal Courts

Even before the development of targeted sanctions at the end of the 1990s, the establishment of the two *ad hoc* international criminal tribunals concerning former Yugoslavia (ICTY)[19] and Rwanda (ICTR)[20] raised serious fundamental rights concerns for the first time.[21] While it was clearly laid down in the resolutions establishing these tribunals that all States had to cooperate with them,[22] it was not explicitly provided that the tribunals would be bound by the fair trial guarantees applicable in case of criminal proceedings as they are contained in human rights instruments such as in Article 14 ICCPR.[23] It was therefore not really surprising that individuals

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a Great Asset: The UN Security Council's Counter-Terrorism Regime: Violating Human Rights", 25 *Berkeley J. Int'l Law* (2007) 203–227; Elin Miller, "The Use of Targeted Sanctions in the Fight Against International Terrorism. What About Human Rights?", 97 *American Society of Int'l Law Proc.* (2003) 46–51.

19) UN Security Council Res 827 (1993), *reproduced in* 32 ILM (1993) 1203. See also Daphna Shraga/Ralph Zacklin, "The International Criminal Tribunal for the Former Yugoslavia", 5 *European Journal of International Law* (1994) 360–380.

20) UN Security Council Res 955 (1994) *reproduced in* 33 ILM (1994) 1602.

21) See August Reinisch, "Das Jugoslawien-Tribunal der Vereinten Nationen und die Verfahrensgarantien des II. VN-Menschenrechtspaktes. Ein Beitrag zur Frage der Bindung der Vereinten Nationen an nicht-ratifiziertes Vertragsrecht" (with English summary), 47 *Austrian Journal of Public and International Law* (1995) 173–213.

22) UN Security Council Res 827 (1993) para. 4 ("… all States shall cooperate fully with the International Tribunal and its organs in accordance with the present resolution and the Statute of the International Tribunal and that consequently all States shall take any measures necessary under their domestic law to implement the provisions of the present resolution and the Statute, including the obligation of States to comply with requests for assistance or orders issued by a Trial Chamber under Article 29 of the Statute.").

23) See, however, para. 106 of the Report of the Secretary-General pursuant to paragraph 2 of Security Council Resolution 808 (1993), UN Doc S/25704 (3 May 1993), *reproduced in* 32 ILM (1993) 1159 ("It is axiomatic that the International Tribunal must fully respect internationally recognized standards regarding the rights of the accused at all stages of its proceedings. In the view of the Secretary-General, such internationally recognized standards

indicted by the ICTY's or the ICTR's prosecutors challenged the lawfulness of their prosecution by questioning the legality of the UN Security Council resolutions establishing these tribunals. Though the main argument against the legality of the two *ad hoc* tribunals derived from a "constitutional" challenge questioning the power of the Security Council to create subsidiary organs with the power to make binding criminal determinations, the lack of clear and unequivocal provisions making internationally accepted rights of defence applicable to the tribunals' have equally given rise to challenges.

The best know case is certainly the *Tadić* case[24] in which the ICTY vigorously rejected the claim that the UN Security Council resolution establishing this tribunal was unlawful. However, more interesting than the implicit affirmation of the UN Security Council's (implied) power to establish *ad hoc* criminal tribunals is the tribunal's unequivocal opinion that the UN Security Council is not "*legibus solutus*." According to the ICTY, "neither the text nor the spirit of the Charter conceives of the Security Council as unbound by law."[25] In a similar way, the ICTR affirmed the legitimacy of its own establishment in the *Kanyabashi* case.[26]

The legality of UN Security Council resolutions establishing the two *ad hoc* criminal tribunals has also become the subject of challenges before national courts. A number of them broadly followed the *Tadić* reasoning, such as the Dutch court to which Serbia's former president Milosevic resorted in order to challenge his ICTY indictment. However, the district court in The Hague equally found that the UN Security Council had lawfully exercised its powers when establishing the ICTY.[27] The Hague court also

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are, in particular, contained in article 14 of the International Covenant on Civil and Political Rights.").

24) *Prosecutor* v. *Dusko Tadić* (Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction), ICTY Appeals Chamber, 2 October 1995, Case no. IT-94-1-AR72, *reprinted in* 35 ILM (1996) 32.

25) *Ibid*., 42.

26) *Prosecutor* v. *Kanyabashi*, Case No. ICTR-96-15-T, Decision on the Defence Motion on Jurisdiction, 18 June 1997; see also Virginia Morris, "Prosecutor v. Kanyabashi – Decision of International Criminal Tribunal for Rwanda on its Jurisdiction and the Powers of the UN Security Council", 92 *American Journal of International Law* (1998) 66–70.

27) *Slobodan Milosevic* v. *The Netherlands*, 29 June 2001, 48 NILR 357 (2001); Judgement in interlocutory injunction proceedings of 31 August 2001, Kort Geding 2001/258, 688, UNJYB 445 (2001). Expressly relying on the ICTY's *Tadić* decision, *supra* note 24, the Hague District Court found: "Compelling considerations supporting this conclusion were that there was

briefly disposed of Mr Milosevic's complaint that the ICTY would not be an independent and impartial court in the sense of Article 6 of the ECHR. It simply rejected that claim by invoking the ECtHR's view in *Naletilić* v. *Croatia*[28] "that the Tribunal fulfils all the criteria necessary for the protection of the accused, including those of impartiality and independence."[29]

This aspect of the *ad hoc* tribunals established by the UN Security Council was also litigated before Swiss courts. In the *Rukundo* case,[30] a person indicted by the ICTR tried to resist a transfer to the ICTR by alleging that the procedure before this international tribunal would fall foul of international human rights standards. The highest Swiss court, the Bundesgerichtshof, rejected that assertion holding that the applicant had not adduced sufficient evidence that would have rebutted the presumption of a human rights conform procedure before the ICTR. Interestingly, however, the court did not accept an unqualified obligation to transfer suspects to the international tribunal. Rather, it insisted that Swiss courts would not render assistance to international proceedings that did not guarantee basic human rights.[31]

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nothing in the Charter to militate against the inauguration and establishment of a tribunal for the prosecution and trial of persons suspected of serious violations of international humanitarian law, that the inauguration and establishment of the Tribunal can be considered to fall within the scope of Article 41 of the Charter, and that an international organization such as the United Nations, in which it is simply impossible to observe the traditional separation of legislative, executive and judicial powers, and where indeed no such separation exists, is perfectly entitled to establish a tribunal by way of a measure." UNJYB 445, at 448 (2001).

28) *Mladen Naletilić* v. *Croatia,* European Court of Human Rights, 4 May 2000, Application No. 51891/99, para. 1.b. ("Involved here is the surrender to an international court which, in view of the content of its Statute and Rules of Procedure, offers all the necessary guarantees including those of impartiality and independence. Accordingly, no issue arises under Article 6 § 1 in this respect.").

29) *Slobodan Milosevic* v. *The Netherlands*, Judgement in interlocutory injunction proceedings of 31 August 2001, UNJYB 445, at 449 (2001).

30) *Emmanuel Rukundo* v. *l'Office fédéral de la justice*, Swiss Federal Tribunal, 3 September 2001, No 1A.129/2001, available at <www.bger.ch>.

31) *Ibid*., para. 3 b ("La Suisse ne prête pas son concours à des procédures qui ne garantiraient pas à la personne poursuivie un standard de protection minimal correspondant à celui offert par le droit des Etats démocratiques, défini en particulier par la CEDH ou le Pacte ONU II, ou qui heurteraient des normes reconnues comme appartenant à l'ordre public international.").

Rukundo may be contrasted with the outcome of the US *Ntakirutimana* case.[32] Also in that case a request to extradite a person to the ICTR was challenged, *inter alia*, on the grounds of the perceived lack of competence of the UN Security Council to establish a criminal tribunal and of the inadequate protection of constitutional and international due process rights by the ICTR.[33] The Fifth Circuit Court rejected this challenge. However, it did so less out of a general deference to UN law than as a result of the limited review available under the *habeas corpus* petition. By asserting that the requested judicial review would run counter to the foreign relations power vested in the executive branch,[34] the appellate court adhered to a separation of powers policy which also underlies the political questions[35] as well as the act of State[36] doctrines under which US courts manage to abstain from deciding cases involving international law issues.

4. Targeted Sanctions through Blacklisting and Judicial Review by National Courts

The targeted sanctions adopted by the UN Security Council since the late 1990s have led to a new wave of challenges by affected individuals. At the center of many complaints are UN blacklisting decisions, i.e. the decisions to include legal and natural persons in the sanctions program established by different UN Security Council resolutions.

A good example is the mechanism how individuals are put on the so-called Consolidated List comprising persons believed to be associated with the Taliban and/or Al Qaeda.[37] In 1999, the Security Council adopted Resolution 1267 (1999) imposing a flight embargo and an asset freeze on

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32) *Ntakirutimana* v. *Reno*, 184 F.3d 419 (5th Cir. 1999); 528 US 1135 (*cert. denied*).

33) 184 F.3d 419, 430 (5th Cir. 1999).

34) 184 F.3d 419, 430 (5th Cir. 1999) ("Such matters, so far as they may be pertinent, are left to the State Department, which ultimately will determine whether the appellant will be surrendered to the [ICTR].").

35) See *Baker* v. *Carr*, 369 U.S. 186 (1962); *Nixon* v. *United States*, 506 U.S. 24 (1993).

36) See *Underhill* v. *Hernandez*, 168 U.S. 250 (1897); *Banco Nacional de Cuba* v. *Sabbatino*, 376 U.S. 398 (1964).

37) See Eric Rosand, "The Security Council's Efforts to Monitor the Implementation of Al Qaeda/Taliban Sanctions", 98 *American Journal of International Law* (2004) 745–763.

Afghan Taliban in order "that the Taliban turn over Usama bin Laden".[38] These sanctions were expanded by Resolution 1333 (2000) to include "Usama bin Laden and individuals and entities associated with him … including those in the Al-Qaida organization."[39] The specific individuals and entities meant to be targeted are registered by the 1267 Sanctions Committee[40] in "an updated list, based on information provided by States and regional organizations."[41] According to the Committee Guidelines, the Sanctions Committee decides unanimously whether or not to include a person or entity in the Consolidated List.[42] Where the Committee fails to reach a consensus the matter is referred to the Security Council which will then decide according to its usual voting procedure.

Even more problematic is the procedure for a so-called de-listing, i.e. the removal from the UN blacklist. Initially, this was possible only upon a request by the listed person's home State or State of residence.[43] After much criticism, a mechanism permitting individual requests by the persons affected was introduced through the "focal point process" established by UN Security Council Resolution 1730 (2006).[44] Though blacklisted persons may now directly request the "focal point" set up within the UN Secretariat, this body does not investigate the matter in substance. Rather, it merely informs the member State that requested the listing as well as the home State or State of residence of the listed persons of the de-listing request. In order to arrive at an actual de-listing, one of these States has to demand that the matter is put on the Sanction Committee's agenda. Since decisions are made unanimously, any member of the Sanction Committee may veto the de-listing request.

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38) UN Security Council Resolution 1267, U.N. Doc. S/RES/1267 (15 October 1999).

39) UN Security Council Resolution 1333, para. 8(c), U.N. Doc. S/RES/1333 (19 December 2000).

40) "Security Council Committee established pursuant to resolution 1267 (1999) concerning Al-Qaida and the Taliban and Associated Individuals and Entities"; established by UN Security Council Resolution 1267 (1999), para. 6. See also <www.un.org/sc/committees/1267>.

41) UN Security Council Resolution 1390, para. 2(c).

42) Security Council Committee Established Pursuant to Resolution 1267, Guidelines of the Committee for the Conduct of its Work (7 November 2002, as amended), para. 6(c), available at <www.un.org/Docs/sc/committees/1267/1267_guidelines.pdf>.

43) 1267 Committee Guidelines, *supra* note 42, para. 8(e).

44) UN Security Council Resolution 1730, U.N. Doc. S/RES/1730 (19 December 2006).

Since the possibility to challenge such blacklisting decisions is limited, it is not surprising that individual persons and entities have increasingly tried to mount challenges before national courts and administrative agencies and, often as a sequel, before international human rights bodies. Such challenges frequently allege that the listing and delisting procedures infringe the fundamental rights guarantees enjoyed as a matter of national constitutional law, customary international law standards, especially those of an alleged *jus cogens* character, or universal or regional human rights instruments. Challenges of this type have been brought before various national courts. The best-known cases are the blacklisting challenge in the *Sayadi* case initially brought before Belgian courts and subsequently referred to the Human Rights Committee,[45] the *Nada* case that was finally decided by the highest Swiss court,[46] and the various challenges of Community acts implementing UN Security Council sanctions, most importantly the *Kadi* case.[47]

Before looking at these cases in more detail, it is worth recalling that the question whether national courts possess any power of judicial review concerning UN Security Council resolutions can be considered either from the perspective of UN law or from the perspective of the national law of the court requested to review such resolutions. Unsurprisingly, the answers differ.

4.1. *The United Nations Legal Perspective*

From a United Nations legal perspective, the issue is relatively clear. National courts do not have any power to question the legality of binding UN Security Council resolutions. The Council has wide discretion in deciding which measures it considers appropriate to adopt in situations threatening international peace and security.[48] Once it adopts binding decisions, such decisions have to be carried out by all UN member States or at least those

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45) See *infra* text at note 101.

46) See *infra* text starting at note 61.

47) See *infra* text starting at note 92.

48) Article 41 UN Charter ("The Security Council may decide what measures not involving the use of armed force are to be employed to give effect to its decisions, and it may call upon the Members of the United Nations to apply such measures. These may include complete or partial interruption of economic relations and of rail, sea, air, postal, telegraphic, radio, and other means of communication, and the severance of diplomatic relations.").

which the Security Council determines have to carry them out.[49] In practice, the Security Council rarely uses this discretionary power.[50] Instead, binding UN Security Council resolutions have to be implemented by all members. Even conflicting treaty obligations cannot change this.[51]

There is, of course, an intensive academic debate about a potential Charter-inherent limitation of the duty to carry out binding UN Security Council resolutions which may stem from the particular wording of Article 25 UN Charter which provides: "The Members of the United Nations agree to accept and carry out the decisions of the Security Council in accordance with the present Charter." In particular, there are diverging views as to the appropriate meaning of the finals words of this clause ("in accordance with the present Charter"), whether they qualify the decisions which have to be carried out or whether they qualify the obligation to do so.[52] The latter view would render them rather superfluous since the obligation to accept and carry out Security Council decisions is already laid down in the first part of the sentence. The former interpretation, however, would in effect absolve UN members from obedience towards decisions not adopted "in accordance with the present Charter", e.g. because they were adopted *ultra vires*, contradicted basic rules of the UN Charter or suffered from another form of illegality.

4.2. *National Court Practice*

In spite of the seemingly clear-cut obligation to abide by any binding UN Security Council resolution, various national courts have at various stages

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49) Cf. Article 48(1) UN Charter ("1. The action required to carry out the decisions of the Security Council for the maintenance of international peace and security shall be taken by all the Members of the United Nations or by some of them, as the Security Council may determine.).

50) See Brun-Otto Bryde/August Reinisch, "Article 48", in Bruno Simma (ed.), *The Charter of the United Nations: A Commentary* (2nd edn, 2002), para. 6.

51) Article 103 UN Charter ("In the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail.").

52) See Jost Delbrück, "Article 25", in Bruno Simma (ed.), *The Charter of the United Nations. A Commentary,* para. 17; Erika de Wet, *The Chapter VII Powers of the United Nations Security Council* (2004) 375 *et seq*.

raised doubts as to the extent of this obligation or otherwise diminished the effectiveness of UN Security Council resolutions.

An obvious example of the latter phenomenon is the insistence of States to separate the international law obligation to carry out UN Security Council resolutions from the domestic effect given to them and the domestic constitutional law rule that a State may freely decide whether to honor international law obligations or not. From a UN perspective, UN members are obligated to carry out decisions of the UN Security Council.[53] The UN Charter, however, leaves it to the discretion of States how they fulfill this obligation, whether by regarding binding UN Security Council resolutions as directly applicable or by adopting implementing measures.[54] Apparently, the majority of UN members follow the second path. As a result of this disjunction between the international obligation and its domestic validity national courts may have to conclude that binding UN decisions are breached.

The well-known US case of *Diggs* v. *Shultz*[55] aptly illustrates this problem. A US circuit court openly acknowledged that the US had violated the UN Security Council imposed embargo against Southern Rhodesia by adopting subsequent legislation. However, it stressed that according to domestic law the US was free to denounce treaty obligations and that, under the political questions doctrine, courts were enjoined from remedying such violations.[56] It is important to note, however, that *Diggs* v. *Shultz* did not imply any judicial review. While UN Security Council resolutions were not followed, their legality was not questioned.

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53) Article 25 UN Charter ("The Members of the United Nations agree to accept and carry out the decisions of the Security Council in accordance with the present Charter."); 48(1) UN Charter ("The action required to carry out the decisions of the Security Council for the maintenance of international peace and security shall be taken by all the Members of the United Nations or by some of them, as the Security Council may determine.").

54) See Paul Conlon, *United Nations Sanctions Management: A Case Study of the Iraq Sanctions Committee, 1990–1994* (2000); Hazel Fox and C. Wickremasinghe, "British Implementation of UN Sanctions against Iraq", 41 *International and Comparative Law Quarterly* (1992) 920; Michael P. Scharf and Joshua L. Dorosin, "Interpreting UN Sanctions: The Rulings and Role of the Yugoslavia Sanctions Committee", 19 *Brook. J. Int'l Law* (1993) 771–827.

55) *Diggs* v. *Shultz*, 470 F.2d 461 (D.C. Cir. 1972).

56) *Ibid.*, at 466 ("Under our constitutional scheme, Congress can denounce treaties if it sees fit to do so, and there is nothing the other branches of government can do about it. We consider that this is precisely what Congress has done in this case.").

Also a number of other US cases, involving economic sanctions some of which were taken pursuant to UN Security Council resolutions, did not reach the issue of the legality of the underlying UN acts. Most of these cases were brought questioning either the legality of the exercise of presidential powers under the International Emergency Economic Powers Act (IEEPA)[57] or the specific application of this legislation. However, US courts have consistently refused to annul sanctions imposed by the executive.[58] Relying on earlier precedent upholding Congressional delegation to the executive under the IEEPA,[59] a US circuit court found in the recent *Dhafir* case concerning targeted financial sanctions that the delegation to the President of the Congressional authority to create criminal offenses was constitutional and that his power was lawfully exercised when the transfer of funds was made a criminal offence.[60]

4.3. *The* Kadi *Case before the European Courts in Luxembourg*

To date, probably the most important cases concerning a decentralized challenge to UN Security Council resolutions are the decisions of the Court of First Instance and the appellate decision of the ECJ in the so-called *Kadi* case. Though the two Community courts are, of course, not proper national courts – from a UN perspective – their judgments may be considered as domestic court pronunciations on UN acts since the Community considers itself bound by obligatory UN Chapter VII resolutions as a result of their members being bound.

In 2005, the CFI rendered its judgment in the *Kadi* and the *Yusuf and Al Barakaat* case involving the legality of UN Security Council-mandated, targeted financial sanctions by the European Community.[61]

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57) International Emergency Economic Powers Act (IEEPA), 50 U.S.C.S. § 1701 *et seq*.

58) Cf. *Nat'l Council of Resistance of Iran* v. *Dep't of State*, 373 F.3d 152 (D.C. Cir. 2004). See also Andreas F. Lowenfeld, 'The United States' in Vera Gowland-Debbas (ed.), *National Implementation of United Nations Sanctions* 618–619 (2004).

59) *See Dames & Moore* v. *Regan*, 453 U.S. 654, 675, 101 S. Ct. 2972, 69 L. Ed. 2d 918 (1981); *Regan* v. *Wald*, 468 U.S. 222, 232–233, 104 S. Ct. 3026, 82 L. Ed. 2d 171 (1984).

60) *United States* v. *Dhafir*, 461 F.3d 211 (2nd Cir. 2006).

61) Case T-315/01, *Yassin Abdullah Kadi* v. *Council and Commission*, Court of First Instance, 21 September 2005, [2005] ECR II-3649, 45 ILM 81 (2006); Case T-306/01 *Yusuf and Al Barakaat International Foundation* v. *Council and Commission*, Court of First Instance, 21 September 2005, [2005] ECR II-3533.

The applicants complained about their inclusion in EC sanctions lists which had led to the freezing of their assets. They were specifically targeted by Council Regulation 881/2002[62] which listed their names as individuals associated with Usama bin Laden, Al-Qaeda or the Taliban. As a result of this listing they became subject to the challenged resolution's provision that "[a]ll funds and economic resources belonging to, or owned or held by, a natural or legal person, group or entity designated by the Sanctions Committee and listed in Annex I shall be frozen."[63] Their names had been previously designated by the UN Security Council Sanctions Committee established pursuant to operative paragraph 6 of UN Security Council Resolution 1267 (1999), a subsidiary organ of the UN Security Council, and were simply incorporated by the EC Regulation.

Among other complaints, the applicants had argued that their inclusion in the Community regulation was unlawful because the imposition of the sanctions violated their fundamental rights of due process and respect of property. They thus requested the annulment of the regulation pursuant to Article 230 TEC.[64]

The CFI rejected this challenge. It held that, as a matter of principle, it had no jurisdiction to review the legality of the challenged EC regulation because it resulted from a binding UN Security Council resolution which, according to the UN Charter,[65] prevailed over any other law, including Community law. Any review of the EC regulation would amount to an impermissible incidental control of the legality of UN Security Council resolutions. The only exception to this judicial "abstention policy" was the power of Community courts to scrutinize whether UN Security Council resolutions violated norms of *jus cogens*. In the court's view, it had the power

> to check, indirectly, the lawfulness of the resolutions of the Security Council in question with regard to jus cogens, understood as a body of higher rules of public international

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62) Council Regulation (EC) No 881/2002 of 27 May 2002 imposing certain specific restrictive measures directed against certain persons and entities associated with Usama bin Laden, the Al-Qaeda network and the Taliban, and repealing Council Regulation (EC) No 467/2001, OJ 2002 L 139, p. 9.

63) Article 2(1) Council Regulation (EC) No 881/2002.

64) See *supra* note 7.

65) Article 103 UN Charter.

> law binding on all subjects of international law, including the bodies of the United Nations, and from which no derogation is possible.[66]

The CFI even broadly qualified human rights as possessing a *jus cogens* character finding that, *inter alia*, the right to property, the right to be heard and the right of access to court formed part of this core body of international rules.[67] However, it came to the conclusion that these specific rights had not been violated and thus dismissed the claims.[68]

This judgment was appealed by Mr Kadi and Al Barakaat and, in 2008, led to a Grand Chamber[69] decision of the ECJ.[70] The largely successful appeals demonstrate a completely different approach to the issue of judicial review of UN sanctions.

The ECJ disagreed with and reversed the CFI concerning the level of reviewability of EC sanctions and the standard of scrutiny in case of fundamental rights violations. Contrary to the CFI, the Grand Chamber of the ECJ affirmed the full reviewability of all Community acts including

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66) *Kadi* v. *Council and Commission*, CFI, *supra* note 61, para. 226.

67) *Kadi* v. *Council and Commission*, CFI, *supra* note 61, paras 228–229 ("Furthermore, the Charter of the United Nations itself presupposes the existence of mandatory principles of international law, in particular, the protection of the fundamental rights of the human person. In the preamble to the Charter, the peoples of the United Nations declared themselves determined to 'reaffirm faith in fundamental human rights, in the dignity and worth of the human person'. In addition, it is apparent from Chapter I of the Charter, headed 'Purposes and Principles', that one of the purposes of the United Nations is to encourage respect for human rights and for fundamental freedoms. Those principles are binding on the Members of the United Nations as well as on its bodies. Thus, under Article 24(2) of the Charter of the United Nations, the Security Council, in discharging its duties under its primary responsibility for the maintenance of international peace and security, is to act 'in accordance with the Purposes and Principles of the United Nations'. The Security Council's powers of sanction in the exercise of that responsibility must therefore be wielded in compliance with international law, particularly with the purposes and principles of the United Nations.").

68) *Kadi* v. *Council and Commission*, CFI, *supra* note 61, paras 233–292.

69) According to Article 16 of the Statute of the Court of Justice, the ECJ sits in a Grand Chamber consisting of eleven out of the total of 27 judges, instead of the normal chamber size of three or five judges, "when a Member State or an institution of the Communities that is party to the proceedings so requests." The fact that it was a Grand Chamber of the ECJ underlines the significance of these cases.

70) Joined Cases C-402/05 P and C-415/05 P, *Yassin Abdullah Kadi and Al Barakaat International Foundation* v. *Council and Commission*, European Court of Justice, 3 September 2008, 47 ILM 923 (2008).

those that implement UN Security Council resolutions. While the ECJ confirmed the CFI's view that they lacked jurisdiction to review acts of the UN, it held that Community acts, including those implementing UN resolutions are subject to the full judicial review of the Luxembourg courts. In the Court's words,

> the Community judicature must, in accordance with the powers conferred on it by the EC Treaty, ensure the review, in principle the full review, of the lawfulness of all Community acts in the light of the fundamental rights forming an integral part of the general principles of Community law, including review of Community measures which, like the contested regulation, are designed to give effect to the resolutions adopted by the Security Council under Chapter VII of the Charter of the United Nations.[71]

According to the ECJ, such review is strictly limited to Community acts and does not extend to underlying UN resolutions. The ECJ very explicitly rejected the idea that Community courts would have jurisdiction to

> to review the lawfulness of such a resolution adopted by an international body, even if that review were to be limited to examination of the compatibility of that resolution with jus cogens.[72]

In order to separate the two spheres, the ECJ stressed the difference between the UN and the Community legal order in an almost "dualist" fashion. Since the UN Charter leaves its members a "free choice" of implementing UN Security Council resolutions in their domestic legal order[73] and since "any judgment given by the Community judicature deciding that a Community measure intended to give effect to such a resolution is contrary to a higher rule of law in the Community legal order would not entail any challenge to the primacy of that resolution in international law",[74] the ECJ had no difficulty in reaffirming its full "constitutional" functions to review the legality of Community acts, including their fundamental rights conformity.[75] Because the CFI had erroneously refrained from exercising its

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71) *Ibid*., para. 326.

72) *Ibid*., para. 287.

73) *Ibid*., para. 298.

74) *Ibid*., para. 288.

75) *Ibid*., para. 285.

power under the "constitutional" principle of full review the ECJ set aside the two judgments in this respect.[76]

By this ruling the ECJ implicitly eliminated the much criticized need to identify the *jus cogens* character of fundamental rights guarantees in order to engage in a substantive review of sanctions decisions. Instead, the ECJ reaffirmed its well-established case-law[77] that

> all Community acts must respect fundamental rights, that respect constituting a condition of their lawfulness which it is for the Court to review in the framework of the complete system of legal remedies established by the Treaty.[78]

On this basis, the ECJ proceeded to scrutinize the human rights conformity of the actual listing procedure as well as the freezing measures. The Court found that

> in the light of the actual circumstances surrounding the inclusion of the appellants' names in the list of persons and entities covered by the restrictive measures contained in Annex I to the contested regulation, it must be held that the rights of the defence, in particular the right to be heard, and the right to effective judicial review of those rights, were patently not respected.[79]

According to the ECJ, such a right to effective judicial review, which forms part of the general principles of law to be respected by the Community institutions, implies that a Community organ imposing restrictive measures against individuals on security grounds must "communicate those grounds to the person or entity concerned, so far as possible, either when that inclusion is decided on or, at the very least, as swiftly as possible after that decision

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76) *Ibid*., paras 327–328.

77) See also Article 6(2) TEU, which provides that "[t]he Union shall respect fundamental rights, as guaranteed by the [ECHR] and as they result from the constitutional traditions common to the Member States, as general principles of Community law," and is widely regarded as a codification of the ECJ's case-law making fundamental rights obligatory for Community institutions in cases such as Case 29/69 *Stauder* v. *Stadt Ulm* [1969] ECR 419, Case 11/70 *Internationale Handelsgesellschaft* v. *Einfuhr- und Vorratsstelle für Getreide und Futtermittel* [1970] ECR 1125, Case 4/73 *Nold* v. *Commission* [1974] ECR 491, and Case 44/79 *Hauer* v. *Land Rheinland-Pfalz* [1979] ECR 3727.

78) *Kadi et al.* v. *Council and Commission*, *supra* note 70, para. 285.

79) *Ibid*., para. 334.

in order to enable those persons or entities to exercise, within the periods prescribed, their right to bring an action."[80] The Court acknowledged that fashioning an appropriate system of fundamental rights protection in this regard will require a balancing of "legitimate security concerns about the nature and sources of information taken into account in the adoption of the act concerned" and "the need to accord the individual a sufficient measure of procedural justice."[81] It found, however, that the fact that the challenged regulation did not contain any "procedure for communicating the evidence justifying the inclusion of the names of the persons concerned in Annex I to that regulation"[82] and that the appellants were at no time informed of "the evidence adduced against them that allegedly justified the inclusion of their names"[83] led to an infringement of their rights of defence[84] as well as of their right to an effective legal remedy.[85]

The ECJ further determined that the actual freezing of the assets of Mr Kadi constituted an unjustified restriction of his right to property.[86] While the Court acknowledged that the right to property was not an absolute fundamental right, but rather one that may be restricted in the public interest, it continued to examine whether such a restriction did not amount to a "disproportionate and intolerable interference impairing the very substance of the fundamental right" to property.[87] The Court found that the freezing of funds was undertaken in the general interest of combating terrorism[88] and that subsequent UN Security Council resolutions provided both for humanitarian exceptions for frozen funds as well as for a periodic re-examination of the measures.[89] However, since the challenged EC regulation did not contain any guarantee to have Mr Kadi's case, which involved a significant

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80) *Ibid.*, para. 336.

81) *Ibid.*, para. 344.

82) *Ibid.*, para. 345.

83) *Ibid.*, para. 346.

84) *Ibid.*, para. 348.

85) *Ibid.*, para. 351.

86) *Ibid.*, para. 370.

87) *Ibid.*, para. 357.

88) *Ibid.*, para. 363.

89) *Ibid.*, paras 364–365.

restriction of his property rights, reviewed by competent authorities the Court found a violation of his fundamental right to respect for property.

As a result, the ECJ annulled Council Regulation (EC) No 881/2002 insofar as it concerned Mr Kadi and the Al Barakaat International Foundation. Since the annulment could seriously and irreversibly prejudice the effectiveness of the freezing measures, the Court upheld the effects of the regulation for a period of no more than three months running from the day of the judgment, in order to allow the Council to remedy the infringements found.

Shortly before the expiry of the three months period, the Commission adopted a regulation[90] in which it again listed both Mr Kadi and Al Barakaat as persons whose assets should be frozen according to Regulation No 881/2002. In the explanatory text of the regulation's preamble, the Commission stated that, in order to comply with the judgment of the Court of Justice, it had communicated the narrative summaries of reasons provided by the UN Al-Qaeda and Taliban Sanctions Committee, to Mr Kadi and to Al Barakaat International Foundation and had given them the opportunity to comment on these grounds in order to make their point of view known. After stressing that it had carefully studied their comments, the Commission rather laconically stated that their listing was still "justified" because of their association with the Al-Qaeda network.[91]

It appears doubtful whether this procedure conforms to the ECJ's requests to respect the right of defence and the right to an effective legal remedy of the persons affected by the freezing measures. At this stage, it is certainly not excluded that both Mr Kadi and Al Barakaat approach the European courts again in order to vindicate respect for their fundamental rights.

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[90] Commission Regulation (EC) No 1190/2008 of 28 November 2008 amending for the 101st time Council Regulation (EC) No 881/2002 imposing certain specific restrictive measures directed against certain persons and entities associated with Usama bin Laden, the Al-Qaida network and the Taliban, OJ 2008 L 322, p. 25.

[91] *Ibid.*, preambular para. 6 ("After having carefully considered the comments received from Mr Kadi in a letter dated 10 November 2008, and given the preventive nature of the freezing of funds and economic resources, the Commission considers that the listing of Mr Kadi is justified for reasons of his association with the Al-Qaida network.").

4.4. *The* Nada *Case before Swiss Courts*

After the CFI's decision in the *Kadi* case and before the ECJ had a chance to rule on the appeals in that case, the Federal Tribunal, Switzerland's Supreme Court, rendered a judgment in another targeted sanctions case, the so-called *Nada* case.[92] Mr Nada's assets had been frozen according to Swiss measures[93] following the adoption of UN Security Council resolutions and his name being put on the Consolidated List in 2001. After criminal proceedings against Mr Nada were terminated for lack of evidence,[94] he petitioned the Swiss State Secretariat for Economic Affairs (SECO) to have the financial sanctions against him removed. This request was denied because SECO and, on appeal, the Federal Department of Economic Affairs considered that the blocking was ordered by binding UN Security Council resolutions which could not be reviewed by SECO.

In the administrative appeal brought before the Federal Tribunal, this court largely embraced the CFI's approach which permitted a limited scope of review as to the *jus cogens* compatibility of Security Council acts.[95] However, different from the CFI, the Swiss Court did not qualify the fundamental rights concerning the right of property and the procedural guarantees of a fair trial to belong to the core of *jus cogens* rights.[96] It thus

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92) *Youssef Nada* v. *State Secretariat for Economic Affairs and Federal Department of Economic Affairs*, Administrative appeal judgment, Case No 1A 45/2007, Switzerland, Federal Tribunal, 14 November 2007; ILDC 461 (CH 2007); 133 BGE II 450.

93) Verordnung vom 2. Oktober 2000 über Massnahmen gegenüber Personen und Organisationen mit Verbindungen zu Usama bin Laden, der Gruppierung "Al-Qaïda" oder den Taliban, 2 October 2000, SR 946.203 (Switzerland), available at <www.admin.ch/ch/d/sr/c946_203.html>.

94) See *Jürg Wernli* v. *Schweizerische Bundesanwaltschaft, Bundesstrafgericht* [Federal Criminal Court], Nov. 30, 2005, BK 2005.14 (Switzerland), para. A; available at <bstger.weblaw.ch/docs/BK_2005_14.pdf>.

95) *Nada* v. *SECO*, Federal Tribunal, *supra* note 92, para. 7 ("Grenze der Anwendungspflicht für Resolutionen des Sicherheitsrats stellt jedoch das ius cogens als zwingendes, für alle Völkerrechtssubjekte verbindliches Recht dar.").

96) *Nada* v. *SECO*, Federal Tribunal, *supra* note 92, para. 7.3 ("Dagegen gehören weitere Grundrechte, selbst wenn sie für die Schweiz von überragender Bedeutung sind, nicht zum zwingenden Völkerrecht … Dies gilt insbesondere für die vom Beschwerdeführer angerufenen Grundrechte der Eigentumsgarantie und der Wirtschaftsfreiheit … Aber auch die von ihm geltend gemachten Verfahrensgarantien (Anspruch auf rechtliches Gehör und ein faires Verfahren nach Art. 6 Ziff. 1 EMRK und Art. 14 Abs. 1 UNO-Pakt II; Recht auf

refrained from exercising judicial review over the decision to put Mr Nada on the list of targeted persons.

The Swiss Federal Supreme Court even went so far as to state that although the UN Security Council's de-listing procedure was not in conformity with the standards of judicial control granted by Swiss constitutional law[97] and international human rights treaties,[98] it was unable to remedy this situation.[99] Pursuant to the Court, this could only be achieved on the international level by introducing an effective control mechanism within the UN.[100]

5. Other Cases Reviewing the Legality of UN Security Council Resolutions

The above mentioned *Kadi* cases as well as the *Nada* case and others are particularly important because they pose genuine judicial review questions resulting from requests to hold UN Security Council resolutions or at least their implementing measures unlawful and thus invalid. Other national cases often deal with indirect attacks against sanctions decisions.

One of the few cases where a listing decision has been directly challenged before national courts – and ultimately even before the human rights control system of the ICCPR – is the *Sayadi* case. In this case, individuals whose assets had been frozen pursuant to the blacklisting provided for in UN Security Council Resolution 1390 (2002) had asked to be de-listed as a result of a lack of evidence against them. After lengthy proceedings they even

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eine wirksame Beschwerde gemäss Art. 13 EMRK und Art. 2 Abs. 3 UNO-Pakt II) gehören nicht zum notstandsfesten Kern der internationalen Menschenrechtskonventionen (vgl. Art. 15 Abs. 2 EMRK, Art. 4 Abs. 2 UNO-Pakt II) und damit grundsätzlich nicht zum ius cogens.").

97) Article 29(a) of the Constitution, 1874 (Switzerland).

98) Article 6(1) of the ECHR and Article 14(1) of the International Covenant on Civil and Political Rights, 16 December 1966, entered into force 23 March 1976, 999 UNTS 171.

99) *Nada* v. *SECO*, Federal Tribunal, *supra* note 92, para. 8.3 ("Trotz der erwähnten Verbesserungen genügt das Delisting-Verfahren weder den Anforderungen an gerichtlichen Rechtsschutz gemäss Art. 29a BV, Art. 6 Ziff. 1 EMRK und Art. 14 Ziff. 1 UNO-Pakt II noch an eine wirksame Beschwerde i.S. von Art. 13 EMRK und Art. 2 Abs. 3 UNO-Pakt II.").

100) *Nada* v. *SECO*, Federal Tribunal, *supra* note 92, para. 8.3 ("Diese Situation kann nur durch die Einführung eines wirksamen Kontrollmechanismus auf Ebene der Vereinten Nationen behoben werden.").

obtained a court order from the Brussels Court of First Instance requiring the Belgian State to initiate the procedure to have their names removed from the Sanctions Committee's list.[101] When no de-listing was effectuated, the applicants brought a complaint before the Human Rights Committee which found that Belgium had violated Articles 12 and 17 ICCPR by assisting the Security Council in placing their names on the Consolidated List of the United Nations Sanctions Committee.[102]

In situations involving the legality of UN Security Council resolutions, national courts generally tend to avoid these issues and national judges usually do not seek the opportunity to second-guess such UN acts. To a certain extent, this avoidance behavior can also be recognized in the *Kadi* case where the CFI affirmed the non-reviewability of UN law as a result of Article 103 UN Charter[103] and where the ECJ insisted on the non-reviewability of the UN Security Council resolutions and stressed that it would only review the implementing acts on the European level.[104]

In a number of other cases, courts have managed to restrict their role to one of interpreting UN Security Council resolutions without questioning their legality. For instance, in the *Bosphorus* case,[105] the ECJ did not decide on the legality of a UN freezing order against Yugoslav assets and its EC implementing legislation. In fact, the referring Irish Supreme Court merely asked for an interpretation of the applicable EC regulation which had led to the impoundment of two aircrafts by Irish authorities since these planes

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101) *Nabil Sayadi and Patricia Vinck* v. *Belgian State*, Tribunal de première instance de Bruxelles, 4th Ch., 11 February 2005; cited in Third Report of the Analytical Support and Sanctions Monitoring Team appointed pursuant to Res. 1526 (2004) concerning Al-Qaida and the Taliban and associated individuals and entities, UN Doc. S/2005/572; also cited in *Nabil Sayadi and Patricia Vinck* v. *Belgium*, Application to Have Names Removed from the Consolidated List of the United Nations Sanctions Committee, Human Rights Committee, View, 29 October 2008, Communication No. 1472/2006, UN Doc. CCPR/C/94/D/1472/2006 (29 December 2008), para. 2.5.

102) *Nabil Sayadi and Patricia Vinck* v. *Belgium*, Application to Have Names Removed from the Consolidated List of the United Nations Sanctions Committee, Human Rights Committee, View, 29 October 2008, Communication No. 1472/2006, UN Doc. CCPR/C/94/D/1472/2006 (29 December 2008).

103) See *supra* text at note 65.

104) See *supra* text at note 72.

105) C-84/85 *Bosphorus Hava Yollari Turzim ve Ticaret AS* v. *Minister of Transport, Energy and Communications, Ireland and the Attorney General* [1996] ECR I-3953.

had been leased to the Turkish applicant by the former Yugoslav airline JAT. Thus, the ECJ only determined the scope of EC Regulation No 990/993[106] in the light of UN Security Council Resolution 820 (1993).[107] The ECJ found that, taking into account the purpose of the sanctions regime, the limitation of the applicant's right to property under international law had to be considered proportionate.[108] Of course, one can maintain that by concluding that the EC measures were proportionate the Court implicitly affirmed also the legality of the UN sanctions.

In the *Al Jedda* case,[109] English courts avoided the crucial issue whether action taken pursuant to UN Security Council resolutions conflicted with mandatory human rights norms. The case arose from a complaint by an individual held by British forces in Iraq pursuant to UN Security Council Resolution 1546 (2004) authorizing such internment. Al Jedda's argument that his detention violated Article 5 ECHR was only briefly addressed and rejected. In fact, the *Al Jedda* case in first line stands for the proposition that the action of the coalition forces in Iraq remain attributable to those States. Thus, unlike in the ECtHR's *Behrami* judgment,[110] the State was not absolved from international responsibility.[111]

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106) EC Regulation 1990/93 [1993] OJ L 102, 14.

107) *Bosphorus*, *supra* note 105, para. 14. According to the ECJ, in order "to determine the scope of […] Regulation No 990/993, account must be taken of the text and the aim of […] Resolution 820.".

108) *Bosphorus*, *supra* note 105, para. 26.

109) *R (on the application of Al-Jedda)* v. *Secretary of State for Defence* [2005] EWHC 1809 (Admin); *R (Al Jedda)* v. *Secretary of State for Defence* [2006] 3 WLR 954; *R (on the application of Al-Jedda)* v. *Secretary of State for Defence* [2007] UKHL 58, 12 December 2007.

110) *Agim Behrami and Bekir Behrami* v. *France*, *Ruzhdi Saramati* v. *France, Norway and Germany*, European Court of Human Rights, 2 May 2007, Joined App. Nos. 71412/01 & 78166/01. See K.M. Larsen, "Attribution of Conduct in Peace Operations: The 'Ultimate Authority and Control' Test", 19 *European Journal of International Law* (2008) 509–531; A. Sari, "Jurisdiction and international responsibility in peace support operations: the *Behrami* and *Saramati* cases", 8 *Human Rights Law Review* (2008), 151–170.

111) *R (on the application of Al-Jedda)* v. *Secretary of State for Defence* [2007] UKHL 58, 12 December 2007, para. 24 ("The analogy with the situation in Kosovo breaks down, in my opinion, at almost every point. The international security and civil presences in Kosovo were established at the express behest of the UN and operated under its auspices, with UNMIK a subsidiary organ of the UN. The multinational force in Iraq was not established at the behest of the UN, was not mandated to operate under UN auspices and was not a subsidiary organ of the UN. There was no delegation of UN power in Iraq. It is quite true

As to the potential illegality of a UN Security Council resolution authorizing a prolonged detention without trial, the House of Lords per Lord Bingham found that also merely authorizing resolutions benefitted from the primacy rule of Article 103 UN Charter and that, as a consequence, UN Security Council resolutions superseded in principle all conflicting treaty obligations. He also suggested, however, that the primacy of UN law may be limited by *jus cogens*.[112] But a *jus cogens* character of the guarantee against arbitrary deprivation of liberty was not even discussed. Instead, the House of Lords noted that according priority to UN law over Article 5(1) of the ECHR appeared to be consistent with the established case law of the ECtHR.

Nevertheless, the Law Lords suggested to reconcile the "clash between on the one hand a power or duty to detain exercisable on the express authority of the Security Council and, on the other, a fundamental human right which the UK has undertaken to secure to those (like the appellant) within its jurisdiction" by "ruling that the UK may lawfully, where it is necessary for imperative reasons of security, exercise the power to detain authorised by UNSCR 1546 and successive resolutions, but must ensure that the detainee's rights under article 5 are not infringed to any greater extent than is inherent in such detention."[113] Thus, in analogy to an international law conforming

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that duties to report were imposed in Iraq as in Kosovo. But the UN's proper concern for the protection of human rights and observance of humanitarian law called for no less, and it is one thing to receive reports, another to exercise effective command and control. It does not seem to me significant that in each case the UN reserved power to revoke its authority, since it could clearly do so whether or not it reserved power to do so.").

[112] *R (on the application of Al-Jedda)* v. *Secretary of State for Defence* [2007] UKHL 58, 12 December 2007, para. 35 ("Emphasis has often been laid on the special character of the European Convention as a human rights instrument. But the reference in article 103 to "any other international agreement" leaves no room for any excepted category, and such appears to be the consensus of learned opinion. The decisions of the International Court of Justice (*Case Concerning Questions of Interpretation and Application of the 1971 Montreal Convention Arising From the Aerial Incident at Lockerbie* [1992] ICJ Rep 3, para 39; *Case Concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide* [1993] ICJ Rep 325, per Judge ad hoc Lauterpacht, pp 439–440, paras 99–100) give no warrant for drawing any distinction save where an obligation is *jus cogens* and according to Judge Bernhardt it now seems to be generally recognised in practice that binding Security Council decisions taken under Chapter VII supersede all other treaty commitments (Simma (ed), *The Charter of the United Nations: A Commentary,* 2nd ed (2002), pp 1299–1300).").

[113] *R (on the application of Al-Jedda)* v. *Secretary of State for Defence* [2007] UKHL 58, 12 December 2007, para. 39.

interpretation of domestic law, the House of Lords adopted a human rights conforming interpretation of international law obligations in order to avoid a conflict between UN law and the demands under the ECHR.

Another English court had already taken a similar approach in the 2001 *Othman* case.[114] It involved a challenge against a decision of the UK Secretary of State for Work and Pensions that had implemented UN Security Council resolution 1333 (2000) as well as related EC regulations and led to the suspension of social benefits to the applicant who was listed as a terrorist suspect under the so-called Taliban list. While the challenge against this suspension was dismissed, the judge recognized an implicit humanitarian limitation to the unqualified freezing of assets which would allow minimum payments to be made to the applicant in order to provide for his basic needs[115] or "bare necessities of life"[116] without recourse to the UN Sanctions Committee which would not be in a position to make a speedy determination.[117]

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114) *R (on the application of Othman)* v. *Secretary of State for Work and Pensions*, 28 November 2001, EWCH Admin 1022; *reprinted in* UNJYB 507 (2001).

115) *Ibid*., para. 57 ("Accordingly, I would read this regulation subject only to the proviso that the member State is entitled, and indeed perhaps bound, to ensure that the effect of applying the regulation is not so as to mean that the individual in question, in this case the Claimant, has because of having no means of support, reached a situation where his health and perhaps his very life are at risk.").

116) *Ibid*., para. 60 ("In my judgement, for the reasons I have given and because of what I described as the law of humanity, it is not impossible, not prohibited by the regulation, for the authorities (I use that word to encompass all who might be responsible for ensuring that the Claimant has some means of livelihood and that his family do not suffer hardship in excess of any hardship that is reasonably necessary as a result of the provisions of the regulation) to ensure, as I say, that they do have the bare necessities of life. I use the expression "bare necessities of life" advisedly, because I fully recognize that the Claimant is not entitled to anything more than that.").

117) *Ibid*., para. 61 ("It seems to me that it would be quite absurd to think that that sort of matter would have to be determined by the United Nations through the Taliban Sanctions Committee. Quite apart from anything else, I very much doubt if a decision would be able to be obtained particularly speedily in that way. That is not intended as a criticism; it is merely a recognition of the realities of the situation.").

6. Policy Issues

6.1. *Risks Inherent in Decentralized Judicial Review of UN Security Council Resolutions*

Any outside judicial review of acts of an international organization is likely to cast doubts on the obligatory character of such acts, in particular, if they are meant to be binding according to their internal rules. In the case of UN Security Council resolutions, judicial review, with the inherent potential of a finding that some resolutions may have been adopted unlawfully, is likely to weaken the authority of decisions adopted by the Council. This is particularly true if the judicial review is not exercised by an internal mechanism, but by external bodies such as national courts.

Where judicial review is internal – as in the case of the ECJ and its power to annul Community acts – there is usually a system in place which calls for a follow-up in order to repair the damage. In the case of the ECJ's annulment power, the result simply is the invalidation of the challenged Community acts.[118] This implies: "Go back to start!", i.e. the Community institutions have to adopt a new act.[119] In the case of external judicial review, there is no follow-up procedure. If a national court finds fault with a UN Security Council resolution, the most likely outcome is that the resolution will be deprived of its binding force within that national legal system.[120] In other jurisdictions where no challenges have been brought or where challenges have not yet been instituted or decided or where they may be excluded for procedural or other reasons, the same UN Security Council resolution will be regarded as binding. Inevitably, this leads not only to a weakening of the authority of a UN Security Council resolution but also to a fragmentation of the single obligatory character of such instruments.

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118) This is clearly expressed in Article 231(1) TEC ("If the action is well founded, the Court of Justice shall declare the act concerned to be void.").

119) This follows from Article 233(1) TEC ("The institution or institutions whose act has been declared void or whose failure to act has been declared contrary to this Treaty shall be required to take the necessary measures to comply with the judgment of the Court of Justice.") as well as the established practice of the Community institutions.

120) This solution has been suggested in the German Constitutional Court's *Maastricht* decision. See *Brunner et al.* v. *The European Union Treaty*, German Constitutional Court, BVerfGE 89, 155; [1994] *Common Market Law Reports* 57.

One possible response in order to mitigate the risk of fragmentation and of over-zealous national courts annulling UN Security Council resolutions would lie in differentiating between different degrees of unlawfulness. Such an approach was suggested in the *BASF* case[121] where the Court of First Instance of the European Community held that a Commission communication was so gravely devoid of legal effect that it did not even constitute an "act" of an institution of the Community. Rather, it was considered legally "inexistent" and there was thus no need to annul it.[122] However, the differentiation between "absolutely void" and merely "voidable" is already difficult to agree upon in a legal system providing for an effective judicial review mechanism like the European Community. Incidentally, the ECJ overruled the CFI's decision and found that the illegality merely constituted a ground for annulment.[123] It is surely even more difficult to find consensus among different national courts on what kind of illegality would fall under such a category.

A further complication arising from judicial review of UN Security Council resolutions by the European courts lies in the ensuing responsibility consequences. Although the ECJ in *Kadi* was careful in insisting that its judgment only affected EC acts and not UN resolutions it is clear that by depriving EC implementing measures of their validity, also the underlying binding UN resolutions will not be effectively carried out. This situation is likely to create major problems both for the EU and its Member States which will fall short their obligations under the UN Charter without being effectively able to remedy this deficit.

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121) Joined cases T-79/89, T-84/89, T-85/89, T-86/89, T-89/89, T-91/89, T-92/89, T-94/89, T-96/89, T-98/89, T-102/89 and T-104/89 *BASF AG and others* v. *Commission of the European Communities*, Court of First Instance (Second Chamber) [1992] ECR II-315.

122) *Ibid*, paras 100–101 ("[…] by reason of the particularly serious and manifest defects which it exhibits, the Commission "measure" published in […] is non-existent. Actions against a non-existent measure must be dismissed on grounds of inadmissibility […]").

123) Case C-137/92 P *Commission of the European Communities* v. *BASF AG, Limburgse Vinyl Maatschappij NV, DSM NV, DSM Kunststoffen BV, Hüls AG, Elf Atochem SA, Société Artésienne de Vinyle SA, Wacker Chemie GmbH, Enichem SpA, Hoechst AG, Imperial Chemical Industries plc, Shell International Chemical Company Ltd and Montedison SpA*, European Court of Justice [1994] ECR I-2555.

6.2. *Positive Effects of Decentralized Judicial Review of UN Security Council Resolutions*

From a national perspective, often from a national constitutional law perspective, the protection of core values such as human rights will frequently prevail over the internationalist, pro-international organizations stance equally often contained in national law. This prevalence of core constitutional law protections has been affirmed in a number of domestic law cases. For instance, in the American case of *US* v. *Steinberg*,[124] a conflict between a UN Security Council resolution and US constitutionally guaranteed fundamental rights and freedoms was resolved in favor of the latter. Similarly the German *Solange* cases[125] as well as the Italian *Frontini* case[126] evidence the unwillingness of national courts to forego fundamental rights guarantees enshrined in domestic constitutional law for the sake of international cooperation, *in casu* of supranational integration within the EC.[127]

From a purely technical point of view, such conflicts should have been easily solved in favor of compliance with international/European law obligations. It is a generally accepted principle that national law, including national constitutional law, cannot justify a State's non-compliance with international obligations.[128] Similarly, under Article 103 of the Charter,[129]

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124) *US* v. *Steinberg*, 478 F. Supp. 29 (N.D. Ill. 1979) ("This country has a continuing obligation to observe with entire good faith and scrupulous care all of its undertakings under [the UN Charter], including support for the resolutions of the Security Council. Of course, a treaty […] cannot run counter to the provisions of the Constitution of this country. Therefore, the government […] could not choose between respecting the constitutional rights of a citizen and adhering to the provisions of a treaty.").

125) *Internationale HandelsgesellschaftmbH* v. *Einfuhr- und Vorratstelle für Getreide und Futtermittel (= Solange I)*, Federal Constitutional Court, 29 May 1974, 2 *Common Market Law Reports* (1974) 540; *In re application of Wünsche Handelsgesellschaft (=Solange II)*, Federal Constitutional Court, 22 October 1986, 3 *Common Market Law Reports* (1987) 225.

126) *Frontini* v. *Ministero Delle Finanze*, Italian Constitutional Court, Case 183/73, 2 *Common Market Law Reports* (1974) 372.

127) See *infra* text at note 131.

128) Cf. Article 27 Vienna Convention on the Law of Treaties, 23 May 1969 ("A party may not invoke the provisions of its internal law as justification for its failure to perform a treaty.")

129) Cf. Article 103 UN Charter ("In the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail.")

States may not justify non-compliance with UN law with conflicting obligations under human rights treaties.

However, one may doubt whether the UN Charter's "formal" solution to solve potential conflicts between international human rights obligations and obligations under binding UN Security Council resolutions in favor of the latter[130] is fully adequate in such situations. Certainly, unconditional preference to UN law would enhance the effectiveness of that legal order. However, where this leads to a conflict with fundamental human rights obligations, a substantive assessment may be required to come to an adequate solution.

When balancing the need for international cooperation within international organizations and the exigencies of providing a substantive fundamental rights protection to citizens and foreigners, sometimes difficult policy choices have to be made. Safeguarding human rights standards, in itself an internationalist agenda, is of utmost importance; so is compliance with binding UN Security Council resolutions aiming at maintaining world peace and security. Thus, it would appear crucial to find a way to achieve both goals at the same time. Instead of the dichotomy "compliance with UN Security Council resolutions" vs. "upholding human rights", as it often has been phrased in the context of targeted sanctions, it seems that the long-term goal would lie in a combination of both made possible by the adoption and application of UN Security Council resolutions in a human rights conforming fashion. What may sound like the proverbial "squaring of the circle" should in fact be possible to achieve. On the one hand, the UN may be brought to adopt sanctions resolutions in a way that conforms to basic human rights obligations.[131] On the other hand, States may use their implementation discretion in a way to ensure that fundamental rights are not infringed or at least to minimize the potential of such infringement.

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130) It is generally accepted that the duty to accord preference is not limited to direct Charter obligations but includes obligations resulting from binding UN Security Council resolutions. See Rudolf Bernhardt, "Article 103", in B. Simma (ed.), *The Charter of the United Nations: A Commentary* (2nd edn, 2002), para. 9.

131) Attempts in this direction can be seen in the follow-up to the targeted sanctions debate leading to suggestions to fashion a more human rights compliant sanctions mechanism. See Cameron, *supra* note 18; Fassbender, *supra* note 18; Watson Institute for International Studies, *supra* note 18.

In both situations, national courts may play a crucial role. The refusal of national courts to apply UN Security Council resolutions believed to be contrary to human rights requirements would appear to build up pressure on the Council and its members to make sure that such concerns are taken into account. In addition, national courts will play a crucial role in actually shaping the way how States implement UN Security Council resolutions.

One of the most beneficial spill-over effects of national court decisions refusing blanket adherence to UN Security Council resolutions appears to stem from the inherent, indirect pressure for reform within the UN Security Council. The story of the ECJ pressured into paying more serious attention to fundamental rights protection within the EC by disobedient national courts like the German Bundesverfassungsgericht or the Italian Corte Costituzionale[132] has been re-told too often to be innovative. It is still worth recalling that in 1974 in its *Solange I* decision,[133] the German Constitutional Court upheld its jurisdiction over a human rights complaint against a Community act "as long as" Community law does not contain a comparably adequate fundamental rights protection and that it took until 1986 that the same court reversed its earlier reasoning in *Solange II*[134] and found that German courts would not exercise their power to review acts of Community organs "as long as" an equivalent human rights protection was guaranteed by the ECJ.

What was, of course, crucial in this development was the way how the EC, as an international organization, reacted to this judicial rebellion from within. Instead of insisting on its direct effect and supremacy of Community law doctrines including precedence of secondary EC law over constitutional law principles of its members[135] and at the same time holding that it did not

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[132] According to the Italian Constitutional Court in *Frontini* v. *Ministero Delle Finanze*, *supra* note 126, limitations of sovereignty could not allow EC institutions to violate "the fundamental principles of our constitutional order or the inalienable rights of the human person."

[133] *Internationale HandelsgesellschaftmbH* v. *Einfuhr- und Vorratstelle für Getreide und Futtermittel (= Solange I)*, Federal Constitutional Court, 29 May 1974, 2 *Common Market Law Reports* (1974) 540.

[134] *In re application of Wünsche Handelsgesellschaft (= Solange II)*, Federal Constitutional Court, 22 October 1986, 3 *Common Market Law Reports* (1987) 225.

[135] See Case 106/77, *Amministrazione delle Finanze dello Stato* v. *Simmenthal SpA* [1978] ECR 629.

have jurisdiction to hear fundamental rights complaints against Community organs because the EC Treaty did not contain any such guarantees,[136] the ECJ gradually "expanded" its jurisdiction over alleged human rights infringements by EC institutions. In the late 1960s/early 1970s, the ECJ developed a now firmly established jurisprudence regarding fundamental rights violations as infringements of general principles of (Community) law which can be challenged by an annulment action.[137]

Transferring the EC narrative to the UN may not be novel. But the question is less one of innovation than of persuasiveness and effectiveness. It is clear that the high level of integration within the EC/EU differs markedly from the UN system. Still, it appears plausible that the external pressure on the UN Security Council to design a system of targeted sanctions which confirms to basic notions of human rights will be also strong enough to motivate the Council in order to reach its own interest of compliance with its resolutions. To some extent the measures taken by the UN Security Council in devising a new de-listing mechanism[138] and others demonstrate already the Council's awareness that there is indeed a problem. In fact, not only national courts but also a number of human rights bodies have informed the UN Security Council in this sense.[139]

The second major contribution of national courts to the human rights conform design of UN Security Council sanctions lies in their interpretative power when shaping national application and implementation policies. Where obligations under sanctions resolutions contain some room for maneuver, national courts play a crucial role in ensuring that such resolutions are applied in a human rights conforming manner. The attempt by the House of Lords in the *Al Jedda* case illustrates this approach. While the

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136) See Case 1/58, *Stork* v. *High Authority* [1959] ECR 17; Cases 36-8 and 40/59, *Geitling* v. *High Authority* [1960] ECR 423; Case 40/64, *Sgarlata and others* v. *Commission* [1965] ECR 215.

137) Starting with Case 29/69, *Stauder* v. *City of Ulm* [1969] ECR 419; Case 11/70, *Internationale Handelsgesellschaft* v. *Einfuhr- und Vorratsstelle für Getreide und Futtermittel* [1970] ECR 1125; Case 4/73, *Nold* v. *Commision* [1974] ECR 491. See also Philipp Alston (ed.), *The EU and Human Rights* (1999); Nanette Neuwahl and Allan Rosas (eds), *The European Union and Human Rights* (1995).

138) UN Security Council Resolution 1730 (2006); see also text *supra* at note 44.

139) See *Nabil Sayadi and Patricia Vinck* v. *Belgium*, Human Rights Committee, 29 October 2008, Communication No. 1472/2006, *supra* note 102.

court refrained from finding that the UN Security Council authorization violated *jus cogens*,[140] it stressed "that the UK may lawfully, where it is necessary for imperative reasons of security, exercise the power to detain authorised by UNSCR 1546 and successive resolutions, but must ensure that the detainee's rights under article 5 are not infringed to any greater extent than is inherent in such detention."[141]

Both potential forms of contributions by national courts will require a careful approach in order to avoid parochial concepts from prevailing over true international ones. While it may be tempting for domestic courts to substitute their own notions of fundamental rights protection for an international one, they would have to refrain from such temptation in order to secure the aim of contributing to a genuine international human rights protection.

7. Conclusion

The question of judicial review of UN Security Council resolutions is in fact not a new one. It has received much attention by international lawyers in the course of the *Lockerbie* case before the ICJ. However, even before *Lockerbie* the World Court has repeatedly upheld its jurisdiction in cases where the legality of measures of the UN Security Council or other UN organs was in issue. With the surge of targeted sanctions, in particular in connection with the freezing of assets of suspected terrorists, the legitimacy and accuracy of UN Security Council resolutions has again come to the fore. Increasingly, individuals blacklisted by the Security Council or otherwise affected by its decisions are trying to challenge such UN acts before international and national fora. The *Kadi* case before the CFI and ECJ is just one of the most prominent recent examples. But also the Swiss Supreme Court and other national courts had to rule on the scope of reviewability of UN Security Council resolutions.

This increased tendency of judicial bodies to question the legality of UN sanctions may lead to a loss of coherence and effectiveness of UN law. However, this risk could be out-weighted by positive effects of such

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140) See *supra* note 112.

141) *R (on the application of Al-Jedda)* v. *Secretary of State for Defence* [2007] UKHL 58, 12 December 2007, para. 39.

decentralized judicial review stemming from an increased pressure by UN member States to require the UN Security Council to act in a human rights-conforming manner.