

The UN Collective Security System and its Relationship with Economic Sanctions and Human Rights

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I. Introduction

The UN collective security system is based on the complementary nature of two fundamental structural criteria. First, “In order to ensure prompt and effective action by the United Nations, its Members confer on the Security Council primary responsibility for the maintenance of international peace and security ... ” (Article 24 UN Charter). Second, “All Members of the United Nations, in order to contribute to the maintenance of international peace and security, undertake to make available to the Security Council, on its call and in accordance with a special agreement or agreements, armed forces, assistance, and facilities, including rights of passage, necessary for the purpose of maintaining international peace and security” (Article 43 UN Charter). After sixty-five years neither of these fundamental ideas has been implemented in full. Nevertheless, the Security Council understands its delegated powers in a dynamic way,¹ and therefore has not hesitated to authorise many different measures under Chapter VII.

During the last two decades, UN economic sanctions have come under harsh criticism. The experience of the sanctions imposed on Iraq by the UN Security Council in the 1990s, and still in place, shows the ethical and legal concerns of sanctions. The humanitarian problems caused by economic sanctions against Iraq illustrate their adverse impact on the population.² For a long time, different UN organs and hu-

¹ Ch. Tomuschat, “International Law as the Constitution of Mankind”, in: International Law Commission (ed.), *International Law on the Eve of the Twenty-first Century: Views from the International Law Commission*, 1997, 37 et seq.; D. Sarooshi, *The United Nations and the Development of Collective Security: The Delegation by the UN Security Council of its Chapter VII powers*, 1999, 174; T.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”, *NYIL* 26 (1995), 33 et seq. (70-71).

² S. Willett, *The Gulf Crisis: Economic Implications*, 1990; P. Clawson, *How Has Saddam Survived?, Economic Sanctions: 1990-93*, 1993. UNICEF Press Release Doc. CF/DOC/PR/1999/29 of 12 August 1999. In 1999, after conducting the first surveys since 1991 of child and maternal mortality in Iraq, UNICEF concluded that in the heavily-populated southern and central parts of the country, children under five are dying at more than twice the rate they were 10 years ago. Richard Garfield, an expert on the ef-

humanitarian agencies have called for an end to many of the sanctions in order to facilitate a greater flow of food and medicines.³ The UN General Assembly's debate emphasised the need to lift the sanctions in order to end human suffering in Iraq,⁴ although the international community must ensure compliance with the sanctions imposed by the Security Council as measures to restore international peace and security. Many lessons have been learned from the economic sanctions against Iraq and the implementation of the oil for food program⁵, as the sanctions have affected the civilian population more than the Iraqi Government. Indeed, the Government of Iraq pointed to sanctions as the primary cause of suffering in Iraq, while others blamed the authorities in Baghdad. A reliable assessment right at the beginning could have identified the processes which affected humanitarian conditions, and could therefore have assisted in mitigating the unintended negative consequences of the sanctions.

For these reasons, reliable assessments are needed to evaluate humanitarian conditions, to identify whether and how sanctions cause harm, to improve the quality of people's lives by anticipating potential negative consequences, and to get maximum humanitarian benefit from available resources. A reliable assessment methodology will help to address these needs. Economic sanctions by the international community, have a stronger impact on the target country than a unilateral embargo

fects of sanctions on civilians, states that "the underlying causes of these excess deaths include contaminated water, lack of high quality foods, inadequate breastfeeding, poor weaning practices, and inadequate supplies in the curative health-care system", R. Garfield, "Morbidity and mortality among Iraqi children from 1990 through 1998: assessing the impact of the Gulf war and economic sanctions", unprinted version, July 1999, available on Campaign Against Sanctions on Iraq <www.casi.org.uk/info/garfield/dr-garfield.html>. In his opinion, the lack of food due to sanctions translated into a 32 per cent drop in per capita calorie intake compared to before the Gulf war. According to the Government of Iraq, by 1997, only half of the water treatment capacity of the country was operational.

³ D. Jehl, "UN Official Calls for an End of Sanctions against Iraq", *International Herald Tribune*, 21 September 1999, 10.

⁴ UN Press Release GA/9618 of 30 September 1999.

⁵ E. de Wet, "Human rights limitations to economic enforcement measures under article 41 of the United Nations Charter and the Iraq sanctions regime", *LJIL* 14 (2001), 277 et seq. (282); E. Hoskins, "The Humanitarian Impacts of Economic Sanctions and War in Iraq", in: Th. Weiss (ed.), *Political Gain and Civilian Pain*, 1997, 92 et seq. (106-108).

respectively sanction. Nevertheless, multilateral action cannot overrule the principle of proportionality and the respect for human rights which are enshrined within the UN collective security system.

To date, the international community's efforts to combat international terrorism are an excellent illustration of the difficulties faced by the UN collective security system. The effort to maintain international peace and security on the one hand and the principle of proportionality and the need to protect human rights on the other. The Security Council, being the legitimate authority in matters of collective security, by adopting the necessary measures to prevent acts of terror or any breach of the peace is duty-bound to minimise "collateral damage" by considering the specific means to be applied in each case.

The collective security system of the United Nations will be more efficient, robust and credible if, in order to address threats to the international peace and security, it deals with each situation on an individual basis. Its effectiveness depends ultimately not only on the legality of its decisions but also on the common perception of their legitimacy, their being taken on solid evidentiary grounds and for the right reasons, morally as well as legally. As noted by the High-level Panel on Threats, Challenges and Change, "if the Security Council is to win the respect it must have as the primary body in the collective security system, it is critical that its most important and influential decisions, those with large-scale life-and-death impact, be better made, better substantiated and better communicated. In particular, in deciding whether or not to authorize the use of force, the Council should adopt and systematically address a set of agreed guidelines, deciding not whether force can legally be used but whether, as a matter of good conscience and good sense, it should be."⁶

The Report of the Secretary-General "In Larger Freedom: Towards Security, Development, and Human Rights For All", outlines that "the task is not to find alternatives to the Security Council as a source of authority but to make it work better,"⁷ within the competences of Chapter VII. The language of Chapter VII is inherently broad enough, and has been interpreted broadly enough, to allow the Security Council to approve any chosen coercive action, including military action, against a state when it deems this "necessary to maintain or restore international peace and security."⁸ For these reasons the UN General Assembly has

⁶ Doc. A/59/565 of 2 December 2004, para. 204.

⁷ Doc. A/59/2005 of 21 March 2005, para. 126.

⁸ Article 42 UN Charter.

called upon the Security Council “to ensure that fair and clear procedures exist for placing individuals and entities on sanctions lists and for removing them, as well as for granting humanitarian exceptions.”⁹ Precisely what constitutes “fair and clear procedures” is contested, however, and its determination will necessarily rely on both legal and political arguments. To determine the exact scope, one should assess the powers, procedural guarantees and authority of the institution involved.

This article focuses on the UN sanctions regime in the recent practice of the Security Council and its compatibility with human rights. It has to be emphasised that this article does not question the legitimacy of economic sanctions as an instrument for enforcing Security Council decisions or as a response to grave human rights violations. It does not analyse the issue of who has the right to decide whether the Security Council has acted *ultra vires* or not. Instead, it is based on the premises that the Member States can reject the legality of a Security Council decision at the moment of its individual or regional implementation and thus refuse to implement it as a “right of last resort”.¹⁰ In essence, this article only questions how UN economic sanctions, adopted in accordance with the UN Charter, must simultaneously be in accordance with general human rights law, thereby showing that international law and the United Nations Charter are adapting to the new international context and challenges.

The article begins by briefly defining the powers of the UN Security Council, examining how the Security Council is bound by human rights, and summarising the recent UN sanctions practice. It then examines if and to what extent the Security Council may limit human rights norms. The article argues that the Council’s limitations must be in ac-

⁹ 2005 World Summit Outcome, A/RES/60/1 of 16 September 2005, para. 109.

¹⁰ De Wet, see note 5, 280. As emphasised by de Wet, the refusal to implement a Council’s decision as a “right of last resort” must, however, only be exercised in extreme situations where there is a strong case that the measures are illegal. The refusal of implementation may be possible also as “a collective right of last resort”, when an international binding decision is to be applied in a regional or national legal order. G. Nolte, “The Limits of the Security Council’s Powers and its Functions in the International Legal System: Some Reflections”, in: M. Byers (ed.), *The Role of Law in International Politics*, 2000, 318. Nolte indicates that Member States, acting alone or within a representative group of other Member States, could be the ultimate interpreters of the legality of a Security Council action.

cordance with international law, in particular human rights law and shows how the Council is learning to deal with numerous difficulties. It should be noted that the debate on the human rights conformity of Security Council resolutions imposing sanctions is not an isolated incident of public criticism of UN actions, but rather an important aspect of a broader and increasing debate on the accountability of international organisations in general, and on the accountability of the United Nations, in particular.¹¹

II. The UN Collective Security System and the Security Council

Article 2 (4) of the Charter states that “All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations.” Further, Article 2 (7) adds that “this principle shall not prejudice the application of enforcement measures under Chapter VII.” Hence, the Security Council has the primary responsibility for the maintenance of international peace and security (Article 24 (1)).

The Security Council is a political body; entitled to adopt measures having legal consequences. The competence granted to the Council by the Charter is a normative one. Under Chapter VII it can take enforcement action to maintain or restore international peace and security. Such measures range from economic sanctions to military interventions in case the Security Council has previously established the existence of “any threat to the peace, breach of the peace or act of aggression” under Article 39 of the Charter. This is of utmost importance, as the drafters of the Charter refused to define what constitutes “any threat to the peace” and, on the contrary, agreed that a responsible and capable Council should determine whether there was a threatening situation or not, on a case by case basis.¹² Thus, after a decision under Article 39 stating that a situation constitutes any threat to, or breach of the peace, the Security Council can order states to undertake provisional measures under Article 40, measures under Article 41 – normally referred to as sanctions – and finally, military action under Article 42, against the en-

¹¹ J. Müller (ed.), *Reforming the United Nations*, 2006.

¹² 15 P/3, 1 UNCIO, Words of the United States Representative at the Opening of the Conference in San Francisco, 124.

tity responsible for the threat or breach.¹³ The Security Council seldom states explicitly on which article it is basing its resolution, but confines itself to state that it is “acting under Chapter VII of the Charter.”¹⁴ The fact that a situation constitutes a threat to the peace does not prejudice the objective nature of the specific situation. The general concept of international peace and security can cover all kinds of situations.¹⁵

1. The Wide Margin of Appreciation within the Framework of Chapter VII

According to Article 39 of the UN Charter, the Security Council “shall determine the existence of any threat to the peace, breach of the peace, or act of aggression and shall make recommendations, or decide what measures shall be taken ...”. This means that on the basis of actual facts, the Council will decide the severity of the situation. Its very wide discretion is not arbitrary;¹⁶ any situation contrary to international peace and security may potentially be determined. This wide margin of appreciation cannot be delegated;¹⁷ however, the competence of the Council is not unlimited. This conception of the discretion of the Security Council has two limits. On the one hand, it is obliged to act on real

¹³ I. Österdahl, *Threat to the Peace*, 1998; J.A. Frowein, “Article 41 and Article 42”, in: B. Simma (ed.), *The Charter of the United Nations: A Commentary*, 1995, 621 et seq.

¹⁴ S/RES/824 (1993) of 6 May 1993; S/RES/841 (1993) of 16 June 1993; S/RES/917 (1994) of 6 May 1994; S/RES/1160 (1998) of 31 March 1998.

¹⁵ ICTY Appeals Chamber *Tadić* Decision 1995 IT-94-1-AR72, para. 28.

¹⁶ B. Conforti, “Le pouvoir discrétionnaire du Conseil de Sécurité en matière de constatation d’une menace contre la paix d’une rupture de la paix ou d’un acte d’agression”, in: Académie de Droit International de La Haye (ed.), *Le développement du rôle du Conseil de Sécurité*, Colloque de l’Académie de Droit International de La Haye, 21-23 Juillet 1992, 1993, 51 et seq.; M. Bothe, “Les limites des pouvoirs du Conseil de Sécurité”, *ibid.*, 67 et seq.; I. Cameron, “UN Targeted Sanctions, Legal Safeguards and the European Convention on Human Rights”, *Nord. J. Int’l L.* 72 (2003), 159 et seq. (178).

¹⁷ Sarooshi, see note 1, 33. On the contrary, some authors do not deny that under specific circumstances the General Assembly may exercise such functions, see D. Zaum, “The Security Council, the General Assembly and War: the Uniting for Peace Resolution”, in: A. Roberts/ D. Zaum (ed.) *Selective Security. War and the United Nations Security Council since 1945*, 2008, 154 et seq.

and imminent threats.¹⁸ On the other, it serves as a curb on the abuse of power.

The end of the Cold War and the disappearance of the political blocs have led to a closer co-operation among the permanent members of the Security Council. In some circumstances, China and the Russian Federation have preferred to abstain, rather than exercise their right to veto, thereby allowing the Council to develop an intense executive, regulatory and disciplinary activity within Chapter VII.¹⁹ Traditionally not only armed conflicts between states have been identified as a threat to international peace and security²⁰ but under certain circumstances also direct or indirect support by one state for armed rebel groups operating in another state.²¹ However, the living conditions of civilians and respect for human rights have not always been considered essential elements of peace and security. Until 1990 the protection of human rights was regarded as an internal affair of states.

¹⁸ Doc. A/59/565, see note 6, where the High-level Panel Report outlines that the main problem arises where the threat in question is not imminent but still claimed to be real, for example, the acquisition, with allegedly hostile intent, of nuclear weapons-making capability (para. 188). Thus, the international community has to be concerned about nightmare scenarios combining terrorists, weapons of mass destruction and irresponsible states, and much more besides, which may conceivably justify the use of force, not just reactively but preventively and before a latent threat becomes imminent (para. 194).

¹⁹ G. Nolte, "The different functions of the Security Council with respect to Humanitarian Law," in: Roberts/ Zaum, see note 17, 519 et seq. (520-521).

²⁰ S/RES/1297 (2000) of 12 May 2000; S/RES/1298 (2000) of 17 May 2000 and S/RES/1308 (2000) of 17 July 2000; S/RES/1312 (2000) of 31 July 2000 and S/RES/1430 (2002) of 14 August 2002; on the situation between Eritrea and Ethiopia. On the situation between Iraq and Kuwait, S/RES/661 (1990) of 6 August 1990; S/RES/986 (1995) of 14 April 1995; S/RES/1284 (1999) of 17 December 1999; S/RES/1382 (2001) of 29 November 2001; S/RES/1447 (2002) of 4 December 2002.

²¹ In the Nicaragua case the Court stated " ... that the US had to have effective control of the operations in order to be responsible" and that was finally denied, *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, ICJ Reports 1986, 14 et seq. (101 et seq., para. 191) which analyses the customary nature of the rule prohibiting the use of force and recognises that "(...) it will be necessary to distinguish the most grave forms of the use of force (those constituting an armed attack) from other less grave forms." S/RES/1343 (2001) of 7 March 2001 and S/RES/1497 (2003) of 1 August 2003, on the situation in Liberia.

Taking into account article 31 3. b) of the Vienna Convention on the Law of Treaties, the Security Council recognises that certain domestic situations (e.g. civil wars or serious violations of human rights) can be considered threats to international peace and security and, therefore, fall under its primary responsibility.²² The early Council enforcement actions against violations of human rights and the humanitarian intervention in internal affairs were considered innovative and not always peacefully accepted.²³ It was e.g. the magnitude of the repression perpetrated against the Kurdish civilian population of northern Iraq and the masses of refugees and displaced persons with cross-border incursions which threatened the peace and security in the region and thus, led the Security Council to authorise humanitarian intervention in Iraq. Subsequently, it also authorised military action in similar situations e.g. in the former Yugoslavia,²⁴ Somalia,²⁵ Rwanda,²⁶ Kosovo,²⁷ Côte d'Ivoire,²⁸ and East Timor.²⁹ In other instances, the Council has estimated that the dismantling of a state's institutions, particularly the police and the judiciary, the breakdown of law and public order, or the illegal exploitation

²² P. Valek, "Is unilateral humanitarian intervention compatible with the UN Charter?", *Mich. J. Int'l L.* 26 (2004-2005), 1223 et seq. (1233).

²³ F.K. Abiew, *The Evolution of the Doctrine and Practice of Humanitarian Intervention*, 1999, 273.

²⁴ S/RES/770 (1992) of 13 August 1992 and S/RES/757 (1992) of 30 May 1992, the Council authorised the states to take all measures necessary to facilitate the delivery of humanitarian assistance in Bosnia and Herzegovina, in coordination with the United Nations.

²⁵ S/RES/733 (1992) of 23 January 1992, where the Security Council expressed "alarm at the worsening civil war in Somalia and the heavy losses of human lives".

²⁶ S/RES/918 (1994) of 17 May 1994.

²⁷ Indeed, the violence in the province of Kosovo was spreading into the Federal Republic of Yugoslavia. Under these circumstances the Security Council adopted resolution S/RES/1160 (1998) of 31 March 1998, condemning the Serbian security forces for excessive power abuse committed against civilians and the Army for the Liberation of Kosovo for terrorist acts. After the armed intervention and as a result of it, the Federal Republic of Yugoslavia and the Kosovo came to an agreement. In S/RES/1244 (1999) of 10 June 1999 the Council endorsed the agreement of the parties and the G8, and, acting under Chapter VII, established a security force for Kosovo.

²⁸ S/RES/1572 (2004) of 15 November 2004 and S/RES/1643 (2005) of 15 December 2005.

²⁹ S/RES/1264 (1999) of 15 September 1999.

of natural resources are threats to the international peace and security.³⁰ The Council has also enabled the system of collective security against the failure to protect civilians during armed conflict,³¹ to control the risks of small arms trafficking,³² against the recruitment of child soldiers,³³ to stop child abuse³⁴ and to ensure the safety of its staff.³⁵ The continuous violation of international law has also provoked institutional intervention imposed by the Council.³⁶ Therefore, the Security Council decided to intervene in Haiti,³⁷ Somalia,³⁸ Afghanistan,³⁹ Liberia,⁴⁰ Sierra Leone,⁴¹ Sudan,⁴² Iraq⁴³ and the Democratic Republic of the

³⁰ Doc. S/2001/357 of 12 April 2001 and Doc. S/2001/1072 of 13 November 2001, where the Panel notes that the struggle for minerals, agricultural products, land and even tax revenues has led to micro-conflicts in the Congo and attracted armies of six African states. The situation attracted criminal groups linked to the armies of Rwanda, Uganda, Zimbabwe and the Government of the Democratic Republic of the Congo.

³¹ S/RES/1738 (2006) of 23 December 2006; S/RES/1674 (2006) of 28 April 2006.

³² S/RES/1467 (2003) of 18 March 2003.

³³ S/RES/1612 (2005) of 26 July 2005; S/RES/1460 (2003) of 30 January 2003; S/RES/1379 (2001) of 20 November 2001; S/RES/1314 (2000) of 11 August 2000.

³⁴ S/RES/1325 (2000) of 31 October 2000; S/RES/1445 (2002) of 4 December 2002.

³⁵ S/RES/1296 (2000) of 19 April 2000, op. para. 5.

³⁶ S/RES/1676 (2006) of 10 May 2006; S/RES/1737 (2006) of 23 December 2006. See, Y. Kerbrat, *La référence au Chapitre VII de la Charte des Nations Unies dans les résolutions à caractère humanitaire du Conseil de sécurité*, 1995.

³⁷ S/RES/940 (1994) of 31 July 1994.

³⁸ S/RES/1872 (2009) of 26 May 2009, op. paras 2 and 6; S/RES/1844 (2008) of 20 November 2008.

³⁹ S/RES/1662 (2006) of 23 March 2006; S/RES/1659 (2006) of 15 February 2006; S/RES/1806 (2008) of 20 March 2008; S/RES/1868 (2009) of 23 March 2009.

⁴⁰ S/RES/1854 (2008) of 19 December 2008.

⁴¹ S/RES/1270 (1999) of 22 October 1999; S/RES/1289 (2000) of 7 February 2000; S/RES/1306 (2000) of 5 July 2000; S/RES/1389 (2002) of 16 January 2002.

⁴² S/RES/1070 (1996) of 16 August 1996, the Council adopted new measures under Chapter VII of the Charter because the Sudanese Government had not responded to the requests made in op. para. 4 of Resolution S/RES/1044 (1996) of 31 January 1996, as reaffirmed in op. para. 1 of Reso-

Congo.⁴⁴ In all these cases the Council attempted to rebuild the *status quo*.⁴⁵

Once the Security Council determines that a particular situation poses a threat to the peace or that there exists a breach of the peace or an act of aggression, it enjoys a wide margin of discretion in choosing the course of action. It can exercise its exceptional powers under Chapter VII to choose between the particular measures provided for in Arts 41 and 42 of the Charter.

A question arises in this respect as to whether the choice of the Security Council is limited to the measures provided for in Arts 41 and 42 of the Charter (as the wording of Article 39 suggests), or whether it has even broader discretion in the form of general powers to maintain and restore international peace and security under Chapter VII. In the latter case one does not have to find every measure decided by the Security Council under Chapter VII within the confines of Arts 41 and 42, or possibly Article 40. Whatever the case, under both interpretations, the Security Council has broad discretion in deciding on the course of action and evaluating the appropriateness of the measures to be taken. The wording of Article 39 is quite clear as to the channelling of the very broad and exceptional powers of the Security Council under Chapter VII through Arts 41 and 42. These two articles leave the Security Council a wide choice. This consideration is reinforced by the fact that the Security Council is not a “law enforcement organ”, but it enjoys unfettered discretions as a political one. Indeed, the UN Charter recognises

lution S/RES/1054 (1996) of 26 April 1996; therefore, its failure posed a threat to international peace and security.

⁴³ S/RES/1441 (2002) of 8 November 2002. See explanations by the following states, Doc. S/PV.4644, 8 November 2002: United States 2-17; United Kingdom 18-20; Spain 28-29; Angola 31-32. Doc. S/PV.4701, 5 February 2003, Syria 10-12; Iraq 34-36; and Pakistan 32-33.

⁴⁴ S/RES/1291 (2000) of 24 February 2000; S/RES/1304 (2000) of 16 June 2000; S/RES/1323 (2000) of 13 October 2000; S/RES/1332 (2000) of 14 December 2000; S/RES/1341 (2001) of 22 February 2001; S/RES/1355 (2001) of 15 June 2001; S/RES/1376 (2001) of 9 November 2001; S/RES/1417 (2002) of 14 June 2002; S/RES/1445 (2002) of 4 December 2002; S/RES/1484 (2003) of 30 May 2003.

⁴⁵ J. Stromseth, “Rethinking humanitarian intervention: the case for incremental change”, in: J.L. Holzgrefe (ed.) *Humanitarian Intervention: Ethical, Legal and Political Dilemmas*, 2003, 232 et seq. (241); Danish Institute for International Studies, *Humanitarian Intervention: Legal and Political Aspects*, 1999, 64.

the Council's powers and tasks as those of a political organ enjoying a wide margin of discretion regarding "how to maintain or restore international peace and security". This idea was stressed by Kelsen, stating that "the purpose of the enforcement action under article 39 is not to maintain or restore the law, but to maintain, or restore peace, which is not necessarily identical with the law."⁴⁶

The broad scope of action has enabled the Council to act against non-state actors such as rebel groups⁴⁷ or mercenaries⁴⁸ and against specific individuals which can be individually identified.⁴⁹ Whatever the case, when adopting any measure under Article 41 of the Charter, the Security Council should be guided by the approach taken in Annex II of General Assembly Resolution 51/242 (Supplement to an Agenda for Peace), which indicates that sanctions should be resorted to only with the utmost caution, when other peaceful options provided by the Charter are inadequate. The reasons that necessitate the imposition of sanctions should be identified and stated in advance.⁵⁰

UN sanctions is the common denomination to designate non-military measures decided by the UN Security Council following Article 41 of the UN Charter, despite the fact that the word "sanction" does not appear in the Charter. It is, moreover, an open question whether Article 41 measures are really "sanctions" as a matter of international law, i.e. reprisals or countermeasures. It should be noted that Article 41 has evolved over time. Undoubtedly nowadays sanctions are still an important tool under the Charter of the United Nations in order to maintain international peace and security without recourse to force. The feasibility of interrupting postal, telegraphic and radio communications was challenged by Member States at various times, and such severances have rarely occurred. Some of the measures adopted by the Se-

⁴⁶ H. Kelsen, *The Law of the United Nations*, 1951, 294.

⁴⁷ S/RES/1521 (2003) of 22 December 2003.

⁴⁸ S/RES/1457 (2003) of 24 January 2003; S/RES/1474 (2003) of 8 April 2003.

⁴⁹ In the case of Liberia; S/RES/1343 (2001) of 7 March 2001; S/RES/1521 (2003) of 22 December 2003; S/RES/1638 (2005) of 11 November 2005; S/RES/1523 (2004) of 30 January 2004, concerning Western Sahara. In case of Afghanistan and Al-Qaida, S/RES/1390 (2002) of 16 January 2002; S/RES/1455 (2003) of 17 January 2003; S/RES/1526 (2004) of 30 January 2004; S/RES/1617 (2005) of 29 July 2005; S/RES/1735 (2006) of 22 December 2006; S/RES/1822 (2008) of 30 June 2008.

⁵⁰ A/RES/64/115 of 15 January 2010.

curity Council are not expressly mentioned in Article 41, although in some respects, the Council has clearly gone beyond these stipulations.

Some writers consider an alternative view of UN sanctions under Article 41, at least potentially, as a kind of economic warfare, i.e. non-forcible measures regularly undertaken in wartime alongside (or instead of) armed measures, for the purpose of harming or defeating the enemy, rather than as peacetime countermeasures.⁵¹ Subsequently, the list of Article 41 is non-exhaustive.⁵² The most frequently adopted sanctions have covered prohibitions of export and import,⁵³ selective embargoes,⁵⁴ prohibitions of service,⁵⁵ prohibitions of movement of funds and freezing of funds and assets,⁵⁶ prohibition of air, sea and land communi-

⁵¹ F. Stenhammar, "United Nations Targeted Sanctions, the International Rule of Law and the European Court of Justice's Judgment in Kadi and al-Barakaat", *Nord. J. Int'l L.* 79 (2010), 113 et seq. (120).

⁵² N.J. Schrijver, "The Use of Economic Sanctions by the UN Security Council: An International Law Perspective", in: H.H.G. Post (ed.), *International Economic Law and Armed Conflict*, 1994, 128.

⁵³ S/RES/661 (1990) of 6 August 1990, concerning Iraq-Kuwait; S/RES/757 (1992) of 30 May 1992, concerning the Federal Republic of Yugoslavia; S/RES/917 (1994) of 6 May 1994, concerning Haiti. Regarding the specific prohibition of export and import of diamonds, see S/RES/1295 (2000) of 18 April 2000 on the situation in Angola; S/RES/1306 (2000) of 5 July 2000, S/RES/1385 (2001) of 19 December 2001, both on the situation in Sierra Leone; S/RES/1343 (2001) of 7 March 2001, on the situation in Liberia.

⁵⁴ Oil in the case of Haiti with Resolution S/RES/917 (1994) of 6 May 1994, the Security Council expanded the embargo to include all commodities and products, with the exception of medical supplies and foodstuffs. The expanded embargo went into effect on 21 May 1994. S/RES/661 (1990) of 6 August 1990, against Iraq; arms and related material in the case of the Former Yugoslavia S/RES/713 (1991) of 25 September 1991. In Resolution S/RES/788 (1992) of 19 November 1992, the Security Council imposed an arms embargo on Liberia; S/RES/918 (1994) of 17 May 1994 concerning Rwanda; S/RES/1493 (2003) of 28 July 2003, concerning the Democratic Republic of the Congo.

⁵⁵ S/RES/1127 (1997) of 28 August 1997, concerning Angola.

⁵⁶ In Resolution S/RES/883 (1993) of 11 November 1993, the Security Council tightened sanctions, approving the freezing of Libyan funds and financial resources in other countries and the prohibition on providing equipment to Libya for oil refinery and transport. With regard to Bosnia and Herzegovina, see S/RES/820 (1993) of 17 April 1993; Libya S/RES/883 (1993) of 11 November 1993; Bosnian Serbs S/RES/942 (1994) of 23 September 1994; against Osama bin Laden, the Taliban and other entities,

cation,⁵⁷ severance or reductions of diplomatic and other official relations,⁵⁸ and restrictions on movement of persons⁵⁹ as a means to enforce the effectiveness of its other measures.⁶⁰ The sanctions resolutions also usually contained humanitarian and other exceptions,⁶¹ medical equipment and foodstuffs in humanitarian circumstances being generally excepted, although the resolutions have shown great inconsistency

S/RES/1267 (1999) of 15 October 1999; S/RES/1333 (2000) of 19 December 2000; S/RES/1390 (2002) of 16 January 2002.

⁵⁷ S/RES/665 (1990) of 25 August 1990 on the situation in Iraq; S/RES/1221 (1999) of 12 January 1999 about the UNITA; S/RES/820 (1993) of 17 April 1993 on the situation in Bosnia and Herzegovina and S/RES/1267 (1999) of 15 October 1999 on Afghanistan.

⁵⁸ Question concerning the situation in Southern Rhodesia, S/RES/217 (1965) of 20 November 1965; S/RES/253 (1968) of 29 May 1968; S/RES/277 (1970) of 15 March 1970; Libya, S/RES/748 (1992) of 31 March 1992; Bosnia and Herzegovina, S/RES/757 (1992) of 30 May 1992; Angola, S/RES/1173 (1998) of 12 June 1998 and against the Taliban, S/RES/1333 (2000) of 19 December 2000.

⁵⁹ S/RES/1054 (1996) of 26 April 1996 in case of Sudan; S/RES/1137 (1997) of 12 November 1997, on the situation between Iraq and Kuwait; S/RES/1343 (2001) of 7 March 2001, concerning Liberia; S/RES/942 (1994) of 23 September 1994, concerning Bosnia and Herzegovina; S/RES/1171 (1998) of 5 June 1998 in case of Sierra Leone; S/RES/1333 (2000) of 19 December 2000 against the Taliban.

⁶⁰ In Resolution S/RES/1132 (1997) of 8 October 1997, the Security Council imposed an oil and arms embargo on Sierra Leone, as well as travel restrictions for members of the military junta of Sierra Leone. The Security Council imposed several embargoes on the Federal Republic of Yugoslavia: firstly, in Resolution S/RES/713 (1991) of 25 September 1991, the Security Council imposed a general and complete embargo on all deliveries of weapons and military equipment. One year later, in its Resolution S/RES/757 (1992) of 30 May 1992, the Security Council imposed economic and other sanctions on the Federal Republic of Yugoslavia, including a full trade embargo, a flight ban and the prevention of the participation of the Federal Republic of Yugoslavia in sporting and cultural events. Finally, in Resolution S/RES/942 (1994) of 23 September 1994, the Security Council imposed comprehensive economic and diplomatic sanctions on Bosnian Serb military forces.

⁶¹ For instance, in Resolution S/RES/1070 (1996) of 16 August 1996, the Security Council decided to impose an air embargo on Sudan; however, the sanctions measures adopted, which were to enter into force pending a decision by the Council within 90 days after the date of the adoption of Resolution S/RES/1070 (1996), was not imposed, for humanitarian reasons.

in other types of exceptions.⁶² In short, the network of sanctions spans all continents and covers all types of content.

2. Legal Limitations to the Security Council's Measures under Chapter VII

In asking whether there are many specific humanitarian and human rights limits to the exercise of the Security Council's power to impose economic sanctions, one has to focus on whether – in absence of any treaty obligations – general international law binds the United Nations and thus one of its principal organs, the Security Council. In other words, the apparently widespread acceptance of the proposition that international organisations are bound by general international law must be considered.⁶³ While the United Nations is certainly an international organisation, its special status and responsibilities, coupled with the specific functions and powers conferred on it by the Charter, have cast doubt on whether this proposition also holds true for the organisation itself.⁶⁴ One must ask whether the organisation can act as if it were the organ of world governance, and thus override international law and state sovereignty wherever it sees fit. The debate on the scope of the Council's powers in particular has been ongoing since the establishment of the United Nations. As already said, the Council's powers under Chapter VII are quite broad, but nevertheless are also subject to limita-

⁶² S/RES/841 (1993) of 16 June 1993, on the situation in Haiti; S/RES/1284 (1999) of 17 December 1999 on the situation between Iraq and Kuwait; S/RES/1110 (1997) of 28 May 1997, on the situation in the former Yugoslav Republic of Macedonia; S/RES/1133 (1997) of 20 October 1997, on the situation concerning Western Sahara; S/RES/1132 (1997) of 8 October 1997, on the situation in Sierra Leone; S/RES/1343 (2001) of 7 March 2001, on the situation in Liberia; S/RES/1005 (1995) of 17 July 1995, on the supply of an appropriate quantity of explosives for the use in the demining operations in Rwanda; S/RES/1333 (2000) of 19 December 2000 on the situation in Afghanistan; S/RES/1298 (2000) of 17 May 2000 on the situation in Eritrea/Ethiopia; S/RES/1390 (2002) of 16 January 2002 against the Taliban and Al-Qaida.

⁶³ D.W. Bowett, *The Law of International Organizations*, 1982; P.M. Dupuy, *Droit International Public*, 1995.

⁶⁴ G. Oosthuizen, "Playing the Devil's Advocate: the United Nations Security Council is Unbound by Law", *LJIL* 12 (1999), 549 et seq.

tions.⁶⁵ There are two types of possible limits to the Security Council's action, one being substantive, and the other formal. Herdegen has recently suggested a number of substantive limits to the actions of the Security Council.⁶⁶ Gowlland-Debbas has also drawn up a list of rules and principles which the Council may not violate.⁶⁷ Both authors suggest a balance between the powers of the Security Council to undertake an authoritative concretisation of its own powers and the most basic human rights standards. Nolte has doubts about this theoretical substantive approach,⁶⁸ insisting that the point at which an excessive use by the Council of its powers becomes manifest must be determined by reference to all the factors of the specific case.

Some other commentators have argued that the Security Council can act above international law and therefore no legal substantial limits exist on measures adopted by it under Chapter VII.⁶⁹ This interpretation is based on the wording of Arts 25 and 103 of the UN Charter. According to Article 25 of the UN Charter, the UN Members "agree to accept and carry out the decisions of the Security Council in accordance with the present Charter." Specifically, Article 103 states that "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

⁶⁵ I. Brownlie, "International Law at the Fiftieth Anniversary of the United Nations", *RdC* 255 (1995), 217 et seq., who considers that "the Council thus acts as agent of all the members and not independently of their wishes; it is moreover, bound by the Purposes and Principles of the Organization, so that it cannot, in principle, act arbitrarily and unfettered by any restraints." In other words, but a similar idea, see, J. Delbrück, "Article 24", in: B. Simma (ed.), *The Charter of the United Nations. A Commentary*, 2002, 403, 406; R. Higgins, "The Advisory Opinion on Namibia. Which UN Resolutions are Binding under Article 25 of the Charter?", *ICLQ* 21 (1972), 278 et seq.; K. Zemanek, "Is the Security Council the sole judge of its own legality?", in: E. Yakpo/ T. Boumedra (eds), *Liber Amicorum Mohamed Bedjaoui*, 1999, 640 et seq.

⁶⁶ M. Herdegen, *Befugnisse des UN-Sicherheitsrates – Aufgeklärter Absolutismus im Völkerrecht?*, 1998, 15.

⁶⁷ V. Gowlland-Debbas, "The Functions of the United Nations Security Council in the International Legal System", in: M. Bayers (ed.) *The role of law in international politics: essays in international relations and international law*, 2000, 277-300.

⁶⁸ Nolte, see note 10, 321.

⁶⁹ Oosthuizen, see note 64, 549.

Charter shall prevail.” Therefore, it has been argued that Article 103 of the UN Charter allows states to disregard e.g. human rights treaty obligations in the execution of Security Council resolutions.⁷⁰ There are, however, opposing views, for instance, those of Alvarez, according to whom Article 103, makes the Council decision prevail over both treaty and customary law.⁷¹ But according to the clear wording of Article 103 the Charter shall only prevail in the event of a conflict between an obligation of a Member State under the present Charter and its obligation under any international agreement,⁷² but not under general international law.⁷³ Whatever the merits of this argument, Article 103 could never override the operation of norms that have peremptory status. As Judge Lauterpacht’s Separate Opinion points out, even if the Charter prevails over other international agreements, the “relief which Article 103 of the Charter may give the Security Council in case of conflict between one of its decision and an operative treaty obligation cannot – as a matter of simple hierarchy of norms – extend to a conflict between a Security Council Resolution and *jus cogens*.”⁷⁴ As the core human rights are part of *jus cogens*, Article 103 would not allow a Council decision to prevail over, for instance, the prohibition of genocide and torture or other inhumane treatment.⁷⁵

⁷⁰ The prevalence of the UN Charter over the ICCPR with regard to article 1 was declared by the United Kingdom upon signature (<<http://www.unhchr.ch/html/menu3/b/>>). The United Kingdom in its derogation of 18 December 2001 did not explicitly refer to Article 103. Indeed it based its derogation on article 4 of the ICCPR. But it made reference to SC Resolution S/RES/1373 (2001) of 28 September 2001 requiring all states to take measures to prevent terrorist attacks.

⁷¹ J. Alvarez, “The Security Council’s war on terrorism: problems and policy option”, in: E. de Wet/ A. Nollkaemper (eds), *Review of the Security Council by Members States*, 2003, 119 et seq. (133).

⁷² R. Bernhardt, “Article 103”, in: Simma, see note 65, 1300.

⁷³ A. Orakhelashvili, “Security Council Acts: Meaning and Standards of Review”, *Max Planck UNYB* 11 (2007), 143 et seq. (150).

⁷⁴ Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro), Separate Opinion of Judge ad hoc Lauterpacht, ICJ Reports 1993, 407 et seq. (440 para. 100).

⁷⁵ C. Olivier, “Human Rights Law and the International Fight against Terrorism: How do Security Council Resolutions Impact on States’ Obligations under International Human Rights Law? (Revisiting Security Council Resolution 1373)”, *Nord. J. Int’l L.* 73 (2004), 399 et seq. (414).

The interpretation that Article 103 obligations prevail over both treaty and customary law cannot be accepted for the following reasons. First of all, according to Article 24 (1), read together with Arts 1 and 2 of the UN Charter, the Council's decisions must be in accord with the purposes and principles of the United Nations. Promoting and encouraging respect for human rights and fundamental freedoms are among these purposes, and therefore the Council must always take them into account when acting under Chapter VII. Since, as argued by some legal commentators,⁷⁶ humanitarian law can be perceived as "human rights in armed conflicts", the Council is also bound by rules of international humanitarian law.

Another limitation is imposed by legal norms regarded as *jus cogens*. The key question is which human rights have the status of *jus cogens*. Article 53 of the widely ratified Vienna Convention on the Law of Treaties provides a definition of *jus cogens*, namely "a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm." The ICJ endorsed the concept of *jus cogens* in the case of Armed Activities on the Territory of the Congo, considering that the *jus cogens* nature of the prohibition of genocide was well established and that the status of *jus cogens* creates rights and obligations *erga omnes*.⁷⁷ Norms regarded as *jus cogens* are non-derogable, and it is generally accepted that these standards also apply to Security Council enforcement measures adopted under Chapter VII of the UN Charter.⁷⁸ As the hard core of human rights and international humanitarian law constitute *jus cogens*, these norms apply to measures imposed by the Security Council under Chapter VII. This view is also supported by the statement of Judge Weeramantry in the Lockerbie case stating that "the history of the United Nations ... corroborates the view that a limitation on the plenitude of the Security Council's power is that those powers must be exercised in accordance with the well-established principles of international law."⁷⁹ Finally, the Security

⁷⁶ L. Doswald-Beck/ S. Vite, "International Humanitarian Law and Human Rights Law", *International Review of the Red Cross* 75 (1993), 94 et seq.

⁷⁷ Armed Activities on the Territory of the Congo (New Application: 2002) (Democratic Republic of the Congo v. Rwanda), ICJ Reports 2006, 6 et seq. (30 para. 60).

⁷⁸ Gill, see note 1, 79.

⁷⁹ ICJ, Order with regard to the request for the Indication of Provisional Measures in the Case Concerning Questions of Interpretation and Applica-

Council, as laid down in Arts 24-26 of the UN Charter, is to bear responsibility for the maintenance of international peace and security. It would be contrary to its role if the Council disregarded the rule of law,⁸⁰ since a peaceful world order can only be realised through respect for the rule of law.⁸¹ Consequently, the Security Council cannot have the discretionary power to disregard one of the founding principles of a peaceful international order: the rule of law.⁸²

As Reisman argues, the UN collective security system was intended to operate in accordance with the will and discretion of the permanent members of the Security Council.⁸³ While it is true that the powers of the Security Council are based on political as much as legal factors, its decisions are binding as legal norms. The ICJ solved this issue by stating,⁸⁴ that the political character of the organ of an international organisation does not release it from the observance of legal provisions which constitute limitations on its powers or criteria for its judgments.⁸⁵ As Judge Jennings categorically states in the *Lockerbie* case,

“The first principle of the applicable law is this: that all discretionary powers of lawful decision-making are necessarily derived from the law, and are therefore governed and qualified by the law. This must be so if only because the sole authority of such decisions flows itself from the law. It is not logically possible to claim to represent the power and authority of the law and, at the same time, claim to be above the law.”⁸⁶

tion of the 1971 Montreal Convention Arising from the Aerial Incident at Lockerbie (*Libya v. United States*), *ILM* 31 (1992) 694-696.

⁸⁰ Other authors have also suggested that the principle of good faith constitutes a limit to the enforcement powers of the Security Council. See V. Gowlland-Debbas, “Security Council Enforcement Action and Issues of State Responsibility”, *ICLQ* 43 (1994), 93 et seq.

⁸¹ H.P. Gasser, “Collective Economic Sanctions and International Humanitarian Law – An Enforcement Measure under the United Nations Charter and the Right of Civilians to Immunity: An Unavoidable Clash of Policy Goals”, *ZaöRV* 56 (1996), 880 et seq.

⁸² *Ibid.*, 881.

⁸³ M. Reisman, “Peacemaking”, *Yale L. J.* 18 (1993), 415 et seq. (418).

⁸⁴ Orakhelashvili, see note 73, 146.

⁸⁵ ICJ Reports 1948, 57 et seq. (64) on the conditions of admission of a State to Membership in the United Nations.

⁸⁶ Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (*Libyan Arab Jamahiriya*

Therefore, the key to understanding the powers of the Council lies in understanding their delegated nature because they are regulated in the UN Charter as “constitutions of delegated powers”.⁸⁷ It should be remembered that in conferring on the Council primary responsibility for the maintenance of international peace and security, the Member States agree that the Council acts on their behalf. Thus, the UN Charter constitutes an act of common will of the Member States which transfers certain limited powers to the Council, so that the resulting legal product cannot acquire more power than its creator.⁸⁸

The Council thus acts as the agent of all the members and not independently of their wishes; it is bound by the purposes and principles of the organisation, so that it cannot, in principle, act arbitrarily, unfettered by any restraints.⁸⁹ From Article 39 UN Charter it is clear that the Security Council plays a pivotal role and exercises very wide discretion. And as has been seen consistently in international literature⁹⁰ and case law,⁹¹ this wide discretion does not mean that its powers are unlimited. As the International Criminal Tribunal for the former Yugoslavia recognised in the *Tadić* case,

v. United Kingdom), Dissenting opinion of Judge ad hoc Jennings, ICJ Reports 1998, 99 et seq. (110).

⁸⁷ T. Franck, “The powers of appreciation: who is the ultimate guardian of UN Legality?” *AJIL* 86 (1992), 519 et seq. (523); P.M. Dupuy, “The Constitutional Dimension of the Charter of the United Nations Revised”, *Max Planck UNYB* 1 (1997), 2 et seq. (8); M. Herdegen, “The Constitutionalization of the UN Security System”, *Vand. J. Transnat’l. L.* 27 (1994-1995), 135 et seq.

⁸⁸ M. Bedjaoui, *Nouvel ordre mondial et contrôle de la légalité des actes du Conseil de Sécurité*, 1994, 46, who states that “La Charte, comme tout traité, ne peut pas être en contradictions avec le droit international et en tout cas en opposition avec certaines normes impératives de et intransgressibles du droit international. Il est donc clair que le Conseil de Sécurité ne peut agir que conformément au droit international dès lors qu’il ne fait pas de doute par ailleurs qu’il est tenu au respect du traité qui l’a institué”.

⁸⁹ Brownlie, see note 65, 217.

⁹⁰ Gowlland-Debbas, see note 67, 277 et seq.; Nolte, see note 10, 315 et seq.; M. Glennon, *Limits of Law, Prerogatives and Power. Intervention after Kosovo*, 2001, 102.

⁹¹ Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970), ICJ Report 1971, 16 et seq. with regard to the legal consequences for states of the continued presence of South Africa in Namibia.

“The Security Council is an organ of an international organization, established by a treaty which serves as a constitutional framework for that organization. The Security Council is thus subjected to certain constitutional limitations, however broad its powers under the constitution may be. Those powers cannot, in any case, go beyond the limits of the jurisdiction of the Organization at large, not to mention other specific limitations or those which may derive from the internal division of power within the Organization. In any case, neither the text nor the spirit of the Charter conceives of the Security Council as *legibus solutus* (unbound by law).”⁹²

For all these reasons, after having made the determination that a specific situation is a threat to peace, the Security Council is bound by some legal norms in exercising coercive measures as a consequence of its determination.⁹³ Like every other organ of an international organisation, the Security Council is bound by its mandate,⁹⁴ and by general international law,⁹⁵ in particular humanitarian law⁹⁶ and human rights law.⁹⁷

⁹² *Tadić*, see note 15, para. 28.

⁹³ A. Reinisch, “Developing Human Rights and Humanitarian Law Accountability for the Imposition of Economic Sanctions”, *AJIL* 95 (2001), 851 et seq. (856). See also, in this regard, J. Dugard, “Judicial Review of Sanctions. United Nations Sanctions and International Law”, in: V. Gowlland-Debbas, (ed.) *United Nations Sanctions and International Law*, 2001, 83 et seq. (88), who makes a distinction between substantive review and incidental review; the former being whether a situation constitutes a threat to international peace and security, the latter being a review of the particular sanction selected.

⁹⁴ N. Angelet, “International Law limits to the Security Council”, in: Gowlland-Debbas, see note 93, 71 et seq. (79).

⁹⁵ Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt, ICJ Reports 1980, 73 et seq. (80).

⁹⁶ W.M. Reisman/ D.L. Stevick, “The Applicability of International Law Standards to United Nations Economic Sanctions Programmes”, *EJIL* 9 (1998), 86 et seq. (126–127).

⁹⁷ Committee on Economic, Social and Cultural Rights, General Comment 8, 5 December 1997; I. Brownlie, “Decisions of the Political Organs of the UN and the Rule of Law”, in: R.St.J. McDonald (ed.), *Essays in Honour of Wang Tieya*, 1993, 102. The Secretary-General considered it “axiomatic that the International Tribunal [for Yugoslavia, established by the Council] must fully respect internationally recognized standards regarding the rights of the accused at all ... in particular ... article 14 of the ICCPR”, a conclu-

Moreover, the Security Council, when resorting to enforcement measures of any nature, is bound by the principle of proportionality,⁹⁸ which is commonly inferred from the reference to “necessary” measures in Arts 41 and 42 of the UN Charter. Proportionality is, however, a limitation even on measures which may be justified. The principle of proportionality thus forms part of the positive law of the Charter, and any measures employed under Chapter VII. The proportionality principle is twofold: that the measures adopted are necessary, and that they provide an adequate response to the behaviour of the target state.⁹⁹ From this principle it follows that the Security Council should impose extreme measures such as sanctions only after exhausting all other measures, in particular those outlined in Article 40. The Security Council should notify the target state before the implementation of sanctions, as the imminent threat of a sanctions regime may itself be sufficient to alter the state’s behaviour.¹⁰⁰

To fulfil the requirement of necessity, a sanctions regime must be designed in such a way that it can reasonably be expected to achieve its objectives: to alter the behaviour of the target entity and to bring it in compliance with the legal prescriptions. As such, sanctions must be directed towards the actor responsible for the disturbance of international peace and must create an appropriate and effective degree of coercion.¹⁰¹ This latter requirement can be deduced from Article 1 (1) of the Charter, which empowers the UN to “take effective collective measures for the prevention and removal of threats to the peace ...”. Since the Security Council, by virtue of Article 24 (2) of the Charter, is bound to act in accordance with the purposes and principles of the UN, effectiveness arguably functions as one of its guiding principles in imposing

sion accepted by the Security Council (Report Pursuant to Security Council Resolution 808 (1993) of 3 May 1993, Doc. S/25704, para. 106).

⁹⁸ Doc. A/56/10 (2001) of 21 September 2001. Article 51 of the International Law Commission Draft articles on Responsibility of States for international wrongful acts stipulates that “countermeasures must be commensurate with the injury suffered, taking into account the gravity of the internationally wrongful act and the rights in question”.

⁹⁹ A. Randelzhofer, “Article 51”, in: Simma, see note 13, 788, 805.

¹⁰⁰ G. Abi-Saab, “The Concept of Sanctions in International Law”, in: Gowlland-Debbas, see note 93, 29, 39.

¹⁰¹ R. Geiss, “Humanitarian Safeguards in Economic Sanctions Regimes: A Call for Automatic Suspension Clauses, Periodic Monitoring, and Follow-Up Assessment of Long-Term Effects”, *Harvard Human Rights Journal* 18 (2005), 167 et seq. (175).

coercive measures under Chapter VII. The Security Council has a wide margin of discretion in ensuring the adequacy of a sanctions regime during the entire length of its imposition. But, if the omission of certain humanitarian safeguards would *ipso facto* render a sanctions regime inadequate (and thus disproportionate), the proportionality principle would require the Security Council to include such safeguards.

In addition to the proportionality principle, fundamental human rights principles also set the outer limits of the Security Council's discretion in employing sanctions. First and foremost, the Security Council is bound by the *jus cogens* norms, including the right to life. On a formal level, the Council is limited by *jus cogens*. De Wet has convincingly shown that the delegation of powers to the United Nations by its Member States should be understood as an ongoing interaction, so that the delegated powers continue to be limited by developments in *jus cogens*.¹⁰² Notwithstanding these intrinsic limits to the Security Council's powers, the UN Member States have implicitly accepted the supremacy of the Security Council when they created the UN Charter, which does not provide for any body with explicit powers to monitor and control it. And they also accepted the clear obligation under the UN Charter to comply with Security Council decisions i.e. sanctions adopted under Chapter VII.

In general, it can be affirmed that international law does not accept that national law be put as an excuse for the failure to comply with international obligations.¹⁰³ The only explicit limit on the power of the Security Council is Article 24 (2). These principles and purposes figure prominently in more specific obligations. For example Article 55 creates a specific mandate that the UN shall promote "universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion." Article 56 then provides the corresponding commitment on the part of Member States to "pledge themselves to take joint and separate action in cooperation with the Organization for the achievement of the purposes set forth in article 55." The Principles and Purposes of the Charter, including the adherence to human rights, are certainly broad and perhaps imprecise. The scope of human rights mentioned as a purpose of the United Nations is very vague, and the purposes and principles of the Charter were designed to provide guidelines for the organs of the

¹⁰² E. de Wet, *The Chapter VII Powers of the United Nations Security Council*, 2004, 189.

¹⁰³ Arts 26 and 47 of the Vienna Convention on the Law of Treaties.

United Nations in a flexible manner.¹⁰⁴ But this is largely a reflection of the state of international human rights development at the time of the Charter's adoption. The UN Charter, which was meant to govern in the wake of the development of stronger international legal regimes, including human rights, must be interpreted with an evolving human rights referent in mind. Support for this idea can be found in both the practice and scholarship that interpret Charter concepts in the light of modern human rights law, most of which was actually sponsored by the United Nations.¹⁰⁵ It is the Security Council which has *Kompetenz-Kompetenz* in the matter of compliance: there should be no possibility of assessment as to whether its sanctions violate human rights, since either a United Nations norm, or a norm of general international law, would be overruled by a legal body. The Security Council under Chapter VII is not meant to be fettered by law.¹⁰⁶

III. New Approaches to Economic Sanctions

1. Legal Framework

After determining the prerequisites of Article 39 of the UN Charter, the Security Council can make recommendations or decide what measures

¹⁰⁴ R. Wolfrum, "Article 1", in: Simma, see note 65, 40.

¹⁰⁵ De Wet, see note 5, 284; Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970), see note 91, 57, para. 131: "One could argue that the Security Council is, in principle, bound to respect all human rights contained in the Universal Bill of Human Rights. This includes the United Nations Declaration of Human Rights of 1948, the International Covenant on Civil and Political Rights ... and the International Covenant on Economic Social and Cultural Rights. Although the UN is not a party to these Treaties by means of ratification, they represent the elaboration upon the Charter's original vision of human rights found in its purposes (Art. 1(3) and Arts. 55 and 56.)", ICJ Report 1980, 3 et seq. (42 et seq., para. 91), in the case concerning United States Diplomatic and Consular Staff in Teheran, the Court also held that "to deprive human beings of freedom and to subject them to physical constraint in conditions of hardship is in itself manifestly incompatible with the principles of the Charter of the United Nations, as well as with the fundamental principles enunciated in the Universal Declaration of Human Rights." Racial discrimination is "a flagrant violation of the purposes and principles of the Charter."

¹⁰⁶ Reinisch, see note 93, 865 and references therein.

are to be taken in order to maintain or restore international peace and security.¹⁰⁷ The power of the Security Council to impose sanctions is based on Article 41 of the Charter. It must be stressed, however, that Article 41 of the Charter empowers the Security Council to adopt measures not involving the use of force. Sanctions are the Security Council's main instrument for maintaining international peace and security. The sanctions list of Article 41 is not a closed list, on the contrary, it is open to possible further action provided it does not involve the use of force. Any individual measure can be resorted to alternatively and/or cumulatively.¹⁰⁸ What has to be certain is that any authorised action is necessary in itself.¹⁰⁹

Sanctions aim to modify the behaviour of the target state, party, individual or entity threatening international peace and security, and not to punish or otherwise exact retribution. For this reason all sanctions regimes should be commensurate with these objectives. Measures not involving the use of armed force can vary considerably, but basically one can distinguish between a general trade embargo against one or more states, an economic embargo directed against a particular entity, and a range of lesser "targeted" measures. Economic embargoes are traditional and customary measures in the Council's practice, as in the case of Somalia,¹¹⁰ Sierra Leone,¹¹¹ Liberia,¹¹² the Democratic Republic of the Congo (DRC),¹¹³ Eritrea and Ethiopia,¹¹⁴ Iraq,¹¹⁵ Afghanistan,¹¹⁶ Libya¹¹⁷ or North Korea.¹¹⁸

¹⁰⁷ B. Kondoch, "The Limits of Economic Sanctions under International Law: The Case of Iraq", *International Peacekeeping* 7 (2001), 267 et seq. (281).

¹⁰⁸ Gill, see note 1, 48.

¹⁰⁹ Frowein, see note 13, 621.

¹¹⁰ S/RES/1356 (2001) of 19 June 2001; S/RES/1407 (2002) of 3 May 2002; S/RES/1425 (2002) of 22 July 2002; S/RES/1725 (2006) of 6 December 2006; S/RES/1744 (2007) of 20 February 2007; S/RES/1772 (2007) of 20 August 2007.

¹¹¹ S/RES/1299 (2000) of 19 May 2000; S/RES/1306 (2000) of 5 July 2000.

¹¹² S/RES/1343 (2001) of 7 March 2001.

¹¹³ S/RES/1493 (2003) of 28 July 2003.

¹¹⁴ S/RES/1298 (2000) of 17 May 2000.

¹¹⁵ Notwithstanding the general embargo against Iraq, the oil for food program allowed some transaction under specific international supervision and control. It was finished with the S/RES/1472 (2003) of 28 March 2003.

¹¹⁶ S/RES/1267 (1999) of 15 October 1999 op. para. 4 a): "deny permission for any aircraft to take off from or land in their territory if it is owned, leased or operated by or on behalf of the Taliban". This prohibition was in force

But in most of these cases sanctions have unintentionally contributed to the emergence of black markets, creating huge profit-making opportunities for ruling elites and their collaborators.¹¹⁹ Worst of all, economic sanctions tend to hit the wrong targets; instead of the regime, the population at large and particularly the weakest in society become the true victims. Faced with these situations scholars have condemned economic sanctions as being inhumane and destructive diplomatic measures that jeopardise human rights in target countries.¹²⁰ Such criticism is based on the negative effects of economic sanctions on the population at large in countries targeted by sanctions.¹²¹ Thus, such criticism concerning the effects of economic sanctions is no longer limited to NGOs and humanitarian organisations. The UN Human Rights Commission through its various Sub-commissions had also voiced concern about the adverse consequences of economic sanctions on the enjoyment of human rights.¹²² The General Assembly itself took the lead

until S/RES/1388 (2002) of 15 January 2002 and S/RES/1390 (2002) of 16 January 2002.

¹¹⁷ S/RES/748 (1992) of 31 March 1992.

¹¹⁸ S/RES/1718 (2006) of 14 October 2006; S/RES/1874 (2009) of 12 June 2009.

¹¹⁹ 2005 World Summit Outcome, see note 9, para. 50.

¹²⁰ L. Damrosch, "The Civilian Impact of Economic Sanctions", in: L. Damrosch (ed.), *Enforcing Restraint: Collective Intervention in Internal Conflicts*, 1993, 279.

¹²¹ G. Simons, *The Scourging of Iraq*, 1998, 33-34; D. Malone, "The UN Security Council: 10 lessons from Iraq on regulations and accountability", *Journal of International Law and International Relations* 2 (2006), 1 et seq.; A. Baram, "The Effects of Iraqi Sanctions: Statistical Pitfalls and Responsibility", *The Middle East Journal* 54 (2000), 194 et seq.; E. Hoskis, "The Humanitarian Impacts of Economic Sanctions and War in Iraq", in: T.G. Weiss (ed.), *Political gain and civilian pain*, 1997, 91 et seq.; E. Hoskins, *The Impact of Sanctions: A Study of UNICEF's Perspective*, 1998; L. Minear/ D. Cortright/ J. Wagler/ G. Lopez/ T. Weiss, *Towards More Humane and Effective Sanctions Management: Enhancing the Capacity of the United Nations System*, Occasional Paper No. 3, 1998.

¹²² Doc. E/CN.4/Sub.2/2000/33 of 21 June 2000, Sub-commission on the Promotion and Protection of Human Rights. The adverse consequences of economic sanctions on the enjoyment of human rights, working paper prepared by Mr. Marc Bossuyt, 2000. With regard to the Humanitarian impact of sanctions in Burundi, see Commission on Human Rights Resolutions 1998/82 of 24 April 1998 and 1997/77 of 18 April 1997; Decision 1999/111 of 26 August 1999, of the Sub-commission on the Promotion and Protec-

in passing resolutions questioning unilateral economic sanctions and in particular their extraterritorial effects.¹²³ Meanwhile, however, various UN bodies have become rather outspoken in criticizing multilateral sanctions imposed by the Security Council. Already in 2000 the Sub-Commission on the Promotion and Protection of Human Rights recommended to the Security Council that, “as a first step, it alleviate sanctions regimes so as to eliminate their impact on the civilian population by permitting the import of civilian goods, in particular to ensure access to food and medical and pharmaceutical supplies and other products vital to the health of the population in all cases.”¹²⁴

For this reason, since the late 1990s, the Security Council has increasingly preferred targeted sanctions in the form of blacklisting of individuals and private entities and the freezing of their assets instead of general trade embargoes as means of maintaining international peace and security. These new sanctions should be carefully targeted in support of clear and legitimate objectives under the Charter and be implemented in ways that balance effectiveness to achieve the desired results against possible adverse consequences, including socio-economic and humanitarian consequences, for populations and third states.

This new approach of targeted sanctions is a result of several factors. Three international initiatives have been undertaken to develop political approaches for the targeting of sanctions, with the goal of increasing effectiveness.¹²⁵ The United Nations itself promoted a general review of

tion of Human Rights about its concern over economic sanctions and human rights.

¹²³ Since 1989 the General Assembly has passed resolutions entitled “unilateral coercive economic measures”, because of its concern about impacts on the civil and economic rights of the population. See, A/RES/44/215 of 22 December 1989; A/RES/46/210 of 20 December 1991; A/RES/48/168 of 21 December 1993; A/RES/50/96 of 20 December 1995; A/RES/52/181 of 18 December 1997; A/RES/54/200 of 22 December 1999; A/RES/56/179 of 21 December 2001; A/RES/58/198 of 23 December 2003, A/RES/60/185 of 22 December 2005, A/RES/62/183 of 19 December 2007 and A/RES/64/189 of 9 February 2010.

¹²⁴ Doc. E/CN.4/SUB.2/RES/2000/1 of 11 August 2000, para. 1 entitled Human Rights and Humanitarian Consequences of Sanctions, including Embargoes.

¹²⁵ The first of these, the *Interlaken Process*, was initiated by the Swiss Government in 1998 and focused on targeted financial sanctions. Consultations during the Process identified the role of humanitarian exemptions in designing targeted financial sanctions and briefly mentioned the role of hu-

collective sanctions and the functioning of the Sanction Committees,¹²⁶ encouraged by some academic institutions¹²⁷ and academic opinions.¹²⁸ Consequently, the Security Council and the General Assembly adopted the *Best Practices and Guidelines* for all kinds of sanctions, as discussed in the 2005 World Summit as a guide to the elaboration and implementation of sanctions regimes, notwithstanding its ongoing improvement.¹²⁹

manitarian impact monitoring. The report of the contributions to the sanctions debate resulting from the process did, however, suggest a draft text for incorporating provisions relating to monitoring of potential humanitarian consequences in UN Security Council resolutions. (The Thomas J. Watson Jr. Institute for International Studies, *Targeted Financial Sanctions: A Manual for Design and Implementation – Contributions from the Interlaken Process*, 2001). The second initiative, the *Bonn-Berlin Process*, organised by the Foreign Office of Germany in 2000, focused on arms embargoes and travel sanctions (M. Brzoska (ed.), *Design and Implementation of Arms Embargoes and Travel and Aviation Related Sanctions: Results of the “Bonn-Berlin Process”*, 2001). The third initiative in this triad, the *Stockholm Process on the Implementation of Targeted UN Sanctions*, was coordinated by the Swedish Ministry of Foreign Affairs. Among its recommendations was the need for an “established methodology” for carrying out regular humanitarian and socio-economic impact assessments, (P. Wallenstein et al. (eds), *Making Targeted Sanctions Effective: Guidelines for the Implementation of UN Policy Options. Final Report on the Stockholm Process on the Implementation of Targeted Sanctions*, 2003).

¹²⁶ Doc. S/2005/841 of 29 December 2005, Report of the Informal Working Group on General Issues of Sanctions, established in April 2000 (Doc. S/2000/319 of 17 April 2000).

¹²⁷ Watson Institute for International Studies, *Strengthening Targeted Sanctions Through Fair and Clear Procedures*, 2006, sponsored by the governments of Sweden, Germany and Switzerland (hereafter Watson Institute). <www.watsoninstitute.org/pub/Strengthening_Targeted_Sanctions.pdf>.

¹²⁸ Geiss, see note 101. D. Sarooshi, “The United Nations collective security system and the establishment of peace”, *Current Legal Problems* 53 (2000), 621 et seq.; L. Van den Herik, “The Security Council’s Targeted Sanctions Regimes. A Need of Better Protection of the Individual”, *LJIL* 20 (2007), 797 et seq.; T. Tsagourias, “The shifting laws on the use of force and the trivializations of the UN collective security system: the need to reconstitute it”, *NYIL* 34 (2003), 55 et seq.; J. Cockayne/ D. Malone, “The UN Security Council and Iraq: Some Implications for Public International Law”, *LJIL* 47 (2007), 30 et seq.

¹²⁹ Doc. S/2006/997 of 22 December 2006, Report of the Informal Working Group of the Security Council on General Issues of Sanctions.

2. The New Merits of Targeted Sanctions

There is no generally accepted definition of “targeted” sanctions. Targeted sanctions are also sometimes referred to as “smart sanctions”, or “designer sanctions”.¹³⁰ Nevertheless there is a common consensus that any “targeted” or “smart” sanction should be implemented and monitored effectively with clear benchmarks and should, as appropriate, have an expiration date or be periodically reviewed with a view to lifting or to adjusting it, taking into account the humanitarian situation and depending mainly on the fulfilment by the target state as well as other parties. Sanctions should remain in place for as limited a period as necessary to achieve their objectives and be lifted once their objectives have been achieved.¹³¹ Taking into account all these elements, it is reasonable to believe that target or smart sanctions are another attempt to minimise humanitarian costs.¹³²

While typically states are sanctioned, non-state entities and individuals have recently also become targets. With regard to individuals and entities, sanctions regimes should ensure that the decision to list such individuals and entities is based on fair and clear procedures, including, as appropriate, a detailed statement of the case provided by Member States, and that regular reviews of names on the list are conducted; they should also ensure, to the highest possible degree, maximum specificity in identifying individuals and entities to be targeted; and also that fair and clear procedures for de-listing exist. Listed individuals and entities should be notified of the decision and of as much detail as possible in the publicly releasable portion of the statement of the case. There should be an appropriate mechanism for handling individuals’ or entities’ requests for de-listing.

¹³⁰ D. Cortright/ G.A. López, *The Sanctions Decade: Assessing UN Strategies in the 1990s*, 2000, 240.

¹³¹ A/RES/64/115 of 16 December 2009, Annex, para. 6, *Introduction and Implementation of Sanctions Imposed by the United Nations*, presented by the Special Committee on the Charter of the United Nations and on the Strengthening of the Role of the Organization to examine suggestions and proposals regarding the Charter and the strengthening of the role of the United Nations with regard to the maintenance and consolidation of international peace and security.

¹³² S. Heine-Ellison, “The impact and effectiveness of multilateral economic sanctions: a comparative study”, *The International Journal of Human Rights* 5 (2001), 81 et seq. (91).

Smart sanctions are usually assumed to include the following measures: the freezing of financial assets; the suspension of credits and aid; the denial and limitation of access to foreign financial markets; trade embargoes on arms and luxury goods; flight bans and a ban on international travel, visas and educational opportunities.¹³³ But not all Security Council sanctions regimes involve targeting named individuals. When sanctions are targeted on individuals, this is primarily done by means of a “blacklist”. For example, one only need to recall Resolution 1267 (1999) of 15 October 1999 and its monitoring mechanism Committee 1267. Generally the Security Council delegates the task of drawing up a list of blacklisted persons to a sanctions committee.

As compared to general sanctions, targeted sanctions limit the collateral damage on the civilian population,¹³⁴ and they are intended as a more effective means of coercion to change undesirable behaviour.¹³⁵ Significantly, targeted sanctions are also much less costly to impose in terms of politics and economy. Targeted sanctions thus offer the tempting possibility of being seen to be doing something without incurring the costs associated with traditional sanctions, not to mention the use of force. Targeted sanctions further provide the Security Council with the means to act in situations that would otherwise have been beyond its reach, such as international terrorism by non-state entities. It is also relevant whether one assesses the effectiveness of a sanctions regime solely on the basis of its immediate coercive impact, or whether one takes its long-term impact into account. Ultimately, the purpose of invoking economic enforcement measures is to maintain international peace. This suggests that in assessing the effectiveness of sanctions *ex ante*, the Council should consider their long-term effects in addition to their immediate coercive impact. Given their complex and often partially or wholly unforeseeable side effects, sanctions can seriously undermine the maintenance of international peace. Thus, viewed from a long-term perspective, humanitarian safeguards protecting against se-

¹³³ UN Secretary-General, Report to the Security Council on the Protection of Civilians in Armed Conflict, Doc. S/1999/957 of 8 September 1999, para. 54; M. Bossuyt, “Working Paper on the Adverse Consequences of Economic Sanctions on the Enjoyment of Human Rights”, Sub-Commission on the Promotion and Protection of Human Rights, 52nd Sess. Doc. E/CN.4/Sub.2/2000/33 of 21 June 2000.

¹³⁴ Doc. S/PV.4128, 17 April 2000, 5 Bangladesh; 9-11 Ukraine; 13-15 Malaysia; 18-20 Tunisia; 20-21 Mali; 23-24 Russia; 28-30 Pakistan; 38-39 Cuba.

¹³⁵ Doc. A/50/60- S/1995/1 of 3 January 1995, Supplement to an Agenda for Peace, para. 75.

vere, adverse side effects can actually increase the effectiveness of a sanctions regime in promoting international peace. Carefully targeted sanctions, it is argued, can also reduce the harm done to third-party states, thus removing incentives to defy the sanctions, as has recently occurred in Africa, with many countries ignoring the travel ban against the Libyan Arab Jamahiriya. Use of the six-prong test to ensure proper targeting, clearly defined goals, a definitive exit clause, and regional unanimity, could make sanctions regimes effective while not harming the civilian population. It is up to the international community to demand that the Security Council introduces such changes.

3. Targeted Sanctions in Current Practice

Keeping in mind all these reasonable key elements of targeted sanctions, most commentators welcome the new practice of the Security Council, although such targeted sanctions do not avoid all possible collateral damage. Despite the criticism of economic sanctions by scholars and lawyers, others have argued that these same sanctions have strengthened international human rights law by fostering the growth of international human rights norms.¹³⁶

Targeted sanctions offer the Security Council practical opportunities for acting in situations it considers as detrimental to peace and security.¹³⁷ But in some cases, targeted sanctions also have had some direct and unexpected or indirect adverse effects on the humanitarian conditions of a civilian population, and a serious negative impact on the development capacity and activity of the targeted countries. For this reason, it is worth noting that the Security Council undertakes to consider, as appropriate when imposing measures under Article 41 of the Charter, the economic and social impact of sanctions on individuals with a view to provide appropriate humanitarian exemptions that take account

¹³⁶ A. Howlett, "Getting 'smart': crafting economic sanctions that respect all human rights", *Fordham L. Rev.* 73 (2004), 1199 et seq. (1220); G. López/D. Cortright, "Economic sanctions and human rights. Part of the problem or part of the solution?", *International Journal of Human Rights* 1 (1997), 1 et seq. (9-13).

¹³⁷ This is evidenced by their use in politically charged situations such as Sudan, S/RES/1591 (2005) of 29 March 2005; North Korea, S/RES/1718 (2006) of 14 October 2006; Iran, S/RES/1737 (2006) of 23 December 2006.

of their specific needs and their vulnerability, and to minimise any negative impact.¹³⁸

UN targeted sanctions are not an exclusively terrorism-related phenomenon. It is, however, in the context of counter-terrorism that they have become most clear-cut and have attracted the most attention in the last few years. By the above mentioned Resolution 1267 (1999) of 15 October 1999, the Security Council imposed targeted sanctions on individuals, groups, undertakings or entities associated with Al-Qaida or the Taliban, or those controlled by their associates. These individuals and entities, included on the consolidated list of the 1267 Committee, are subject to financial and travel sanctions as well as to an arms embargo. However, apart from the fight against terrorism, the Council has not hesitated to impose arms embargoes, travel restrictions and the freezing of funds and other financial resources against individuals, rebel armed groups and other entities, for example, in situations such as the DRC, Sierra Leone, Somalia, Liberia, Sudan, Côte d'Ivoire, and Iraq-Kuwait.¹³⁹ The different scope of these examples will briefly be analysed.

With the adoption of Resolution 1493 (2003) of 28 July 2003, the Security Council first imposed on the DRC an arms embargo on all foreign and Congolese armed groups and militias operating in the territory of North and South Kivu and Ituri, and on groups not party to the Global and All-inclusive agreement in the DRC. The sanctions regime was subsequently modified and strengthened.¹⁴⁰ *Inter alia*, the Council extended the scope of the arms embargo to the entire DRC territory,¹⁴¹ imposed targeted sanctions measures (such as a travel ban and an assets

¹³⁸ L. Minear et al., *Towards More Humane and Effective Sanctions Management: Enhancing the Capacity of the United Nations System*, 1998.

¹³⁹ The Security Council Committee was established pursuant to Resolution S/RES/1518 (2003) of 24 November 2003 as the successor body to the Security Council Committee established pursuant to Resolution S/RES/661 (1990) of 6 August 1990 concerning Iraq and Kuwait.

¹⁴⁰ S/RES/1533 (2004) of 12 March 2004; S/RES/1596 (2005) of 18 April 2005; S/RES/1649 (2005) of 21 December 2005; S/RES/1698 (2006) of 31 July 2006; S/RES/1768 (2007) of 31 July 2007; S/RES/1771 (2007) of 10 August 2007; S/RES/1799 (2008) of 15 February 2008.

¹⁴¹ S/RES/1807 (2008) of 31 March 2008, the arms embargo has been further modified and only applies to all non-governmental entities and individuals operating in the eastern DRC. By Resolution S/RES/1896 (2009), adopted on 30 November 2009, the Security Council further extended the arms embargo and targeted travel and financial sanctions until 30 November 2010.

freeze¹⁴²) and broadened the criteria under which individuals and entities could be designated as subject of those measures. Such criteria are, a.: persons and entities acting in violation of the arms embargo; b.: political and military leaders of foreign armed groups operating in the DRC, or Congolese militias receiving support from abroad, which impede the process of disarmament, demobilisation, repatriation, resettlement, and reintegration; c.: political and military leaders recruiting or using child-soldiers, and individuals violating international law involving the targeting of children; d.: individuals operating in the DRC and committing serious violations of international law involving the targeting of children or women in situations of armed conflict, including killing and maiming, sexual violence, abduction and forced displacement; e.: individuals obstructing the access to or the distribution of humanitarian assistance in the eastern part of the DRC; and f.: individuals or entities supporting the illegal armed groups in the eastern part of the DRC through the illicit trade of natural resources. The consolidated travel ban and assets freeze list is maintained and regularly updated by the relevant Sanctions Committee.¹⁴³ The 1533 Committee was established to oversee the relevant sanctions measures¹⁴⁴ and to undertake the tasks set out by the Security Council in op. para. 15 of Resolution 1807 (2008) of 31 March 2008, op. para. 6 of Resolution 1857 (2008) of 22 December 2008 and op. para. 4 of Resolution 1896 (2009) of 30 November 2009. The Sanctions Committee is supported by a Group of Experts.¹⁴⁵ Its mandate was further expanded to include the task of producing recommendations to the Committee for the exercise of due

¹⁴² S/RES/1807 (2008) of 31 March 2008, op. paras 11 and 13 as renewed by S/RES/1896 (2009) of 30 November 2009, op. para. 3.

¹⁴³ See the updated consolidated list <http://www.un.org/sc/committees/1533/pdf/1533_list.pdf>.

¹⁴⁴ S/RES/1533 (2004) of 12 March 2004.

¹⁴⁵ The Group of Experts was originally established by Resolution S/RES/1533 (2004) of 12 March 2004, as appointed by the Secretary-General to monitor the implementation of the sanctions regime with particular focus on North and South Kivu and Ituri. It was subsequently renewed by Resolutions S/RES/1552 (2004) of 27 July 2004; S/RES/1596 (2005) of 18 April 2005; S/RES/1616 (2005) of 29 July 2005; S/RES/1654 (2006) of 21 January 2006; S/RES/1698 (2006) of 31 July 2006; S/RES/1771 (2007) of 10 August 2007; S/RES/1807 (2008) of 31 March 2008; S/RES/1857 (2008) of 22 December 2008 and S/RES/1896 (2009) of 30 November 2009. Additionally, pursuant to Resolution S/RES/1896 (2009), the Group of Experts is due to report to the Security Council before 20 October 2010.

diligence by importers, processing industries and consumers regarding the purchase, sourcing, acquisition and processing of mineral products from the DRC.¹⁴⁶ However, pursuant to op. para. 5 of Resolution 1807 all states are under an obligation to notify the Committee in advance regarding any shipment of arms and related materiel for the DRC, or any provision of assistance, advice or training related to military activities in the DRC, except those referred to in subparas (a) and (b) of op. para. 3 of the resolution, and are encouraged to include in such notifications all relevant information, including, where appropriate, the end-user, the proposed date of delivery and the itinerary of shipments.

Concerning the situation in *Sierra Leone*, the Council established the 1132 Committee¹⁴⁷ in order to undertake tasks related to travel restrictions and petroleum and arms embargoes.¹⁴⁸ Among its tasks, the 1132 Committee adopted and maintained a regularly updated list of leading members of the former Military Junta in Sierra Leone (Armed Forces Revolutionary Council – AFRC) whose entry into or transit through other states was to be prevented in accordance with op. para. 5 of Security Council Resolution 1132 (1997). That travel ban was subsequently re-imposed and expanded to also include leading members of the Revolutionary United Front (RUF).¹⁴⁹

In the case of *Somalia*, by its Resolution 1844 (2008) of 20 November 2008, the Security Council decided to impose individual targeted sanctions, i.e. on financial assistance, for individuals and entities; a travel ban on individuals;¹⁵⁰ and an assets freeze on individuals and entities,¹⁵¹ as designated by the Committee established pursuant to Resolution 751 (1992) of 24 April 1992. Among other issues the Committee is competent¹⁵² “to amend these guidelines to facilitate the implementa-

¹⁴⁶ S/RES/1896 (2009) of 30 November 2009, op. para. 7.

¹⁴⁷ S/RES/1132 (1997) of 8 October 1997, op. para. 10.

¹⁴⁸ Ibid. op. paras 5-6. These sanctions were subsequently terminated and replaced by the arms embargo and travel restrictions contained in op. paras 2 and 5 of Resolution S/RES/1171 (1998) of 5 June 1998.

¹⁴⁹ S/RES/1171 (1998) of 5 June 1998, op. para. 5.

¹⁵⁰ S/RES/1844 (2008) of 20 November 2008, op. para. 2.

¹⁵¹ Ibid., op. para. 4. All states shall freeze without delay funds, other financial assets and economic resources owned or controlled by individuals and entities designated by the Committee.

¹⁵² S/RES/751 (1992) of 15 May 1992, op. para. 11; S/RES/1356 (2001) of 19 June 2001, op. para. 4; S/RES/1844 (2008) of 20 November 2008, op. para. 11.

tion of the measures imposed by Resolution 1844 and keep these guidelines under active review as may be necessary”, “to consider and decide upon requests for exemptions from the General Arms Embargo, which are set out in paragraph 3 of Resolution 1356 (2001), in paragraphs 6 (b) and 7 of Resolution 1744 (2007) and reiterated in paragraphs 11 (b) and 12 of Resolution 1772 (2007) (the “General Arms Embargo Exemptions”), as well as by paragraph 12 of Resolution 1846 (2008)” and “to designate individuals and entities on the basis of the additional criteria as they may be developed by the Security Council, and to consider listing submissions, de-listing requests and proposed updates to the existing information.”¹⁵³

The Security Council Committee pursuant to Resolution 1521 concerning *Liberia* was established on 22 December 2003 to oversee the relevant sanctions measures and to undertake the tasks set out by the Security Council in op. para. 21 of the same resolution. Resolution 1521 (2003) imposed an embargo, a travel ban against Charles Taylor and his family, close associates and all officials of the regime and decided that all states shall freeze without delay funds, other financial assets and economic resources owned or controlled directly or indirectly by Charles Taylor, Jewell Howard Taylor, and Charles Taylor Jr. and/or those other individuals designated by the Committee for inclusion on the Assets Freeze List on the basis of the criteria set out in op. para. 1 of Resolution 1532 (2004).¹⁵⁴ The 1521 Committee published its guidelines for the conduct of its work, including the listing and de-listing procedures as well as some criteria for exemptions in case of necessity according to op. para. 4 of Resolution 1521 (2003).

The Security Council Committee pursuant to Resolution 1591 concerning the *Sudan* was established on 29 March 2005 to oversee the relevant sanctions measures and to undertake the tasks set out by the Security Council in sub-para. 3 (a) of the same resolution. On 30 July 2004 with the adoption of Resolution 1556, the Security Council first

¹⁵³ S/RES/1844 (2008) of 20 November 2008, op. para. 8.

¹⁵⁴ The 1521 Committee is the successor body to two previous Security Council Committees that are no longer in existence, namely the Committee established pursuant to Resolution S/RES/985 (1995) of 13 April 1995 and the Committee established pursuant to Resolution S/RES/1343 (2001) of 7 March 2001. The sanctions regime and the mandate of the Committee have been modified by subsequent resolutions, most notably Security Council Resolutions S/RES/1532 (2004) of 12 March 2004, S/RES/1683 (2006) of 13 June 2006 and S/RES/1903 (2009) of 17 December 2009.

imposed an arms embargo on all non-governmental entities and individuals, including the Janjaweed, operating in the states of North Darfur, South Darfur, and West Darfur. The sanctions regime was modified and strengthened with the adoption of Resolution 1591 (2005) which expanded the scope of the arms embargo and imposed additional measures including a travel ban and an assets freeze on individuals designated by the Committee.¹⁵⁵ These sanctions target those who impede the peace process, constitute a threat to stability in Darfur and the region, violate international humanitarian or human rights law, conduct offensive military over-flights in Darfur, and/or violate the arms embargo.

The Security Council Committee pursuant to Resolution 1572 (2004) concerning *Côte d'Ivoire* was established on 15 November 2004 to oversee the relevant sanctions measures and to undertake the tasks set out by the Security Council in op. para. 14 of the same resolution. Until 31 October 2010, all states shall take the necessary measures to prevent the entry into or transit through their territories of individuals designated by the Committee for inclusion on its consolidated travel ban and assets freeze list on the basis of the criteria summarised in op. para. 12 of Resolution 1727 (2006) of 15 December 2006. In similar temporal terms, all states shall freeze without delay funds, other financial assets and economic resources owned or controlled by individuals and entities designated by the Committee for inclusion on its consolidated travel ban and assets freeze list on the basis of the criteria summarised in op. para. 12 of Resolution 1727 (2006). The consolidated travel ban and assets freeze list is maintained and regularly updated by the 1572 Committee. Exemptions from these measures can be requested from the Committee pursuant to op. paras 12 and 14 of Resolution 1572 (2004). The procedure to request such exemptions, as well as listing and de-listing procedures can be found in the Committee's guidelines for the conduct of its work. Moreover, given the deterioration of the situation in Côte d'Ivoire, the Council emphasised that it is fully prepared to impose targeted measures against persons, to be designated by the Committee, who are determined to be a threat to the peace and national reconciliation process in that state; who are responsible for attacking or obstructing the actions of the UN forces in Côte d'Ivoire, the Special Representative of the Secretary-General, the Facilitator or his Special Representative in Côte d'Ivoire; those who are obstacles to the freedom of movement of the UN forces and the French forces; as

¹⁵⁵ S/RES/1591 (2005) of 29 March 2005, op. para. 3 (f).

well as for serious violations of human rights and international humanitarian law, for inciting public hatred and violating the arms embargo.¹⁵⁶

The Security Council Committee pursuant to Resolution 1518 (2003) was established on 24 November 2003 as the successor to the Security Council Committee established pursuant to Resolution 661 (1990) of 6 August 1990 concerning *Iraq and Kuwait*. The 1518 Committee was established to continue to identify senior officials of the former Iraqi regime and their immediate family members, including entities owned or controlled by them or by persons acting on their behalf, who are subject to the measures imposed by op. para. 23 of Resolution 1483 (2003) of 22 May 1983, i.e. an arms embargo and an assets freeze and transfer. As in other cases, to facilitate the work of the Committee and the Member States in implementing the assets freeze and transfer measures imposed by op. para. 23 of Resolution 1483 (2003), the Committee has published the guidelines of its operations, describing how the lists of individuals and entities are assembled and disseminated, and the delisting-guidelines describing how individuals and entities included on the lists can seek the removal of their names.

In all named cases, and generally speaking, the Council facilitates the work of the specific Committee and the Member States in implementing the assets freeze and transfer measures imposed by its resolutions, adopting procedural guidelines in each case.¹⁵⁷ In all these Sanctions Committees, the level of comprehensiveness of published guidelines and procedures vary.

For example, the DRC Committee does not have public guidelines or procedures – beyond information on relevant resolutions – for the application and administration of the 1533 List. In contrast, the guidelines for the working of the 1518 Committee for Iraq and the 1132 Committee for Sierra Leone are public and are reviewed regularly. Currently, the 1591 Sudan Committee has listed guidelines under active consideration. The Sudan Committee oversees travel and financial sanctions, although no individuals or entities had been listed as of March 2006; but in its latest update of August 2007, there were already four

¹⁵⁶ S/RES/1893 (2009) of 29 October 2009, op. para. 20.

¹⁵⁷ With regard to Iraq, *Guidelines for the application of paragraphs 19 and 23 of Resolution 1483 (2003)* <<http://www.un.org/sc/committees/1518/pdf/1483guide.pdf>>. Concerning Sierra Leone, *Consolidated guidelines of the Committee 1132 for the conduct of its work* <http://www.un.org/sc/committees/1132/pdf/SL_GUIDE.pdf>. For a comparative study in general, see, Heine-Elison, see note 132, 81 et seq.

persons registered. Although the criteria for listing obviously vary depending on the situation, virtually all the committees require a broad description and justification for each listing.

What this means in practice varies considerably across the committees and within them. For example, the 1267 Committee statements tend to be one and a half pages long, while the Liberia Committee delivers two or three paragraphs. The DRC Committee has an explanatory column for proposed designations. Most criteria for listing are overly broad, i.e. “obstructing the peace process”,¹⁵⁸ “any economic resources owned or controlled directly or indirectly”¹⁵⁹ or “associated with Al-Qaida and the Taliban.”¹⁶⁰ Additionally, there is often little transparency concerning the sources of information cited in statements of case.

To varying degrees, the three committees with published guidelines concerning delisting requests – Al Qaida/Taliban, Liberia, and Côte d’Ivoire – all provide that petitioners submit a justification for delisting requests and offer relevant information. More specific guidance as to what constitutes an adequate justification for delisting and the degree of information required is not available, by any Committee, with the exception of the 1636 Lebanon Committee. The current procedures not only lack specific guidance from the respective committees on justifications for delisting, but they are also complicated since the criteria and concerns of the state originally proposing the listing are generally unknown. On this point the Security Council adopted new mechanisms in Resolution 1904 (2009) of 17 December 2009, in order to improve their operation and specify, throughout its sixteen pages, issues such as the assistance of a Monitoring Team and sharing of information among Member States through the INTERPOL database.

This growing use of targeted sanctions represents a significant improvement in the Security Council’s practice in order to protect individual human rights and, therefore, to attempt to reduce the negative impact of economic measures. But a closer reading is needed to identify several problems with their effective implementation. One of the most frequently cited criticisms of targeted sanctions concerns the perceived lack of an adequate process by which individuals or entities may peti-

¹⁵⁸ S/RES/1893 (2009) of 29 October 2009, op. para. 20.

¹⁵⁹ S/RES/1532 (2004) of 12 March 2004, op. para. 1.

¹⁶⁰ S/RES/1267 (1999) of 15 October 1999, op. para. 4.

tion for their removal from the list.¹⁶¹ Although the guidelines of several Sanctions Committees include procedures for removing names, these guidelines vary from committee to committee, with differing standards as to the requirements for information and criteria upon which to base delisting decisions, and the timeframe for responding to such requests. In some cases the criteria for delisting are unspecified, which means that they will be negotiated bilaterally between the committee and every state, as in the Al-Qaida/Taliban, Sierra Leone, and Iraq cases. To varying degrees, the three Sanctions Committees with published guidelines concerning delisting requests – Al Qaida/Taliban, Liberia, and Côte d'Ivoire – all provide that petitioners submit a justification for delisting requests and offer relevant information. More specific guidance as to what constitutes an adequate justification for delisting and the degree of information required is not available, with the exception of the 1636 Committee (Lebanon).

Responding to the criticism of the de-listing procedure, in December 2006, the Security Council directed the Secretary-General to establish “a focal point” within the Secretariat to receive petitions for delisting for the first time directly from individuals or groups.¹⁶² The re-

¹⁶¹ D. Halberstam/ E. Stein, “The United Nations, the European Union, and the King of Sweden. Economic sanctions and individual rights in a plural world order”, *CML Rev.* 46 (2009), 13 et seq. (30); J. Frowein, “The Anti-Terrorism Administration and the Rule of Law”, in: P.M. Dupuy et al. (eds), *Festschrift für Christian Tomuschat*, 2006, 785 et seq. (791); P. Conlon, “The UN’s Questionable Sanctions Practices,” *Außenpolitik* 45 (1995), 327 et seq., regarding a scathing criticism of the administration of sanctions against the former Yugoslavia and Iraq. For a strong criticism of the Security Council and EU practice and for suggestions of “minimum procedural standards under the rule of law,” see Council of Europe Parliamentary Assembly, Resolution 1597 (2008) of 23 January 2008, United Nations Security Council and European Union Blacklists, <<http://assembly.coe.int/Main.asp?link=/Documents/AdoptedText/ta08/ERES1597.htm>>.

¹⁶² S/RES/1730 (2006) of 19 December 2006. The focal point became operational on 30 March 2007. Report of the Security Council Committee Established Pursuant to Resolution 1267 Concerning Al-Qaeda and the Taliban and Associated Individuals and Entities, Doc. S/2008/25 of 17 January 2008, 3 (hereinafter Sanctions Committee Report). The Sanctions Committee amended its Guidelines to specify the procedure before “the focal point,” (Sanctions Committee Report, 2-3). To improve the effectiveness of the sanctions the Sanctions Committee’s Chairman and the Monitoring Team have been visiting states and the Committee has sought to increase contacts not only with states but also with Interpol and other international

sulting focal point procedures, however, do not allow for the individual to participate either in person or through a personal representative or legal counsel in the process of re-evaluation, nor do they require the UN or any government to provide the petitioner with any information other than the status and disposition of the delisting request. If the publicly available descriptions are any indication, the resolution of any such individual petition is still essentially a diplomatic one.¹⁶³ Although these efforts aim to be more transparent and compatible with human rights standards – at least with European human rights standards – such a process is not always conducted with any reasonable understanding of individual rights.

Another criticism of the current delisting procedures is that even though some committees have time limits for consideration of delisting requests, since they are not subject to objection procedures, in practice, such requests can carry on indefinitely. States may either object without specifying a reason, or demand a technical delay that places the request on indefinite hold. For example, the 1267 Al Qaida/Taliban Committee uses a five day timeframe for the delisting request if there is no objection; only three days with no objections in case of the 1518 Iraq/Kuwait Committee. In the case of the Liberia Committee, the delisting request of travel bans listed individuals can take at least two days and another two days if there are no objections for the delisting in case of assets freeze. Recognizing the fact that only a few committees have some temporal criteria for the delisting request, most states undertake bilateral negotiations before submitting such a request.

A final criticism against targeted sanctions is that most of the Sanctions Committees do not foresee any mechanisms to mitigate collateral damage.¹⁶⁴ These negative consequences could be eased to some degree by exemptions to cover basic needs, as appropriate, to be administered by the relevant Sanctions Committee. Although they are focused on individuals or entities, targeted sanctions can also have significant collat-

and regional organisations, (Sanctions Committee Report, 6-9). The Monitoring Team has submitted “no fewer than 347 proposed amendments” to the list which “so far resulted in 324 changes being approved”, *ibid.*, 8.

¹⁶³ C. Feinäugle, “The UN Security Council Al-Qaida and Taliban Sanctions Committee: Emerging Principles of International Institutional Law for the Protection of Individuals?”, *German Law Review* 9 (2008), 1513 et seq. (1521).

¹⁶⁴ M. Bulterman, “Fundamental Rights and the United Nations Financial Sanction Regime: The *Kadi* and *Yusuf* Judgments of the Court of First Instance of the European Communities”, *LJIL* 19 (2006), 753 et seq.

eral effects on the families of targeted individuals, on the employees of targeted entities, or on the users of their services. That is why Sanctions Committees have made significant progress in adopting standardised definitions of basic needs, establishing general criteria for exemptions, and recognising the need to consider extraordinary expenses on a case-by-case basis. The number of exemption requests varies from committee to committee, but the 1267 Sanctions Committee receives approximately one petition per week (including listing, delisting, and exemption requests).

Nevertheless, the Watson Institute Report confirms some variation across existing committees. UN Security Council resolutions appropriately vary, and some committees have fewer possibilities to grant exemptions for liens and judgments than others. As a result, only half of the committees surveyed exempt payments for outstanding financial obligations, such as liens or judgments from judicial proceedings. Similarly, less coordination exists in respect of guidelines specifying the information required for exemptions. Most exemptions are for basic living expenses “including payment for foodstuffs, rent or mortgage, medicines and medical treatment, taxes, insurance premiums, and public utility charges, or exclusively for payment of reasonable professional fees and reimbursement of incurred expenses associated with the provision of legal services, or fees or service charges for routine holding or maintenance of frozen funds, other financial assets and economic resources.” These resolutions also allow, on a case-by-case basis, for additional exemptions for extraordinary expenses.¹⁶⁵ Only the Al Qaida/Taliban and the Lebanon Sanctions Committee spell out the identifying information required for a financial waiver, and only the Liberia, Côte d’Ivoire, and Lebanon Sanction Committees specify the type of information needed for an exemption to the travel ban.¹⁶⁶ It should be highlighted that the Sudan Sanctions Committee, currently has guidelines under active review. Security Council Resolution 1591 (2005) of 29 March specifies that payments of liens or judgments should be exempted from financial assets freeze. Travel exemptions specified under Resolution 1591 include religious and/or humanitarian needs, as well as travel in furtherance of regional peace and stability.

¹⁶⁵ See for example S/RES/1132 (1997) of 8 October 1997, related to Sierra Leone; S/RES/1533 (2004) of 12 March 2004, related to the Democratic Republic of the Congo and S/RES/1636 (2005) of 31 October 2005, in the Lebanon case.

¹⁶⁶ Watson Institute, see note 127, 31.

Nonetheless, there is a broadly based perception that current procedures are not adequately “fair and clear,” which one defines in the most general terms to include both procedural fairness (impartial application of measures, proportionality, the right to be informed and to be heard) and an effective remedy for wrongly listed parties. Therefore, some Member States have indicated an increasing reluctance to add names to the lists of individuals and entities targeted by Security Council sanctions.

IV. The Security Council and Human Rights

1. The Security Council’s Duty to Respect General Human Rights Law

In conferring primary responsibility for the maintenance of international peace and security on the Security Council, the UN Member States agreed that the Council acts on their behalf. As mentioned above Member States are bound by *jus cogens* norms and as they cannot transfer more power than they themselves are permitted to exercise, the Security Council is also bound by *jus cogens*.¹⁶⁷ The relevance and force of *jus cogens* with respect to the Security Council is also discernible in the UN Charter. As also mentioned above according to Article 24 (2) of the Charter, the Security Council is bound to act in accordance with the purposes and principles of the United Nations. These purposes and principles are formulated broadly and, specifically, as they relate to human rights, they can be understood in light of *jus cogens* norms. As basic statements of the most fundamental human values, those human rights norms that have acquired *jus cogens* status directly influence the purposes and principles of the United Nations.¹⁶⁸ In this context, the Security Council is, at least, bound to respect the right to life, which is not only non derogable under the ICCPR,¹⁶⁹ but which has also ac-

¹⁶⁷ Gill, see note 1, 82.

¹⁶⁸ V. Gowlland-Debbas, “U.N. Sanctions and International Law: An Overview”, in: Gowlland-Debbas, see note 93, 16.

¹⁶⁹ M.J. Bossuyt, *Guide to the “Travaux Préparatoires” of the International Covenant on Civil and Political Rights*, 1987, 115.

quired *jus cogens* status.¹⁷⁰ In support of this position, a UN working paper on the criteria for imposing sanctions stipulated “decisions on sanctions must not create situations in which fundamental human rights not subject to suspension even in an emergency situation would be violated, above all the right to life, the right to freedom and the right to effective health care and medical services for all ... Sanctions regimes must correspond to the provisions of international humanitarian law and international human rights norms.”¹⁷¹ In its recent practice, the Council directly recognises the binding force of human rights law by implementing its resolutions, for example, stating clearly that “States must ensure that any measures taken to combat terrorism comply with all their obligations under international law, and should adopt such measures in accordance with international law, in particular international human rights, refugee, and humanitarian law.”¹⁷²

As analysed above, the Security Council undoubtedly has to act in accordance with the purposes and principles of the United Nations,¹⁷³ and the promotion of respect for human rights is one of the purposes of the United Nations.¹⁷⁴ Since they form part of the purposes of the organisation as set out in Article 1 (3) of the Charter, the Security Council’s complete disregard for them would violate the Charter. Therefore, Chapter VII measures cannot disregard the concerns embodied in basic international human rights and humanitarian law. “[H]umanitarian law and human rights norms, rather than establishing precise limits to Chapter VII powers, form guidelines in the exercise of those powers. However, it is up to the [Security Council] to strike the concrete balance between humanitarian and human rights concerns and the goal of

¹⁷⁰ D. Akande, “The International Court of Justice and the Security Council: Is there Room for Judicial Control of Decisions of Political Organs of the United Nations?”, *ICLQ* 46 (1997), 309 et seq. (322).

¹⁷¹ Doc. A/AC.182/L.114/Rev.1 (2004) 14-15, Declaration on the Basic Conditions and Standard Criteria for the Introduction and Implementation of Sanctions and Other Coercive Measures: Revised Working Paper, United Nations General Assembly Special Committee on the Charter of the UN and on the Strengthening of the Role of the Organization, prepared by the Russian Federation.

¹⁷² S/RES/1456 (2003) of 20 January 2003, op. para. 6

¹⁷³ Article 24 para. 2 UN Charter.

¹⁷⁴ Article 1 para. 3 UN Charter.

maintaining peace ...".¹⁷⁵ Hence, the Security Council is, as already shown above, principally bound by human rights law.¹⁷⁶

It should be noted, however, that with regard to the more specific individual rights spelled out in the ICCPR, the ICESCR, and the Universal Declaration of Human Rights (UDHR), the Security Council's legal obligations are less clear,¹⁷⁷ as the United Nations has not yet become a party to any of the human rights treaties currently in force.¹⁷⁸ Nonetheless, numerous considerations weigh in favour of adherence to these treaties,¹⁷⁹ although specific considerations of human rights in the overall work of the Security Council remain vague and are evidenced unsystematically.¹⁸⁰ International human rights law itself generally recognises this balancing act, as, for example, in the emergency principle embodied in article 4 of the ICCPR.¹⁸¹ Taking into account that every state and the international community itself must do everything possible to protect at least the core content of human rights, it should also be recalled that the ICESCR has been ratified by three of the five permanent members of the Security Council (United Kingdom, the Russian Federation, and France) and signed by the United States and China. One could therefore argue that organs of the United Nations, including

¹⁷⁵ J. Frowein/ N. Krisch, "Introduction to Chapter VII" in: Simma, see note 65, 711.

¹⁷⁶ De Wet, see note 5, 284. M. Kulesa, "Von Märchen und Mechanismen – Gefahren und Chancen der Sanktionen des Sicherheitsrates", *Vereinte Nationen* 44 (1996), 89 et seq. (92); A. Segall, "Economic Sanctions: Legal and Policy Constraints", *Rev. ICR* 836 (1999), 763 et seq.

¹⁷⁷ R. Normand, "A Human Rights Assessment of Sanctions: The Case of Iraq, 1990–1997", in: W.J.M. Van Genugten/ G.A. de Groot (eds), *United Nations Sanctions: Effectiveness and Effects, Especially in the Field of Human Rights: A Multi-Disciplinary Approach*, 1999, 19, 25.

¹⁷⁸ Geiss, see note 101, 178.

¹⁷⁹ M. Bedjaoui, *The New World Order and the Security Council: Testing the Legality of Its Acts*, 1994, 14; de Wet, see note 5, 195–198; E. Zoller, *La Bonne Foi en Droit International Public*, 1997, 190–198; Normand, see note 177, 323.

¹⁸⁰ This concept is illustrated in a 1999 presidential statement, SCOR 54th Sess., Doc. S/PRST/1999/34 (1999) of 30 November 1999, Statement by the President of the Security Council, 1: "The Council emphasizes the need fully to respect and implement the principles and provisions of the Charter ... and norms of international law ... The Council also affirms the need for respect for human rights and the rule of law."

¹⁸¹ L. Oraa, *Human Rights in States of Emergency in International Law*, 1992.

the Security Council, have to actively stop behaviour that violates the rights protected in these treaties.¹⁸²

The ICCPR contains mainly negative rights (actions the government cannot take against you). Examples include, the right to life (article 6), the right to be free from slavery and forced labour, (article 8); the right to liberty and security, (article 9) and the right to a fair and public hearing by an impartial tribunal (article 14). Rights protected by the ICCPR are not always immediately enforceable, and state parties must “adopt such legislative or other measures as may be necessary to give effect to the rights recognized” in the Covenant according to article 2 (2). Perhaps this last criteria could be helpful for the Security Council’s resolutions. At the same time, the ICESCR, unlike the ICCPR, includes mainly positive rights (things the government must do for you). Because of the positive nature of economic, social and cultural rights, it is difficult to assess whether they have been violated. Some scholars examining the UN’s development of economic sanctions against states, for example, have criticised that the Security Council has a record of “almost complete failure to consider international law standards ...”.¹⁸³ Each Member State and the community as a whole, should undertake in conformity with article 2 (1) of the ICESCR to, “take steps, individually and through international assistance and co-operation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means ...”. And, similarly, according to article 2 (2) ICCPR, “[w]here not already provided for by existing legislative or other measures, each State Party to the present Covenant undertakes to take the necessary steps, in accordance with its constitutional processes and with the provisions of the present Covenant, to adopt such laws or other measures as may be necessary to give effect to the rights recognized in the present Covenant.” In the implementation of both Covenant obligations, States Parties are required to utilise “all appropriate means, including particularly the adoption of legislative measures.” Each State Party has a margin of appreciation in assessing which measures are most suitable to meet its specific circum-

¹⁸² Akande, see note 170, 323. M. Fraas, *Sicherheitsrat der Vereinten Nationen und Internationaler Gerichtshof*, 1998, 82.

¹⁸³ Damrosch, see note 120, 274. W. Reisman/ D. Stevick, “The Applicability of International Law Standards to United Nations Economic Sanctions Programmes,” *EJIL* 9 (1998), 126 et seq.; for a more positive view, see K. Manusama, *The United Nations Security Council in the Post-Cold War Era – Applying the Principle of Legality*, 2006, 115 et seq. (307).

stances. The obligation of State Parties to promote progressive realisation of the relevant rights to the maximum of their available resources clearly requires governments to do much more than merely abstain from taking measures which might have a negative impact on individuals' rights. In other terms, the obligation is to take whatever steps are necessary to ensure everyone enjoys individual rights and to reduce structural disadvantages, as soon as possible. Hence, both Covenants, impose a duty on each State Party to take positive measures.

The full meaning of the phrase in article 2 (1) "to take steps", implies that the complete achievement of the relevant rights may be achieved progressively, and steps towards that goal must be taken within a reasonably short time after the Covenant's entry into force for the states concerned. Such steps should be deliberate, concrete and targeted as clearly as possible towards meeting the obligations recognised in both Covenants and mainly will involve legislation. However, the adoption of legislative measures, as specifically foreseen by the Covenant, is by no means exhaustive. Rather, the phrase "by all appropriate means" points into another direction. Among the measures which might be considered appropriate, in addition to legislation, is the provision of judicial remedies with respect to rights which may, in accordance with the national legal system, be considered justiciable. The Committee on Economic, Social and Cultural Rights has noted, for example, that the enjoyment of the rights recognised, without discrimination, will often be appropriately promoted, in part, through the provision of judicial or other effective remedies. Indeed, those State Parties which are also parties to the ICCPR are already obliged, by virtue of article 2 (1), (3) and arts 3 and 26 of that Covenant, to ensure that any person whose rights or freedoms (including the right to equality and non-discrimination) recognised in the Covenant are violated, "shall have an effective remedy" (article 2 para. 3 (a)). In addition, there are a number of other provisions in the ICESCR, including arts 3, 7 (a) (i), 8, 10 para. 3, 13 para. 2 (a), paras 3 and 4 and 15 para. 3 that can be applied directly by judicial organs. This will depend on the different national legal systems.¹⁸⁴

The UN Human Rights Committee pointed out that the requirement under article 2 para. 2 ICCPR, to take steps to give effect to the Covenant rights is not further qualified and of immediate effect. A failure to comply with this obligation cannot be justified by reference to

¹⁸⁴ Doc. HRI/GEN/1/Rev. 9 (Vol. I), 27 May 2008, 16, General Comment No. 4: The right to adequate housing (Art. 11 (1) of the Covenant).

political, social, cultural or economic considerations within the state.¹⁸⁵ Similarly, the Security Council is obliged to respect and to act according to the core individual human rights. As Cameron points out, the Security Council, as such, is only bound by those rights that have passed into general international law, and, conceivably, those rights that can be seen as authoritative interpretations of the human rights obligations in the UN Charter, which circumscribe the powers of the Security Council. According to Cameron, the core contents of the two Covenants are authoritative interpretations of the Charter and are in effect binding on the Security Council as such, but this is open to debate.¹⁸⁶

The main issue, however, is to determine how far the Council may affect or limit human rights when acting under Chapter VII of the UN Charter under the consideration that the measures under Article 41 must be chosen by the Council in such a way as “to give effect to its decisions” and must adjust its measures in a proportionate way.¹⁸⁷ Only in this context it can be understood that UN sanctions contribute to and advance respect for international human rights law by defining and reinforcing international human rights norms. If the UN responds with sanctions to a violation of international human rights law, it reinforces a commitment to international norms that such behaviour is unacceptable. In addition, its actions must respect those human rights whose imposition it demands, and not diminish their effectiveness.

2. The Impact of Targeted Sanctions on Certain Human Rights

To date, the Security Council’s practice in adopting economic sanctions shows a tendency to adhere to human rights standards. With regard to the prompt and effective implementation of the measures imposed by its Resolution 1267 (1999), the Council underlines that its sanctions are

¹⁸⁵ Doc. HRI/GEN/1/Rev. 9 (Vol. I), 27 May 2008, 246, General Comment No. 31: The Nature of the General Legal Obligation Imposed on States Parties to the Covenant, Eightieth Session (2004), para. 14.

¹⁸⁶ Cameron, see note 16, 167.

¹⁸⁷ J. Delbrück, “Staatliche Souveränität und die neue Rolle des Sicherheitsrates der Vereinten Nationen”, *VRÜ* 26 (1993), 20 et seq.; J. Gardam, “Legal Restraints on the Security Council Military Enforcement Action”, *Mich. J. Int’l L.* 17 (1996), 307 et seq.; F. Kirgis, “The Security Council’s First Fifty Years”, *AJIL* 89 (1995), 506 et seq.

not aimed at the Afghan people, but are imposed against the Taliban because of its non-compliance with its resolution, and reaffirms its decision to assess the impact, including the humanitarian implications of the measures imposed by that resolution.¹⁸⁸ Therefore it encourages the 1267 Committee to report on this matter and explicitly recognises the “necessity for sanctions to contain adequate and effective exemptions to avoid adverse humanitarian consequences.”¹⁸⁹ Undoubtedly, it can be assumed that the Security Council has repeatedly signalled its willingness to consider the humanitarian impact of sanctions on the civil population in general, and on vulnerable groups, including children, in particular, in a systematic and consistent manner.¹⁹⁰ Like comprehensive sanctions,¹⁹¹ targeted sanctions can impinge upon several kinds of hu-

¹⁸⁸ Doc. S/PRST/2000/12 of 7 April 2000, Statement by the President of the Security Council on the situation in Afghanistan.

¹⁸⁹ S/RES/1333 (2000) of 19 December 2000.

¹⁹⁰ In op. para. 13 (a) of its Resolution S/RES/1343 (2001) of 7 March 2001, the Security Council requested the Secretary-General “to provide, six months from the date of the adoption of the resolution, a preliminary assessment of the potential economic, humanitarian and social impact on the Liberian population of possible follow-up action by the Security Council in the areas of investigation indicated in paragraph 19 (c) of the resolution”. S/RES/1333 (2000) of 19 December 2000, op. para. 15 (d), imposing further sanctions against the Taliban, the Council decides “(…)[t]o review the humanitarian implications of the measures imposed by this resolution and Resolution 1267 (1999), and to report back to the Council within 90 days of the adoption of this resolution with an assessment and recommendations, to report at regular intervals thereafter on any humanitarian implications and to present a comprehensive report on this issue and any recommendations no later than 30 days prior to the expiration of these measures (…)^o. At the same time, in Doc. A/55/163 – S/2000/712 of 12 July 2000, Secretary-General’s report on Children and Armed Conflict, para. 27.

¹⁹¹ Comprehensive economic sanctions create obligations for states, but these requirements do not directly affect the respect for all internationally recognised human rights. Sometimes, they may mainly affect civil and political rights such as those codified in the ICCPR and certain internationally or regionally protected economic rights. It is important to note that economic sanctions potentially infringe upon multiple other human rights as well. Because of their very nature as economic enforcement measures, general economic sanctions may especially infringe upon the right to food and the fundamental right to be free from hunger under article 11 of the ICESCR; the right to the enjoyment of the highest attainable standard of physical and mental health under article 12 of the ICESCR; the right to education

man rights. When the Security Council imposes smart sanctions on individuals, it forces states to take action in a way that might infringe human rights. In recent practice the most common sanctions are general arms embargoes, targeted travel restrictions and the freezing of assets or funds and any sources of terror financing. These sanctions may affect specific individual rights and freedoms, i.e. the free movement of people, the right to property and the right to a fair trial and an effective remedy. But in this context it is worth identifying the scope of all these rights, whether they should be added to this list of non derogable rights and finally, whether these rights and freedoms could be lawfully limited under specific circumstances and procedures.

a. Travel Bans and the Freedom of Movement

In recent practice, the Security Council usually decides that states shall take the necessary measures to prevent the entry into or transit through their territories of individuals designated by each Sanctions Committee. These travel bans imposed in the cases of Al-Qaida,¹⁹² Sierra Leona,¹⁹³ Liberia,¹⁹⁴ the DRC,¹⁹⁵ Côte d'Ivoire¹⁹⁶ or Sudan¹⁹⁷ interfere primarily with the freedom of movement as is guaranteed in article 12 ICCPR and article 2 of Protocol 4 to the European Convention on Human Rights (ECHR).

As is well-known, there is no universal human right that gives individuals a claim to enter any other country than that of their own nationality. Of course, the Security Council does not require states to deny their own nationals entry into their territory, although in some cases it must state so clearly.¹⁹⁸ On the contrary, the individuals listed by the specific committees are required not to live in their own country

under article 13 of the ICESCR; and the right to work under article 6 of the ICESCR.

¹⁹² S/RES/1390 (2002) of 16 January 2002 and subsequent S/RES/1822 (2008) of 30 June 2008, op. para. 1 (b).

¹⁹³ S/RES/1132 (1997) of 8 October 1997.

¹⁹⁴ S/RES/1521 (2003) of 22 December 2003, op. para. 4.

¹⁹⁵ S/RES/1807 (2008) of 31 March 2008, op. paras 9 and 13 as renewed by S/RES/1896 (2009) of 30 November 2009, op. para. 3; S/RES/1906 (2009) of 23 December 2009.

¹⁹⁶ S/RES/1727 (2006) of 15 December 2006, op. para. 12.

¹⁹⁷ S/RES/1591 (2005) of 29 March 2005, op. para. 3 (c).

¹⁹⁸ S/RES/1390 (2002) of 16 January 2002, op. para. 2 (b).

without authorisation of the respective committee,¹⁹⁹ because the liberty of movement and the freedom to choose a residence are rights that are granted only in the country of nationality or residence. Article 12 para. 3 ICCPR provides for exceptional circumstances in which rights under paras 1 and 2 may be restricted. This provision authorises the state to restrict these rights only to protect national security, public order (*ordre public*), public health or morals and the rights and freedoms of others.

In general terms, permissible restrictions must be provided by law, be necessary in a democratic society for the protection of these purposes and be consistent with all other rights recognised in the Covenant. According to the Human Rights Committee,²⁰⁰ the laws authorising the application of restrictions should use precise criteria and may not confer unfettered discretion on those charged with their execution. Faced with this provision, the working guidelines of the different committees provide specific exceptions under humanitarian and religious concerns, as well as the general interest for peace and security within the region.²⁰¹ In this context, it is worth examining how these travel ban restrictions are consistent with other human rights guaranteed in the Covenant, i.e. freedom of religion according to article 18 ICCPR as well as article 9 ECHR. These are the most common exceptions in the studied cases, such as Côte d'Ivoire,²⁰² DRC²⁰³ and Lebanon.²⁰⁴ In case of the 1267 Al-Qaida/Taliban Committee, there are two specific and possible exemptions from the travel ban.²⁰⁵ First, that the travel ban shall not apply where entry or transit is necessary for the fulfilment of a

¹⁹⁹ S/RES/1132 (1997) of 8 October 1997.

²⁰⁰ Doc. HRI/GEN/1/Rev. 9 (Vol. I) of 27 May 2008, 225, General Comment No. 27: article 12 (Freedom of movement) ICCPR.

²⁰¹ Exemption clauses were used in the context of the Iraq-Kuwait crisis in relation to sanctions on Iraq (e.g. S/RES/687 (1991) of 3 April 1991: exemptions to the sanctions regime could be made in cases of "essential civilian need") and also with regard to sanctions on Yugoslavia (Serbia and Montenegro) (e.g. S/RES/757 (1992) of 30 May 1992: exemptions to the sanctions regimes could be made in cases of "essential humanitarian need"). Exemption clauses were already included in the 1960s in the sanctions regime imposed on Southern Rhodesia with respect to food and educational materials, see e.g. S/RES/253 (1968) of 29 May 1968, op. paras 3 (d) and 4.

²⁰² S/RES/1572 (2004) of 15 November 2004, op. para. 10.

²⁰³ S/RES/1807 (2008) of 31 March 2008, op. para. 10.

²⁰⁴ S/RES/1636 (2005) of 31 October 2005, op. para. 2 (i) of the Annex.

²⁰⁵ S/RES/1822 (2008) of 30 June 2008, op. para. 1 (b).

judicial process, and second, when the Committee determines on a case-by-case basis that entry or transit is justified. Under this last type of exemption – case by case – it is possible to apply for an exemption from the travel ban for necessary travel needs, including medical treatment abroad and the performance of religious obligations. The Committee determines, on this basis, that entry or transit is justified after a written request is submitted with all pertinent information and in accordance with procedures set out in Section 11 of the Committee guidelines.

Like any other human rights restriction, in adopting laws providing for restrictions permitted by article 12 para. 3 ICCPR, states – and in this case the Security Council through its Sanctions Committees – should always be guided by the principle that the restrictions must not impair the essence of the right (article 5 para. 1 ICCPR) and that the relation between right and restriction, between norm and exception, must not be reversed. The meaning and scope of article 12 para. 3 ICCPR, clearly indicates that it is not sufficient that the restrictions serve the permissible purposes; they must also be necessary to protect them. And in doing so, restrictive measures must conform to the principle of proportionality; they must be appropriate to achieve their protective function; they must be the least intrusive instrument amongst those which might achieve the desired result; and they must be proportionate to the interest to be protected.

In all cases mentioned, the different Committee guidelines foresee special procedures for seeking waivers to travel restrictions, so restrictions can be neither unlimited nor indefinite. Unfortunately, these are not hypothetical examples.²⁰⁶ In the case of the Sierra Leone sanctions regime, the Sanctions Committee was requested to lift the travel ban on humanitarian grounds for one of the listed persons, namely Foday Sankoh, so that Sankoh, who was in the custody of the Special Court for Sierra Leone, could receive medical treatment in Accra, Ghana. Sankoh died while the Sanctions Committee deliberated for months over the request, and also asked for written assurances that Sankoh be kept in custody and that the request be accompanied by more specific information, such as details about the purpose of travel and dates of departure and return.²⁰⁷

²⁰⁶ Watson Institute, see note 127, 10.

²⁰⁷ Doc. S/2004/166 of 27 February 2004, Annual Report of the Sierra Leone Sanctions Committee, paras 13-14.

Finally, the application of permissible restrictions under article 12 para. 3 ICCPR needs to be consistent with the other rights guaranteed in the Covenant, i.e. the right to respect the private and family life, according to article 17 of the ICCPR, which protects individuals' privacy, family, home or correspondence, honour and reputation. However, every restriction needs to be consistent with the fundamental principles of proportionality, equality and non-discrimination.

b. Assets Freeze and the Right to Property

In all the cases studied, the Council decided that all states should freeze without delay funds, other financial assets and economic resources owned or controlled by individuals and entities designated by the respective committees. In very similar terms and conditions to the travel bans, the Committee guidelines foresee criteria and procedures to implement the measures.

Freezing funds and other sources of financing, as well as any financial sanctions have an impact on property rights e.g. article 1 of Protocol 1 to the ECHR and may affect a person's privacy, reputation, and family rights (article 17 ICCPR, article 8 of the ECHR). Only in extreme cases could such financial sanctions conceivably violate the right to life (article 6 ICCPR and article 2 ECHR).

As already seen, permissible restrictions must be provided by law and must be consistent with all other rights recognised in the Covenants or regional human rights treaties. A legal justification must be provided especially in cases where financial funds remain frozen indefinitely.²⁰⁸ Unless those funds or other financial assets or economic resources are themselves the subject of a prior judicial, administrative or arbitral judgment.²⁰⁹ In those cases such funds shall be transferred, in the case of Iraq, to the Development Fund for Iraq.²¹⁰

c. The Right to a Fair Trial and an Effective Remedy

Currently, the most pressing human rights concerns regarding targeted sanctions relate to the perceived difficulty for the individual to challenge the sanctions taken against him. Hence, the central set of human rights that is affected by sanctions against individuals is the set of pro-

²⁰⁸ S/RES/1390 (2002) of 16 January 2002, op. para. 2 (a).

²⁰⁹ S/RES/1483 (2003) of 22 May 2003, op. para. 23.

²¹⁰ *Ibid.*, op. para. 23b.

cedural rights. If sanctions are wrongly imposed on listed individuals without granting these individuals the possibility of being heard or of challenging the measures taken against them, there may also be a violation of the right of access to court and the right to a fair trial (article 14 ICCPR and article 6 ECHR). When the right to a fair trial is violated, the contracting state or authority must offer an effective remedy and the competent authorities should enforce such remedies when granted. Within this general appreciation, the meaning and the scope of the right to a fair trial, on the one hand, and the requirements of an effective remedy, on the other, should be emphasised.

On the one hand, some authors consider the right to a fair trial as *jus cogens*²¹¹ and the UN Human Rights Committee does not reject the idea that the “fundamental principles of fair trial” are similar to *jus cogens*. While reservations to particular clauses of article 14 ICCPR may be acceptable, a general reservation to the right to a fair trial would be incompatible with the object and purpose of the Covenant.²¹² Moreover, in order to resist sanctions, affected individuals must have access to a body that can review the measures in an effective way. The right to an effective remedy is included in article 2 para. 3 ICCPR and directly protected in article 13 ECHR. The wording of article 14 ICCPR and article 6 ECHR is similar in regard to the “the right to a fair and public hearing by a competent, independent and impartial tribunal established by law.” But these provisions differ in one crucial aspect. Article 14 ICCPR states that “... In the determination of any *criminal charge* against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law ...” (emphasis added). Article 6 ECHR covers the right to a fair trial, “in the determination of his *civil rights and obligations* or of any criminal charge against him, every-

²¹¹ Manusama, see note 183, 125-126; A. Orakhelashvili, “Impact of Peremptory Norms on the Interpretation and Application of United Nations Security Council Resolutions”, *EJIL* 16 (2005), 59 et seq. (65).

²¹² Doc. HRI/GEN/1/Rev. 9 (Vol. I) of 27 May 2008, 248, General comment No. 32: Right to equality before courts and tribunals and to a fair trial, Ninetieth session (2007), para. 6. While article 14 is not included in the list of non-derogable rights of article 4 para. 2 of the Covenant, states derogating from normal procedures required under article 14 in circumstances of a public emergency should ensure that such derogations do not exceed those strictly required by the exigencies of the actual situation. The guarantees of a fair trial may never be made subject to measures of derogation that would circumvent the protection of non-derogable rights.

one is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law” (emphasis added). *Prima facie* article 14 ICCPR would be only applicable where the determination of a “criminal charge” is involved, or where “rights and obligations in a suit at law” are at stake. The question is whether the listing and the imposition of sanctions such as travel restrictions and assets freeze can be qualified as either civil or criminal matters and therefore come within the realm of article 14 ICCPR and/or article 6 ECHR, or whether they are rather administrative measures or measures of a *sui generis* character that remain outside the scope of both provisions.

With regard to the 1267 Committee, targeted individuals are listed on the basis of their association with a terrorist organisation. This criterion for listing bears a criminal law connotation, as in the case of the Côte d’Ivoire sanctions, in which individuals can be listed on the basis of the relevant information that they are responsible for serious violations of human rights and international humanitarian law or that they publicly incite towards hatred and violence.²¹³ But the fact that in some Committees’ guidelines there may be a criminal law connotation for the lifting criteria does not mean that the economic sanctions should be characterised as criminal sanctions. However, the European Court of Human Rights (ECtHR) ruled that the concept of criminal charge bears an “autonomous meaning,” which is independent of the characterisation of a measure pursuant to national law. Moreover, the ECtHR has not given general guidelines to determine whether civil rights or obligations are involved in certain cases, but has chosen to deal with this issue on a case-by-case basis. Actually, the Human Rights Committee has not defined these two concepts in detail (criminal charge – civil rights) and therefore, the doctrine argues different positions.²¹⁴

At the same time, according to article 14 ICCPR and article 6 ECHR, the right to a fair trial is not an absolute one, but may be subject to limitations in extreme cases. Such limitations are permitted by implication since the right of access, by its very nature, calls for regulation by the state. Taking into account the lack of such regulation at an international level and considering that in this respect the contracting states enjoy a certain margin of appreciation, one could conclude that the Security Council, within its prerogatives for the maintenance of international peace and security, could regulate some specific and very ex-

²¹³ S/RES/1572 (2004) of 15 November 2004, op. para. 9.

²¹⁴ Cameron, see note 16, 182; Watson Institute, see note 127, 14.

ceptional restrictions, in any case, or by acting under Chapter VII of the Charter could derogate it completely. On the contrary, even assuming that the application of Chapter VII of the UN Charter offers ground to declare a state of emergency, there should be at least some access to a court. Indeed, in times in which fundamental rights are increasingly restricted for the sake of security in the broadest sense of the word and due to the “war on terror”, it is extremely important that the ECtHR signals to the Security Council, the European Commission and the Member States that there are core fundamental rights that must always be respected. The right to be heard, access to justice and independent full judicial review are of such fundamental importance that they must be respected also in times of emergency. Certain limitations of fundamental rights must be accepted, but never their complete disregard. This understanding is widely accepted at the European level after the *Kadi* and *Yusuf* cases.²¹⁵

From an international as well as European perspective, the right to a fair trial sets high standards – “fair and public hearing,” “within a reasonable time”, and “by an independent tribunal established by law.” Thus, the right to a fair trial would require judicial review of the sanctions, but one can ask whether that right is applicable to the administrative procedures by which UN sanctions are imposed.

The Security Council is a political body; it does not receive complaints directly from individuals and does not have juridical functions. The ICJ is the only juridical organ at UN level, but its jurisdiction is restricted to states. The many Sanctions Committees are subsidiary bodies of the Security Council, political bodies, with no jurisdiction. Hence the requirement of an “independent tribunal established by law” is a utopia.

For example, the 1267 Committee shows this problem clearly. The original procedure for the production of the list consisted basically in

²¹⁵ As analyzed in Cameron, see note 16, 193-195; G. de Búrca, “The European Court of Justice and the International Legal Order After *Kadi*”, *Harv. Int’l L. J.* 51 (2010), 1 et seq.; M. Zgonec-Rozej, “European Court of Justice judgment on the European Community’s enforcement of UN Security Council Sanctions regulations”, *AJIL* 103 (2010), 305 et seq.; L. Herik/N. Schrijver, “Eroding the Primacy of the UN System of Collective Security: the Judgment of the European Court of Justice in the Cases of *Kadi* and *Al Barakaat*”, *International Organizations Law Review* 5 (2008), 329 et seq. N. Lavrano, “Judicial Review of UN Sanctions by the European Court of Justice”, *Nord. J. Int’l L.* 78 (2009), 343 et seq. (357).

the exchange of information between the states and the 1267 Committee on individuals or groups associated with Al-Qaida in order to include them on the list, together with any other relevant information.²¹⁶ This procedure was modified in November 2006, February 2007 and December 2008, with the introduction of significant distinctions in the guidelines for the conduct of the Committee. Among the innovations one can highlight the proposal to create some type of national procedure for the better identification of suspects.²¹⁷ On the subject of these “methods of identification”, each state must ensure that such methods guarantee the right to defence of the affected parties, their right to be heard by the proper authorities, and the right to be informed about the reasons why the state has proposed their inclusion on the Consolidated List. Furthermore, para. 6 h) of the most recent guidelines for the conduct of the committee reminds all states that once their petition is included on the Consolidated List, the states must notify the interested party of the situation and apply the corresponding economic sanction in each case. States present justified proposals and present proof of the links with Al-Qaida, data on the origin of the proof, whether this has been obtained by the intelligence services, police or judiciary, even if there is evidence from the subject himself or any graphic documentation.²¹⁸ The request for new inclusions on the list does not require the state to have presented charges against that person.

The 1267 Committee decides behind closed doors, although the presence of a representative of the petitioning state is permitted at the meeting.²¹⁹ The decision to include the suspect on the List is taken by consensus and in writing, and is sent to every committee member so that, within the time determined by its President, any possible objections may be presented; if this is not done before the deadline, the decision is ratified.²²⁰ Once inclusion on the List is accepted, notification is sent to the country or countries where the person or entity is thought to be, and, in the case of individuals, the respective country is in-

²¹⁶ S/RES/1617 (2005) of 29 July 2005, op. para. 2.

²¹⁷ Guidelines, 9 December 2008, para. 6 b), adopted by the Security Council following the adoption of S/RES/1822 (2008) of 30 June 2008. <http://www.un.org/sc/committees/1267/pdf/1267_guidelines.pdf>.

²¹⁸ S/RES/1526 (2004) of 30 January 2004, op. para. 17; S/RES/1735 (2006) of 22 December 2006, op. para. 5.

²¹⁹ Guidelines 2008, see note 217, para. 12 e).

²²⁰ *Ibid.*, para. 3 b).

formed.²²¹ But the Sanctions Committee has no direct relation with the affected person or entity only inasmuch as each state can undertake, that they “take, in accordance with their domestic laws and practices, all possible measures to notify or inform in a timely manner the listed individual or entity of the designation.”²²²

The original mechanism for the de-listing of individuals and groups from the List was based on a petition from the person in question to his state of residence, or of his citizenship. The state was entitled to ask the 1267 Committee for a revision through diplomatic channels, but the individual had to provide the appropriate reasons. The new Focal Point introduces the possibility of certain direct communication between the committee and the individual, but without mentioning the obligation to respect the right of the targeted person to be heard. The new de-listing procedure – as amended in Resolutions 1730 (2006) of 19 December 2006 and 1822 (2008) of 30 June 2008 – introduces a point by which the petitioner must justify the de-listing request and, in particular, why he no longer fulfils the criteria of being on the list.²²³ Within three months, the Focal Point only informs the petitioner of the committee’s decision to grant or refuse the petition for de-listing, but without giving him the opportunity to review the decision.²²⁴

In this context, it may be understood that all claims presented to the European Court of Justice suffer from the same common defect,²²⁵ in that, at the time when the UN sanctions were applied to the Community regulations, the Consolidated List was directly incorporated into Annex I of the regulations, without a mechanism to guarantee the right to be heard and the right to defend oneself.²²⁶ Therefore, the affected

²²¹ S/RES/1735 (2006) of 22 December 2006, op. para. 10.

²²² S/RES/1822 (2008) of 30 June 2008, op. para. 17.

²²³ S/RES/1617 (2005) of 29 July 2005, op. para. 2; S/RES/1822 (2008) of 30 June 2008, op. para. 2.

²²⁴ S/RES/1730 (2006) of 19 December 2006, op. paras 7-8.

²²⁵ Case T-306/01, *Kadi*, [2005] ECR II-3533; Case T-315/01, *Kadi v. Council*, [2005] ECR II-3649; Case T-47/03 R, *Sison v. Council*, [2003] ECR II-2047; C-402/05 P, *Kadi v. Council* (Grand Chamber), Judgment of 3 September 2008; Case T-306/01, *Yusuf & Al Barakaat v. Council*, [2005] ECR II-3533; Case T-49/04, *Hassan v. Council*, [2006] ECR II-52; Case C-117/06, *Möllendorf*, [2007] ECR I-8361, Case T-318/01, *Othman v. Council*, October 2006 (legal aid granted); Case T-47/03 R, *Sison v. Council*, [2003] ECR II-02047. See, Halberstam/ Stein, see note 161.

²²⁶ C-402/05 P, *Kadi v. Council* (Grand Chamber), Judgment of 3 September 2008, para. 336.

individual's lack of information, the non-communication of the data used against him as a basis for the restrictions imposed, and the absence of a reasonable time period after the imposition of the restrictions for the registered individuals to become aware of their situation, all imply a violation of article 6 ECHR and therefore a violation of the European legal order.

Then again, with regard to the right to an effective remedy, article 2 para. 3 (a) ICCPR provides the general and positive obligation for each State Party of the Covenant "to ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity." Hence, at the international level there is no direct right to an effective remedy. This provision does not have a general scope; on the contrary, it is only applicable when another right of the Covenant is involved. Moreover, article 2 para. 3 of the ICCPR foresees a remedy only if it is determined by the competent judicial, administrative, or legislative authority, which grants more room for non-judicial remedies. With very similar wording, article 13 ECHR recognises the right to an effective remedy also applicable only when another individual guaranteed right is involved, i.e. the right to property according to Protocol 1 of the ECHR. Furthermore, as article 2 para. 3, article 13 of the ECHR does not require a judicial remedy, but speaks instead of a national authority, which appears to grant more room for non-judicial remedies.

In view of this situation and the European experience of claims against the listing procedure and the consequent sanctions, the Security Council cannot and should not turn a blind eye and continue to allow a dramatic impact of its sanctions on the rights recognised in international law. The very different listing and delisting mechanisms set up by the Security Council for the effective implementation of its smart sanctions do not seem to be totally in line with international human rights standards, i.e. with the right to be heard and the right to a fair trial. Therefore, the Security Council has modified the Committee's guidelines several times.²²⁷ And recently, Resolution 1904 (2009) of 17 December 2009 set up the new Office of the Ombudsperson, and the Security Council is looking forward to an early appointment to this post as

²²⁷ Regarding the 1267 Committee see S/RES/1455 (2003) of 17 January 2003; S/RES/1526 (2004) of 30 January 2004; S/RES/1617 (2005) of 29 July 2005; S/RES/1735 (2006) of 22 December 2006 and S/RES/1822 (2008) of 30 June 2008.

a step to continue enhancing due process guarantees for persons on the Consolidated List of the Security Council. This last initiative is welcomed by the UN Human Rights Council.²²⁸ In contrast, it is likely that the right to an effective remedy was already applicable at least at the European level with regard to the right of property. This right leaves more room for different types of remedies, provided that they are as effective as possible in the context of the situation in which they apply.

V. Conclusion

International law and the United Nations Charter are adapting *de facto* to the new international context, without undertaking formal reform. This process is based on an extensive, controversial, but indispensable new approach to the Security Council's primary responsibility for the maintenance of international peace and security. The Security Council plays a significant role in the international legal system. It does so, not so much as an original source of law, but as an organ in charge of implementing the law, and more precisely the Charter of the United Nations. Although the Security Council does not have the power to create law, it does have the power to create rights and obligations for the Member States of the United Nations. Therefore, the Security Council has made wide use of its powers. It acts on the basis of the Charter that it interprets and implements. The Security Council has adopted truly innovative measures; its resolutions can therefore have a certain impact on the international legal order. Based on a hypothetical Article 41 *bis* of the Charter, the Council has adopted this new type of economic sanctions, which, until recently, had only been used against states. However, this new reading of the Charter permits targeted measures against individuals and entities. Consequently, these non state actors become the subject of binding decisions that states must implement.

The Security Council interprets the Charter for its own purpose only. It does not work in an abstract or context-neutral way, but rather selects the interpretation that is most appropriate for the circumstances with which it is confronted. As Halberstam and Stein argued, there are several potential routes by which the United Nations in general, and the Security Council, in particular, might be legally bound to observe

²²⁸ Doc. A/HRC/13/L.20 of 26 March 2010.

fundamental principles of fairness in order not to implement too grave measures.

One idea is that, as the Security Council's discretionary powers and scope of operations expand, the Council might create its own fundamental rights principles by constitutional absorption, that is, by incorporating some of the principles that underpin the legitimacy of its members (both domestically and internationally) into the governing law of the UN Charter. That avenue of fundamental rights protection, however, still remains largely speculative.

At the present time, more traditional considerations may ground the UN's requirement to abide by internationally recognised human rights. As was argued, whether by virtue of the Charter itself, the UN international legal personality, or some version of functional succession, the United Nations Security Council is already now legally bound to observe customary international human rights law. The Security Council operates within a considerable margin of appreciation under Chapter VII, but it must, nonetheless, remain within the limits of human rights laws.²²⁹ As a result of the actions carried out by non-state actors on the international level, the Council adopts new economic targeted sanctions to punish the behaviour of those non-state actors, notwithstanding the fact they may – directly or indirectly – affect some human rights. This has *de facto* quasi-imperative or quasi-jurisdictional relevance.²³⁰

In all the cases studied – the DRC, Sierra Leone, Liberia, Sudan, Côte d'Ivoire, Iraq, Al-Qaida /Taliban – the Council has established Sanctions Committees to assess the travel ban restrictions and the freezing of funds and other financial assets of targeted persons and entities registered on the Consolidated Lists. However, several improvements have been made to the listing and delisting system originally introduced in each resolution. The listing and delisting guidelines also have the consequence that the nominating state is known, which at least allows the target to institute whatever proceedings might exist in the courts of that state to challenge the decision. And the delisting consultation procedure allows the target's state to raise the issue of mistaken blacklisting, which would hopefully encourage the designating state to at least double-check all its sources.²³¹

²²⁹ Halberstam/ Stein, see note 161, 70.

²³⁰ Cameron, see note 16, 182, 191.

²³¹ *Ibid.*, 201.

There is a very important “democratic deficit” in this new smart sanctions system, notwithstanding the improvements that have already been made. The administrative rules governing the listing and delisting procedures are not compatible with general human rights, i.e. with the right to a fair trial and an effective remedy, the right to be heard or the right to defence as recognised in several international conventions. According to article 14 ICCPR and article 6 ECHR, the right to a fair trial and an effective remedy requires some form of review mechanism to consider the listing and delisting requests. Given the extraordinary nature of the Security Council’s role in promoting international peace and security, some margin of appreciation or flexibility in interpretation as to what constitutes an effective remedy is appropriate. Thus, procedures ensuring effective remedy may be different in such circumstances involving the security of a state, or where international peace and security may be at stake, and the criteria for effective remedy may vary. To date, there is no satisfying remedy. A review mechanism under the authority of the Security Council – Monitoring Team, Ombudsperson, or Panel of Experts’ proposals – vary in their degree of independence and would not meet the criteria of ability to grant relief, unless that authority were delegated by the Security Council. The extent to which the review mechanism’s decisions are made public, however, could constitute a form of relief and only if in those cases the affected individual could bring the arguments and evidence as his defence before the court or the panel.

With its *Kadi* judgment, the European Court of Justice firmly rejected the *Kadi/Yusuf* judgments of the Court of First Instance. The Court made unambiguously clear that European Community law, in particular its basic, core fundamental right values, prevail over any international law obligations of the European Union and its Member States, including the UN Security Council Resolutions and the UN Charter. As a consequence thereof, individuals targeted by UN sanctions must have access to full judicial review in order to be able to ensure the effective protection of their fundamental rights, including procedural rights as guaranteed by the ECHR. Thus, the European Court of Justice proved that the Community is indeed based on the rule of law and that the fight against terrorism – however important it may be – cannot be used as a justification for completely abrogating European constitutional law values as guaranteed within the European Community and its Member States. Although this is doubtlessly a possible implication of the *Kadi* and *Al Barakaat* case, the European Union Court

has, pointedly, not said that the targeted UN sanctions would be incompatible with international law.²³²

To sum up, the implementation of UN Security Council targeted sanctions is a delicate business. If states are not wholehearted in their implementation, if the customs authorities, the export control agencies, the national inspection units, and national police are less than enthusiastic, then the sanctions are very easily undermined. Nevertheless, the UN targeted sanctions implementation demands in all cases – not least at the European level – the fullest respect for human rights. This is a new challenge for the international community, which should complete the UN collective security system in the light of new demands by the international community. Indeed, a delicate balance is required between the need for sanctions in order to maintain international peace and security, on the one hand, and the rule of law and human rights standards in all cases, on the other. In short, the re-adaptation of the international order to the new international realities and demands is *in fieri*, it is still being carried out, it is precarious, and for the moment, only a partial re-adaptation has been achieved. However, it lacks – at the present time – effective means for the protection of the respective individuals, at least from the perspective of the standards of protection in Europe.

²³² Stenhammar, see note 51, 133.