

Sense and Sensibility of the Human Rights Obligations of the United Nations Security Council

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1. Introduction	1015
2. Sense – The Debate on the Human Rights Obligations of the UN Security Council	1016
2.1. Emergence of the UN Human Rights Debate – The Empirical Background	1016
2.1.1. The Increasing Executive and Legislative Powers of the Security Council	1018
2.1.2. Control Entails Responsibility	1019
2.2. Conceptualizing the UN Human Rights Obligations – The Normative Background	1022
3. Sensibility – Determining the Scope of the Human Rights Obligations of the Security Council Acting under Chapter VII	1026
3.1. The Council’s Power to Issue Binding Decisions and Article 103 UN Charter	1027
3.1.1. Binding Council Decisions Are Not Restricted to Chapter VII	1027
3.1.2. Article 103 UN Charter Does Not Absolve the Council from Its Human Rights Duties	1028
3.2. The Application of Chapter VII – A Trigger of a State of Emergency Allowing for Derogations from Human Rights Obligations?	1029
3.3. Who Shall Review Security Council Decisions On Grounds of Human Rights – Targeted Financial Sanctions Against Terrorist Suspects as the Litmus Test?	1031
3.3.1. The Decisions of the European Court of First Instance	1032
3.3.2. Regional and Domestic Courts as Successful Tools for Soft-balancing Against US Predominance In the UN	1034
3.3.2.1. European Judges Coining European Foreign Policy	1034
3.3.2.2. Reform of the UN Sanctions Regime	1037
3.3.3. The Human Rights Advisory Panel to UNMIK – A Cautious Improvement	1038
4. Conclusion	1039

“The provisions of the Charter on the subject impose legal obligations not only upon the Members of the United Nations. They imply a comprehensive legal obligation upon the United Nations as a whole ... the degree of legal obligation is particularly high with regard to a subject matter which, as in the case of human rights and freedoms, is a constant and fundamental theme of the Charter.”

Hersch Lauterpacht, 1950¹

1. Introduction

This article examines the context and scope of the human rights obligations of the United Nations, more precisely those of its organ endowed with the “primary

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¹ International Law and Human Rights (New York 1950), 159.

responsibility for the maintenance of international peace and security”,² the Security Council. In previous years, legal scholarship arguing that the UN Security Council is, at least partially, bound to international human rights law has distinctly evolved.³ Whereas it has been convincingly established that the Security Council is not *legibus solutus*,⁴ little has been written on the exact ambit and in particular on imminent restrictions on the Council’s duty to abide by international human rights law. After sketching the predominant doctrinal concepts of the obligation of the UN Security Council to adhere to human rights, this piece will primarily try to contribute to the illumination of the still opaque scope and standard of this duty.

2. Sense – The Debate on the Human Rights Obligations of the UN Security Council

Considering the present topicality of the introductory quote, Hersch Lauterpacht’s foresight commands admiration. With initial assertiveness of the United Nations quickly going to the dogs of the emerging paralysis of the US-Soviet superpower rivalry, history of course did its bit. The fact that the debate on the human rights obligations of the United Nations only surfaced 50 years later,⁵ is, that is to say, predominantly a result of the paralysis of a UN Security Council stalemated by the Cold War.⁶

2.1. Emergence of the UN Human Rights Debate – The Empirical Background

It is conventional wisdom and there is statistical evidence that the dusk of the Cold War was followed by the dawn of renewed Security Council activity in the

² Article 24 para. 1 UN Charter.

³ Erika de Wet, Human Rights Limitations to Economic Enforcement Measures Under Article 41 of the United Nations Charter and the Iraqi Sanctions Regime, 14 *Leiden Journal of International Law* (2001), 277, 284-296; August Reinisch, Developing Human Rights and Humanitarian Law Accountability of the Security Council for the Imposition of Economic Sanctions, 95 *American Journal of International Law* (2001) 851, 853-863; Frédéric Mégret/Florian Hoffmann, The UN as a Human Rights Violator? Some Reflections on the United Nations Changing Human Rights Responsibilities, 25 *Human Rights Quarterly* (2003), 314, 316-325.

⁴ Appeals Chamber of the ICTY, *Prosecutor v. Tadic*, Appeal on Jurisdiction, Case IT-94-1, 2 October 1995, <<http://www.un.org/icty/tadic/appeal/decision-e/51002.htm>, para 28>.

⁵ The question of human rights obligations can thereby be regarded as a key issue in the general debate on the applicability of the rule of law and the principle of legality to the Security Council, see Kenneth Manuſama, *The United Nations Security Council in the Post-Cold War Era – Applying the Principle of Legality*, Leiden – Boston 2006, 1-12.

⁶ In fact the veto was exercised on 279 occasions leaving some 20 million people dead in an estimated 100 conflicts between 1946-89, see Simon Chesterman, *Just War or Just Peace? Humanitarian Intervention and International Law*, Oxford 2001, 120.

early 1990s, rang in by Operation Desert Storm in 1991 to liberate Kuwait from Iraqi invasion.⁷ The subsequent decade, replete with international and internal conflicts such as the dissolution of Yugoslavia, the State collapse of Somalia, the independence of East-Timor or the global action to counter terrorism entailed rapidly increasing powers of the Security Council. This extension of Security Council activities is considerably built on the realization that the maintenance of international peace and security is inextricably intertwined with human rights and development.⁸ The increasing conflation of human rights and development with international peace and security (what also became known under the *Leitmotiv* of human security)⁹ not only lowered the threshold to utilize the Chapter VII trigger of “threat to or breach of the peace”¹⁰ but at the same time changed the modalities of Security Council activity in a way that rendered the Council vulnerable to commit

⁷ In fact, “[T]he fall of the Berlin Wall in November 1989 signaled the advent of a new era in world politics”, see Karen A. Mingsst/Margaret P. Karns, *The United Nations in the Post-Cold War Era*, 2nd ed., Boulder 2000, 88; see also Louis Henkin/Richard Crawford Pugh/Oscar Schachter/Hans Smit, *International Law Cases and Materials*, 3rd ed., St. Paul 1993, who refer in the preface (iii) of their classical textbook to “the rebirth of collective security and the revival of the United Nations Security Council”. The turning point towards a more active role of the Security Council is often discerned in the consensus of the five Permanent Members of the Security Council on the adoption of resolution 598 of 20 July 1987 demanding a cease-fire in the Iran-Iraq war, cf. Adam Roberts/Benedict Kingsbury, Introduction: The UN’s Roles in International Society Since 1945, in: Adam Roberts/Benedict Kingsbury (eds.), *United Nations, Divided World – The UN’s Roles in International Relations*, 2nd ed., Oxford 1993, 34-5.

⁸ In larger freedom: towards development, security and human rights for all, Report of the Secretary-General, UN Doc.A/59/2005, 21 March 2005, <<http://www.un.org/largerfreedom/contents.htm>>, paras. 12-17. The Secretary-General held as follows (paras. 16-17): “Not only are development, security and human rights all imperative; they also reinforce each other. This relationship has only been strengthened in our era of rapid technological advances, increasing economic interdependence, globalization and dramatic geopolitical change. While poverty and denial of human rights may not be said to ‘cause’ civil war, terrorism or organized crime, they all greatly increase the risk of instability and violence. Similarly, war and atrocities are far from the only reasons that countries are trapped in poverty, but they undoubtedly set back development ... Accordingly, we will not enjoy development without security, we will not enjoy security without development, and we will not enjoy either without respect for human rights.”

⁹ See Christian Tomuschat, *Human Rights Between Idealism and Realism*, Oxford 2003, 55-57; Jennifer Moore, *Collective Security with a Human Face: An International Legal Framework for Coordinated Action to Alleviate Violence and Poverty*, 33 *Denver Journal of International Law and Policy* (2004-5), 43; Louise Dowald-Beck, *Human Security: Can It Be Attained?*, 97 *American Society of International Law Proceedings* (2003), 93.

¹⁰ On the changing definition of a “threat to the peace” according to Article 39 UN Charter in the light of humanitarian intervention see Chesterman, *supra* note 6, 127-162. In fact, the Security Council enjoys great discretion in invoking Article 39 UN Charter. While inter-state gross violations of human rights today fulfill the threshold of “threat to the peace”, future developments are hard to predict. In the light of the contemporary re-intensified debate on climate change the Council might for instance find that “global warming” constitutes a “threat to the peace” pursuant to Article 39 UN Charter and impose, similarly as it did in combating terrorism (e.g. SC Resolution 1373), binding decisions on member States to enact and enforce legal rules halting global warming such as provisions on cutting down carbon dioxide emissions.

human rights violations.¹¹ In fact, primarily in the wake of the tremendous effects of the sanctions regime on the Iraqi civilian population and of the terrorist attacks of September 11, the Council's resolutions, while still addressed to UN member States, in an unprecedented way started to regulate the conduct of individuals or groups instead of State organs.¹² Whether the Security Council established the ICTY and ICTR to bring individual perpetrators of human rights violations to justice or vested UN peacekeepers with more robust mandates to detain individuals, these decisions always affected persons' fundamental rights making them the foundation of the debate on human rights obligations of the Security Council.

2.1.1. The Increasing Executive and Legislative Powers of the Security Council

The pertinent expansion of Security Council powers predominantly occurred along the following axes: peace-operations, UN territorial administrations and sanctions against countries and individuals posing a threat to international peace and security.¹³ This aggrandized activity has even led to descriptions of the Security Council as "world legislator" or "world government".¹⁴ In all of the above-mentioned fields the Security Council has extended its powers broadly, assuming tasks sometimes tantamount or at least similar to the exercise of sovereign authority.¹⁵ In general, these powers can be divided into legislative and executive powers: In the case of establishing an individual sanctions regime targeted at terrorist suspects the UN acts as a legislator and the actual human rights sensitive act (e.g. the freezing of assets of a suspect) is done by the organs of a specific UN member State

¹¹ This was overtly highlighted in response to the Council's sanctions committee's listing of terrorist suspects in "A More Secure World: Our Shared Responsibility: Report of the Secretary General's High-level Panel on Threats, Challenges and Change", 2 Dec. 2004, <<http://www.un.org/secureworld/>>, para. 152: "However, the Security Council must proceed with caution. The way entities or individuals are added to the terrorist list maintained by the Council and the absence of review or appeal for those listed raise serious accountability issues and possibly violate fundamental human rights norms and conventions. The Al-Qaida and Taliban Sanctions Committee should institute a process for reviewing the cases of individuals and institutions claiming to have been wrongly placed or retained on its watch lists." See also the similar statement of the General Assembly, World Summit Outcome Document, GA Res. 60/1, 24 October 2005, para. 109: "We also call upon the Security Council, with the support of the Secretary-General, to ensure that fair and clear procedures exist for placing individuals and entities on sanctions lists and for removing them, as well as for granting humanitarian exemptions."

¹² See for instance SC Res. 1267 (1999); SC Res. 1333 (2000).

¹³ There is voluminous legal scholarship on each of these fields of reference. This article will not deal with any of these areas in detail but repeatedly rely on their various ramifications while trying to establish an abstract and general assessment of the standard of the Security Council's human rights obligations.

¹⁴ Catherine Denis, *Le pouvoir normative du Conseil de sécurité des Nations Unies: portée et limites*, Bruxelles 2004, 93-174; Axel Marschik, *The UN Security Council as World Legislator?*, IILJ Working Paper 2005/18, <www.iilj.org>.

¹⁵ Mégret/Hoffmann, *supra* note 3, 316, 325-30.

when it implements the pertinent Security Council resolution. Different from that, the UN can itself commit human rights violations in cases where its own organs (such as UNMIK police) take actions in violations of a person's fundamental rights (e.g. lengthy detention); thereby, the UN and not State organs implement SC resolutions.¹⁶ While in the latter case it is more obvious that the UN is an alleged human rights violator, in both cases SC resolutions relying on their primacy pursuant to Article 103 UN Charter evolve as provenance of conduct undermining international, regional and domestic human rights standards.¹⁷ Thus, in all of these areas of the Security Council's executive and legislative powers, the question of UN human rights responsibilities emerges in order to "preclude the migration of unconstitutional ideas from the international to the regional and national level".¹⁸

2.1.2. Control Entails Responsibility

In other words: regardless whether the enforcement act interfering in an individual's human rights is carried out by a UN or a member State organ, it is based on a more and more far reaching assumption of sovereign-like powers of the Security Council acting under Chapter VII. In establishing the regulatory framework governing a sanctions regime against individuals, by authorizing peacekeeping forces (under the authority of the UN or regional organizations like AU, EU or NATO) or by setting up the legal framework of a transitional administration, the UN assumes control over areas traditionally embedded with sovereign States and exercises this control either by its own or by member States organs. The debate on an incremental UN human rights responsibility is therefore a consequence of in-

¹⁶ The question whether actions of UN peacekeeping forces ("bluehelmets") consisting of soldiers of usually numerous member States (contributing States) are attributable towards member States or the UN rests with the exercise of "command and control" over the forces and is highly controversial. The fact that contributing States remain full disciplinary authority over their soldiers indicates attribution to the contributing States, a conciliatory position recognizes parallel attribution to both the UN and the contributing State. See also the unpublished letter of 3 February 2004 by the United Nations Legal Counsel to the Director of the Codification Division: "As a subsidiary organ of the United Nations, an act of a peacekeeping force is, in principle, imputable to the Organization, and if committed in violation of an international obligation entails the international responsibility of the Organization and its liability in compensation." See in detail Marten Z w a n e n b u r g, *Accountability of Peace Support Operations*, Leiden – Bosten 2005, 34-41. In this regard see also the very recent, controversial decision of the European Court of Human Rights (ECtHR) of 31 May 2007 in the case *Behrami and Behrami v. France and Saramati v. France, Germany and Norway*, in which the Court held that conduct of KFOR troops was on the basis of the authorisation by SC Resolution 1244 attributable to the UN but not to troop contributing nations of KFOR (paras. 121-41).

¹⁷ On the compatibility of individual sanctions and the European Convention on Human Rights see Iain C a m e r o n, *UN Targeted Sanctions, Legal Safeguards and the European Convention on Human Rights*, 72 *Nordic Journal of International Law* (2003), 159-214.

¹⁸ Mattias K u m m, *Democratic Constitutionalism Encounters International Law: Terms of Engagement*, in: Sujit Choudry (ed.), *The Migration of Constitutional Ideas*, Cambridge 2006, 256, 290.

tensified SC activities and is predicated upon the concept that “responsibility derives from control” promulgated by Eagleton¹⁹ more than half a century ago.²⁰

The criterion of control for assuming accountability has become evident in the elaborate debate on the extraterritorial reach of human rights.²¹ There, the prevailing concept of effective control ensues from the exercise of jurisdiction.²² Consequently, where State jurisdiction is replaced by UN jurisdiction such as in the case of UNMIK/UNTAET, the UN may exercise effective control and thus bears responsibility for its actions and omissions.²³

After this more empirical introduction alluding to the expectations of the international community that the responsibilities of the UN as the institutionalized watchdog of human rights must be commensurate with its powers (reflecting an antagonistic idea of rights and duties),²⁴ I will now turn to the normative concept of the human rights obligations of the United Nations.

¹⁹ Clyde Eagleton, *International Organization and the Law of Responsibility*, *Recueil des Cours* 1950-I, 319, 358-9.

²⁰ See similarly the report of the International Law Association, Berlin Conference (2004), *Accountability of International Organisations*, 28 et seq.

²¹ Ralph Wilde, *Legal “Black Hole”? Extraterritorial State Action and International Treaty Law on Civil and Political Rights*, 26 *Michigan Journal of International Law* (2005), 739; Tarik Abdel-Monem, *How Far Do the Lawless Areas of Europe Extend? Extraterritorial Application of the European Convention on Human Rights*, 14 *Journal of Transnational Law and Policy* (2005), 159; see also the pertinent contributions in Fons Coomans/Menno T. Kamminga (eds.), *Extraterritorial Application of Human Rights Treaties*, Antwerp 2004.

²² Wilde, *supra* note 21, 790-804; Theodor Schilling, *Is the United States Bound by the International Covenant on Civil and Political Rights in Relation to Occupied Territories?*, *Global Law Working Paper* 08/04, <<http://www.nyulawglobal.org/workingpapers/documents/GLWP0804Schilling.pdf>>, 6-10.

²³ For Kosovo see UNMIK Regulation 1999/1 (25 July 1999), *On the Authority of the Interim Administration*, para. 1: “All legislative and executive authority with respect to Kosovo, including the administration of the judiciary, is vested in UNMIK and is exercised by the Special Representative of the Secretary-General”; see Georg Nolte, *Human Rights Protection against International Institutions in Kosovo: The Proposals of the Venice Commission of the Council of Europe and Their Implementation*, in: Pierre-Marie Dupuy/Bardo Fassbender/Malcolm N. Shaw/Karl-Peter Sommermann (eds.), *Völkerrecht als Wertordnung. Common Values in International Law – Essays in Honour of Christian Tomuschat*, Strasbourg – Arlington 2006, 245, 246, 251-2: “As far as the control of territory by the international administration is concerned the situation of Kosovo resembles that of a State.”, (246) and Carsten Stahn, *Justice Under Transitional Administration: Contours and Critique of a Paradigm*, 27 *Houston Journal of International Law* (2005), 311, 313: “The presence of the U.N. administrations in Kosovo and East Timor was based on a dirigiste model, vesting U.N. actors directly with the exercise of all of the classical powers of the state, including the administration of justice.” Though, in theory UNMIK was (as was UNTAET) bound to international human rights law, see para. 1.3. UNMIK Regulation No. 24/1999 (in conjunction with Regulation 1/1999): “In exercising their functions, all persons undertaking public duties or holding public office in Kosovo shall observe internationally recognized human rights standards.”; see also the recent *Behrami* decision of the ECtHR, *supra* note 16.

²⁴ See the Second Annual Report 2001-2002 of the Kosovo Ombudsperson Institution, 10 July 2002, 5: “It is ironic that the United Nations, the self-proclaimed champion of human rights in the world, has by its own actions placed the people of Kosovo under UN control, thereby removing them from the protection of the international human rights regime that formed the justification for UN engagement in Kosovo in the first place.”; see also Simon Chesterman, *You, The People. The United*

That the UN does have the legal capacity to incur international duties and responsibilities has long been established since the famous *Reparations for Injuries* case in 1949.²⁵ With the intensified allocation of what used to be sovereign State power towards international organizations or less institutionalized transnational networks,²⁶ the extent of international responsibility of these organizations and networks has become evident in response to the inherent threat that States may divest themselves of human rights obligations when they delegate decision-making power to international organizations or networks.²⁷ According to Article 3 of the International Law Commission's Draft Articles on Responsibility of International Organizations, every internationally wrongful act of an international organization entails the international responsibility of the international organization. Following the systematic concept of the ILC's Articles on State Responsibility,²⁸ an internationally wrongful act of an international organization exists when conduct consisting of an action or omission is a) attributed to the international organization under international law, and b) constitutes a breach of an international obligation of that international organization.²⁹ In addition to the crucial question of attribution of conduct to an international organization,³⁰ the determination of the responsibility

Nations, Transitional Administration, and State-Building, Oxford 2005, 126-7 and Bernhard K n o l l, Beyond the 'Mission Civilisatrice': The Properties of a Normative Order Within an Internationalised Territory, *Leiden Journal of International Law* (2006), 275-304.

²⁵ ICJ, *Reparation for Injuries Suffered in the Service of the United Nations* (Advisory Opinion, 11 April 1949), ICJ Reports 1949, 174.

²⁶ Anne-Marie S l a u g h t e r, *A New World Order*, Princeton 2004; José E. A l v a r e z, *International Organizations as Law-makers*, Oxford 2005.

²⁷ However, the ECtHR, *Waite and Kennedy v. Germany*, Judgment of 18 February 1999, para. 67 held that States remain responsible under the European Convention on Human Rights even where they establish international organizations and where they attribute to these organizations certain competences and grant them immunities; cf. Ian B r o w n l i e, The Responsibility of States for the Acts of International Organizations, in: Maurizio Ragazzi (ed.), *International Responsibility Today – Essays in Memory of Oscar Schachter*, Leiden – Boston 2005, 355, 360-1.

²⁸ See para. 3 of GA Res. 56/83 (12 December 2001), in which the GA "[t]akes note of the articles on responsibility of States for internationally wrongful acts, presented by the International Law Commission, the text of which is annexed to the present resolution, and commends them to the attention of Governments without prejudice to the question of their future adoption or other appropriate action".

²⁹ Report of the ILC on the work of its fifty-fifth session, 33, 58 UN-GAOR, Suppl. No. 10, UN-Doc A/58/10 (2003), 45-49, <<http://untreaty.un.org/ilc/reports/2003/2003report.htm>>.

³⁰ This very decisive question will not be elaborated in this paper but is nonetheless omnipresent in determining the UN human rights responsibility. The crucial point is that State cannot avoid responsibility by creating an international organization but it is still controversial whether States or international organizations shall bear sole responsibility or there shall be parallel responsibility of both. A primary example of this much debated issue is the attribution of the NATO bombardements on Serbia and Montenegro in Spring 1999; Alain P e l l e t, L'imputabilité d'éventuels actes illicites – Responsabilité de l'OTAN ou des États membres, in: Christian Tomuschat (ed.), *Kosovo and the International Community – A Legal Assessment*, The Hague – New York 2002, 193 espoused an attribution to NATO. Whereas neither the ICJ, *Legality of Use of Force* cases (Judgments of 15 December 2004) nor the ECtHR, *Banković* decision of 12 December 2001 pronounced on the issue of attribution with re-

of an international organization is subject to the scope of its international obligations. Whereas the ILC's work focuses on the former issue and is keeping aloof from the sheer impossible task of depicting the whole range of international obligations,³¹ this article attempts to achieve to better calibrate the normative content of the international human rights obligations of the UN Security Council.

2.2. Conceptualizing the UN Human Rights Obligations – The Normative Background

From a normative perspective one must, as a first step, identify the possible sources of international law prescribing human rights obligations of the UN. This has been the focal point of academic contributions in the debate on human rights accountability of the UN. The necessity to establish possible foundations for the applicability of human rights standards to the UN is mainly a corollary of the absence of the UN as a party to international or regional human rights treaty regimes which are (at least hitherto) open only to State parties.³²

In general, three main ways in which the United Nations can be bound by international human rights law have been depicted. Mégret and Hoffmann distinguish between an external, an internal and a hybrid conception: According to the external conception the UN is bound “‘customarily’ as a result and to the extent that international human rights standards have reached customary international law status”.³³ It goes without saying that it is far from clear as to which par-

gard to the bombardments, the ECtHR in its recent *Behrami* decision, *supra* note 16, attributed later conduct of KFOR troops solely to the UN but not to the troop contributing nations of KFOR.

³¹ The ILC has thereby, albeit cautiously, also approached the delicate question of the responsibility of a State in connection with the act of an international organization and adopted in first reading so far Draft Articles 25-30 under a provisional Chapter (x), see the Report of the International Law Commission of its Fifty-eighth session (1 May – 9 June and 3 July – 11 August 2006), GAOR 61, Supplement No. 10 (A/61/10), 261-3, 277-92 (Commentaries thereto).

³² There have been repeated suggestions that international or regional organizations shall accede to international or regional treaties on the protection of human rights. The most concrete step is foreseen by the EU Reform Treaty amending Article 6 para. 2 of the Treaty on European Union which shall then provide for the accession of the European Union to the European Conventions of Human Rights. It has also been discussed whether the UN should accede to the special human rights treaties concerning armed conflict, the Geneva Conventions, see August Reinisch, *Securing the Accountability of International Organizations*, 7 *Global Governance* (2001), 131, 138.

³³ Mégret/Hoffmann, *supra* note 15, 317; Boris Kondoch, *Human Rights Law and UN Peace Operations in Post-conflict Situations*, in: Nigel D. White/Dirk Klaasen (eds.), *The UN, Human Rights and Post-conflict Situations*, Manchester 2005, 19, 36; Tawhida Ahmed/Israel de Jesús Butler, *The European Union and Human Rights: An International Law Perspective*, 17 *European Journal of International Law* (2006) 778, 780-781 arguing that the European Union's obligations to abide by human rights extend far beyond those adopted by its internal rules (primarily the European Convention on Human Rights) due to obligations arising under customary international law; on the sometimes contested assumption that international organizations can have obligations arising from customary international law towards other subjects of international law see distinctly Chittharanjan F. Amerasinghe, *Principles of the Institutional Law of International Organizations*, 2nd ed., Cam-

ticular human rights are today of a customary international law nature. Mitigating at least some uncertainties, the ICJ has held that certain fundamental rights of the human person in international law are obligations *erga omnes*.³⁴ From a hierarchical perspective customary international law also knows a category of rules which have achieved the status of *ius cogens*.³⁵ In a case of conflict these peremptory provisions invalidate other, lower rules of international law including international law norms created by international organizations.³⁶

The predominant arguments advocating in favor of the United Nations to be bound to comply with international human rights ensue from the purposes and principles enshrined in the UN Charter. Article 1 paras. 1, 3 and Article 2 para. 2 UN Charter prescribe that international disputes have to be settled in accordance with the principles of justice and international law and oblige the United Nations to promote human rights and to respect the principle of good faith, respectively.³⁷ This is fully applicable to the Security Council, which “shall act in accordance with the purposes and principles of the organization when discharging its duties”.³⁸ In addition, Article 55 *lit. c*) UN Charter unequivocally requires the UN to promote “universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion”.³⁹

Arguments challenging this self-binding nature of the UN Charter have claimed that these purposes and principles are broad and vague and shall therefore be inap-

bridge – New York 2005, 400: “As in the case of responsibility of international organizations, there can be no doubt that under customary international law, possibly on the analogy of the law governing relations between states, international organizations can also have international obligations towards other international persons arising from the particular circumstances in which they are placed or from particular relationships.”

³⁴ ICJ, *Barcelona Traction, Light and Power Co., Ltd. (Belgium v. Spain)*, Judgment of 5 February 1970, ICJ Reports 1970, 32.

³⁵ Articles 53 and 64 Vienna Convention on the Law of Treaties, May 22, 1969, 1155 UNTS 331; see from a more and more voluminous literature on *ius cogens* for example Alexander Orakhelashvili, *Peremptory Norms In International Law*, Oxford 2006 and Stefan Kadelbach, *Jus cogens, obligations erga omnes and other rules – The Identification of Fundamental Norms*, in: Christian Tomuschat/Jean-Marc Thouvenin (eds.), *The Fundamental Rules of the International Legal Order*, Leiden – Boston 2006, 21, 28-35

³⁶ In a series of cases the European Court of First Instance has confirmed that the Security Council is bound by *ius cogens* norms, see *infra* 3.3.1.; on the consequences of infringements by international organizations which constitute serious breaches of obligations under peremptory norms of general international law see Draft Articles 43 and 44 of the ILC’s work on the responsibility of international organizations which have been proposed in the “Fifth Report on Responsibility of International Organizations” by Special Rapporteur Giorgio Gaja, 2 May 2007, A/CN.4/583, paras. 55-65.

³⁷ Erika de Wet/André Nollkaemper, *Review of Security Council Decisions by National Courts*, 45 *German Yearbook of International Law* (2002), 166, 171-175.

³⁸ Article 24 para. 2 UN Charter. See Reinisch, *supra* note 32, 136; Jose E. Alvarez, *The Security Council’s War on Terrorism: Problems and Policy Options*, in: Erika de Wet/André Nollkaemper/Petra Dijkstra (eds.), *Review of the Security Council by Member States*, Antwerp – Oxford – New York 2003, 119, 124.

³⁹ Kondoch, *supra* note 33, 33.

propriate to set limits on the Security Council's enforcement powers.⁴⁰ However, such assumptions of broadness and vagueness are based on a Charter interpretation in vacuum which ignores the UN's far reaching work in the fields of human rights. In fact, the core content of human rights norms applicable to the United Nations including the Security Council has to be drawn from the rights guaranteed in the International Bill of Rights, encompassing the Universal Declaration of Human Rights of 1948 (UDHR)⁴¹, the International Covenant on Civil and Political Rights of 1966 (ICCPR)⁴² and the International Covenant on Economic, Social and Cultural Rights of 1966 (ICESCR).^{43 44} This "internal conception" built upon the UN's internal juridical order⁴⁵ is complemented and fine-tuned by numerous documents and declarations in specific operational areas of the UN such as the UN High Commissioner's Principles and Guidelines on Human Rights and Human Trafficking.⁴⁶ Andrew Clapham even suggests that the UN's human rights obligations do exactly arise from such unilateral declarations.⁴⁷

The two most pertinent operational activities in this regard concern the conduct of UN transitional administrations and UN peace operations.⁴⁸ In both areas the

⁴⁰ Gabriel H. Osthuisen, *Playing the Devil's Advocate: The United Nations Security Council Is Unbound by Law*, 12 *Leiden Journal of International Law* (1999), 549, 559-563.

⁴¹ GA-Res. 217(III), *Universal Declaration of Human Rights*, Dec.19, 1948, 3 UN-GAOR, 71, UN-Doc. A/810 (1948).

⁴² *International Covenant on Civil and Political Rights*, Dec. 16, 1966, 999 UNTS 171.

⁴³ *International Covenant on Economic, Social and Cultural Rights*, Dec.16, 1966, 993 UNTS 3.

⁴⁴ De Wet/Nollkaemper, *supra* note 37, 173.

⁴⁵ Mégret/Hoffmann, *supra* note 15, 317; cf. David Schweigman, *The Authority of the UN Security Council under Chapter VII of the UN Charter*, Dordrecht 2001, 171-2.

⁴⁶ Report of the United Nations High Commissioner for Human Rights to the Economic and Social Council, UN Doc. E/2002/68/Add.1, 20 May 2002. Guideline 10, particularly addressed to inter-governmental organizations, states as follows: "The direct or indirect involvement of peacekeeping, peace-building, civilian policing, humanitarian and diplomatic personnel in trafficking raises special concerns. States, intergovernmental and non-governmental organizations are responsible for the actions of those working under their authority and are therefore under an obligation to take effective measures to prevent their nationals and employees from engaging in trafficking and related exploitation ...". With regard to UN transitional administrations see UNMIK Regulation No. 24/1999 (*supra* note 23) and UNTAET Regulation No. 1/1999; as regards peacekeeping the UN Department of Peacekeeping Unit Operations Training Unit has issued training manuals and cards such as the "Ten Rules – Code of Personal Conduct for Blue Helmets" which according to rule No. 5 oblige blue helmets to "Respect and regard the human rights of all". Another card with the header "We are United Nations Peacekeepers" states in para. 2: "We will comply with the Guidelines on International Humanitarian Law for Forces Undertaking United Nations Peacekeeping Operations and the applicable portions of the Universal Declaration of Human Rights as the fundamental basis of our standards."

⁴⁷ *Human Rights Obligations of Non-State Actors*, Oxford 2006, 127.

⁴⁸ Peace operations are referred to here in the sense of peacekeeping, peace-making or peace-enforcing operations conducted by armed forces of UN member states, which are also simply known as New York-based operations since the UNDPKO is based in New York. For the distinction between New York-based operations and Geneva-based (mainly monitoring or inquiry) operations see Andrew Clapham/Florence Martin, *Smaller Missions Bigger Problems*, in: Alice H. Henkin (ed.), *Honoring Human Rights: From Peace to Justice* (The Aspen Institute, 1998), 133. Questions of human rights obligations of the UN which have normally only been touched upon in New York-based

UN has been subject to extensive criticism in the wake of human rights violations of its personnel. In the field of peace operations it has taken almost five decades of debate⁴⁹ until the UN officially promulgated the fundamental principles and rules of international humanitarian law as applicable to UN forces, but only when in situations of armed conflict they are actively engaged therein as combatants as well as in enforcement actions and in peacekeeping operations when the use of force is permitted in self-defense.⁵⁰ Thus, the scope of this Bulletin on the observance of international humanitarian law is quite narrow and does for instance not include police-like tasks of peacekeepers outside actual combat situations. When UN forces are acting in non-combat situations, e.g. as police or in assuring humanitarian assistance, international humanitarian law cannot be the applicable *lex specialis* but international human rights norms must prevail.⁵¹ Although the UN Secretary-General has after repeated cases of sexual abuse of women and children by blue-helmets in large-scale missions like in Cambodia or in the Democratic Republic of the Congo⁵² undertaken further steps in order to ensure better conduct and accountability in UN peace operations, the UN is still reluctant to accept to be bound to international human rights in its peace operations. However, this position is incompatible with the amount of control UN forces were bestowed upon in recent much more robust mandates⁵³ and cannot be justified, as will be shown be-

operations, have recently also emerged in Geneva-based operations. In fact the debate on the human rights compatibility encroaches upon all various aspects of UN work and has also been raised in the context of UNHCR, see Ralph Wilde, *Quis Custodiet Ipsos Custodes?: Why and How UNHCR Governance of "Development" Refugee Camps Should be Subject to International Human Rights Law*, 1 *Yale Human Rights and Development Law Journal* (1998), 119 and also Mark Pallis, *The Operation of UNHCR's Accountability Mechanisms*, 37 *NYU Journal of International Law and Politics* (2005), 869.

⁴⁹ The question was first raised by the Report of the Committee on study of legal problems of the United Nations, see: *Should the Laws of war apply to United Nations enforcement action?*, 46 *American Society of International Law Proceedings* (1952), 216-220. The authors of this contribution (William J. Bivens/Leland M. Goodrich/Hans Kelsen/Josef L. Kunz/Louis B. Sohn and the committee's chairman Clyde Egleton) were hesitant on the application of the laws of war but held that the United Nations "should select such of the laws of war as may seem to fit its purposes (e.g., prisoners of war, belligerent occupation), adding such others as may be needed, and rejecting those which seem incompatible with its purposes" (220).

⁵⁰ Secretary-General's Bulletin, *Observance by the United Nations forces of international humanitarian law* (6 August 1999), ST/SGB/1999/13, 38 *ILM* 1656; see Zwanenburg, *supra* note 16, 171-5.

⁵¹ Cf. Clapham, *supra* note 47, 118-25.

⁵² See the press release of UN Secretary-General Kofi Annan, issued on 19 November 2004, in response to the sexual misconduct of UN peacekeepers in the DRC: "I am afraid there is clear evidence that acts of gross misconduct have taken place. This is a shameful thing for the United Nations to have to say, and I am absolutely outraged by it." (UN Doc. SG/SM/9605, AFR/1069, PKO/115). With regard to new allegations of sexual abuse in 2006 see: *The Washington Post*, U.N. Investigating New Sex Allegations in Congo, Washington D.C., August 18, 2006, A18; *The Times*, *Policing the Peacekeepers*, London, May 9, 2006, 19.

⁵³ This "robust peacekeeping" allows the use of force if needed whether in consent-based peacekeeping or imposed peace enforcement missions, Michael W. Doyle/Nicholas Sambanis, *Making War and Building Peace – United Nations Peace Operations*, Princeton 2006, 7; see already the report of Amnesty International, *Human Rights and Peacekeeping* (1994), AI Index IOR 40-001/1994, Sec-

low, by a simple reference to the use of Chapter VII resolutions establishing such mandates.

Finally, the third doctrinal way to establish the UN's obligation to abide by human rights is – Mégret and Hoffmann call it the hybrid conception – that the United Nations is bound “transitively” by international human rights standards as a result and to the extent that its members are bound.⁵⁴ This approach follows the line of reasoning that States should not be allowed to circumvent human rights obligations by establishing an international organization to do the “dirty work”.⁵⁵ Since States are the creators of international organizations they can therefore only set them up with (at least inherent) human rights obligations.⁵⁶

In sum, it has been convincingly established that the United Nations are under an obligation to comply with international human rights law. It has so far been underexposed in academia what that conclusion implies. Does the UN have to respect, protect and fulfill all the obligations of the UDHR, ICCPR and the ICESCR? Has the Security Council to comply fully with human rights even if it acts under Chapter VII? The following part is an attempt to put flesh to the bones of the human rights obligations of the UN Security Council.

3. Sensibility – Determining the Scope of the Human Rights Obligations of the Security Council Acting under Chapter VII

Traditional claims that the United Nations Security Council is bound by international human rights law have been rebutted by reference to its special powers under Chapter VII of the UN Charter. Increasing criticism following abuses committed by UN peacekeepers or within UN transitional administrations has put the latter position under attack. The quest for human rights compatibility of Chap-

tion 2.2, 21: “... the UN must ensure that troops under its command carrying out law enforcement functions, such as arrest, detention, search and seizure, crowd dispersal or ensuring public order, are trained in and abide by international human rights and criminal justice standards. ... If troops are to carry out these policing functions they must abide by and be trained in international standards of policing, rather than the practices of war ...”.

⁵⁴ Mégret/Hoffmann, *supra* note 15, 318.

⁵⁵ Reinisch, *supra* note 32, 137, 143.

⁵⁶ This self-limitation of international organizations already follows from the Roman law dictum “Nemo plus iuris transferre potest quam ipse habet”, which in the present circumstances implies that States are regardless of their international rights and duties already limited by their internal (constitutional) obligations even when they act externally. It is symptomatic for the whole debate that the Security Council in turn regularly reminds the member States to act in accordance with international human rights law, see for instance the pertinent reminder in para. 6 of SC Res. 1456 (2003) concerning member States’ attempts combating terrorism: “States must ensure that any measure 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.”

ter VII resolutions has culminated so far with the European Court of First Instance's decisions on the UN financial sanctions regime targeted on individuals as implemented under European Union law.⁵⁷

The line of reasoning which advocates the inapplicability of human rights to SC resolutions is predicated on the hierarchical nature of binding Security Council resolutions pursuant to Article 25 UN Charter which shall prevail in the event of conflict with "their other obligations under any other international agreement".⁵⁸ However, it is important to draw a distinction between the proposition that human rights are *per se* inapplicable to Security Council decisions (quasi-immunity from human rights) and the argument that binding Council resolutions can be measured by international human rights norms but are regularly or automatically justified by the fact that the Security Council acts in order to "maintain or restore international peace and security".⁵⁹ In the light of what has been said above, the former proposition is deemed to be unacceptable, at least in its rigidity. However, the argument that situations necessitating the maintenance or restoration of international peace and security are tantamount to a "state of emergency", in which derogations from human rights are – at least to some extent – permissible requires closer examination. Similarly, the justification theory, or put differently, the assumption that "the ends justify the means" in situations in which there is a threat or breach to the peace deserves closer evaluation which will be rendered below. First, it shall briefly be recalled what constitutes a binding decision of the Security Council.

3.1. The Council's Power to Issue Binding Decisions and Article 103 UN Charter

3.1.1. Binding Council Decisions Are Not Restricted to Chapter VII

Article 25 UN Charter stipulates that the UN member States agree to accept and carry out the decisions of the Security Council in accordance with the present Charter. This provision is the basis for the competence of the Security Council to issue binding decisions. The question what constitutes "binding decisions" within the powers of the Council has been subject to controversies but it is widely accepted today that such decisions are not only restricted to enforcement measures under Chapter VII but include all those acts whose wording and circumstances leading to their adoption indicate that the decision was intended to have binding effects upon member States.^{60 61}

⁵⁷ See *infra* 3.1.1. and the references in note 80.

⁵⁸ Article 103 UN Charter.

⁵⁹ Article 39 UN Charter.

⁶⁰ Jost Delbrück, Article 25, in: Bruno Simma et al. (eds.), *The Charter of the United Nations: A Commentary*, 2nd ed., Oxford – New York 2002, 452, para. 9-11; Christoph Schreuer, *Die Be-*

3.1.2. Article 103 UN Charter Does Not Absolve the Council from Its Human Rights Duties

An argument frequently invoked against human rights limitations on the Security Council is based on Article 103 UN Charter which prescribes the primacy of the obligations of the UN member States under the Charter in the event of a conflict with their obligations under any other international agreement. Although binding decisions under Article 25 UN Charter constitute obligations under the Charter pursuant to Article 103 UN Charter,⁶² the following grounds render it implausible that the Security Council would thereby be totally absolved from its human rights obligations. First, it is questionable whether a “conflict” in the sense of Article 103 UN Charter could arise at all since the primacy of binding decisions premises that these decisions are compatible with the UN Charter (including conformity with human rights), i.e. they must not be enacted *ultra vires* such as in violation of international human rights; however, it must be conceded that this line of reasoning might amount, at least at first glance, to a circular reasoning. In addition, the assumption that a conflict cannot arise between binding decisions and the Charter is refutable, but only provided that one regards the Security Council bound to human rights solely on the basis that the UN has to respect customary international law (external conception). In this case binding decisions under the Charter would pursuant to Article 103 UN Charter prevail over customary international human rights law, which is, following a teleological rather than a literal interpretation of Article 103 UN Charter, deemed to fall under the meaning of “obligations under any other international agreement”.⁶³ In any event, this would under no circumstances include international human rights norms which have achieved the status of *ius cogens* provisions.

However, the more convincing framework establishing the UN human rights obligations rests upon the internal limitations ensuing from the UN Charter (internal or hybrid conception). In this situation, we would have a conflict between different Charter provisions which renders Article 103 UN Charter inapplicable. It is here, where the alleged circular reasoning can be deconstructed in a way which

schlüsse Internationaler Organisationen, in: Hanspeter Neuhold/Waldemar Hummer/Christoph Schreuer (eds.), *Österreichisches Handbuch des Völkerrechts*, Vol. I, 4th ed., Wien 2004, 86, para. 477; Schweigman, *supra* note 45, 33 note 128.

⁶¹ It is not possible to further elucidate on this question in this paper, which seems tolerable not least due to the fact that almost all of the resolutions raising questions of human rights obligations of the Council are adopted under Chapter VII. One notable exception exists with regard to the power of the Security Council to investigate a dispute under Article 34 UN Charter in order to determine whether the continuance of the dispute is likely to endanger the maintenance of international peace and security, see also *infra* 3.2. and note 72.

⁶² Rudolf Bernhardt, Article 103, in: Bruno Simma et al. (eds.), (note 60), 1295, para. 9; Jean-Marc Thouvenin, Article 103, in: Jean-Pierre Cot/Alain Pellet/Mathias Forteau (eds.), *La Charte des Nations Unies Commentaire article par article*, 3rd ed., Paris 2005, 2132, 2135.

⁶³ Bernhardt, *supra* note 62, 1298, para. 21; cf. Erika de Wet, *The Chapter VII Powers of the United Nations Security Council*, Oxford – Portland 2004, 182-3.

reveals the human rights limitations of the Charter as a prerequisite for the lawfulness of the binding decisions of the Security Council. In sum, Article 103 UN Charter falls short of absolving the Security Council from its obligations to comply with international human rights.⁶⁴

3.2. The Application of Chapter VII – A Trigger of a State of Emergency Allowing for Derogations from Human Rights Obligations?

Having acknowledged that the UN Security Council is in principle bound to human rights, it has been proposed that the Council is *de facto* derogating from its human rights obligations as soon as it has determined the existence of a threat or breach to the peace according to Article 39 UN Charter.⁶⁵ Such a possibility of derogation ensues from Article 4 para. 1 ICCPR which allows States to derogate in time of public emergency threatening the life of the nation and the existence of which is officially proclaimed to the extent strictly required by the exigencies of the situation.⁶⁶ No derogation shall be possible from certain human rights, most notably the right to life and the prohibition of torture.⁶⁷ The Human Rights Committee has held that measures derogating from the provisions of the Covenant must be of an exceptional and temporary nature and that a State can only invoke Article 4 if two conditions are fulfilled, i.e. the presence of a public emergency which threatens the life of the nation and an official declaration of this very state of emergency.⁶⁸ Applying these requirements to the determination of a threat or breach to the peace, it becomes clear that the conditions will regularly be met since a threat or breach to the peace always engenders a state of public emergency perilous to one or more nations. Nonetheless, it is imperative to point out that a proposed formula “determination of a threat or breach to the peace is tantamount to a state of public emergency rendering derogations from specific human rights provisions lawful” must not be triggered axiomatically but has to be predicated upon a diligent, non-abusive application of Article 39.⁶⁹ With respect to the required d e c -

⁶⁴ That the obligations under the Charter would prevail over international and regional human rights treaties is obvious but negligible as the UN is not party of any of these treaties.

⁶⁵ De Wet / Nollkaemper, *supra* note 37, 179-80; de Wet, *supra* note 63, 201-204.

⁶⁶ Manfred Nowak, UN Covenant on Civil and Political Rights, 2nd ed., Kehl 2005, Article 4, para. 1 et seq.

⁶⁷ Article 4 para. 2 ICCPR.

⁶⁸ General Comment No. 29, States of Emergency (Article 4), CCPR/C/21/Rev.1/Add.11 (31 August 2001), para. 2; similarly already General Comment No. 5, Derogation of Rights (1981) para. 3.

⁶⁹ This caveat corresponds to the increasingly frequent use of Article 39 UN Charter in previous years. While it is clear that the Security Council enjoys wide discretion in making a determination of the existence of a threat or breach to the peace, it is not entirely free to invoke Article 39 to any situation where there is no probable link to the disturbance of international peace and security; see also *supra* note 10.

laration of such an emergency one must bear in mind its rationale which rests upon the maintenance of the principles of legality and the rule of law even in exceptional situations.⁷⁰ In fact, the finding of the Security Council that there exists a threat or breach to the peace is always made publicly and circulates worldwide and thus certainly fulfills the criterion of an official declaration pursuant to General Comment No. 29 of the Human Rights Committee.

The proposition that a determination under Article 39 UN Charter allows the Security Council to derogate from certain human rights poses the question to what extent such derogation can be permissible. Before tackling this aspect, it is important to stress the following conclusion: If one accepts that derogations from human rights duties are based on the determination of a threat or breach of the peace, it is clear that without reliance upon Article 39 the Security Council cannot deviate from its human rights obligations.

This implies that the Security Council remains fully bound to international human rights when it adopts measures under Chapter VI, which, as was shown above,⁷¹ can under certain circumstances also amount to binding decisions of the Council in the sense of Article 25 UN Charter. Therefore, the Council must fully comply with its human rights obligations when it acts under Charter VI of the UN Charter. In general, not least as result of the more limited powers of the Council under Chapter VI these obligations are not as obvious as under Chapter VII. Yet, in several instances such as under Article 34 UN Charter, which enables the Security Council to investigate a dispute or a situation in order to determine whether the continuance of the dispute or situation is likely to endanger the maintenance of international peace and security, violations of fundamental human rights appear to be possible.⁷²

Defining the ambit by which the Security Council may derogate from human rights when it invokes Article 39 is an extremely delicate task. It is still easy to establish that the analog application of Article 4 ICCPR means that the Security Council must always abide by non-derogable rights like the prohibition of torture and the right to life. There are very good reasons to argue that most of these non-derogable rights have gained *ius cogens* status, an assumption which supports the widely hold view that the Security Council is in any event bound to respect the peremptory norms of international law.⁷³ However, to conclude that the Security

⁷⁰ General Comment, No. 29, *supra* note 68, para. 2.

⁷¹ See *supra* 3.1.1. and note 60.

⁷² For an overview over fact-finding missions under Article 34 UN Charter see John Quigley, Security Council Fact-finding: A Prerequisite to Effective Prevention of War, 7 Florida Journal of International Law (1992), 191; see also Theodor Schweisfurth, Article 34, in: Bruno Simma et al. (eds.), (note 60), 594, paras. 7-44.

⁷³ See the series of decisions of the European Court of First Instance *infra* note 80; Reinisch, *supra* note 3, 859; John Dugard, Judicial Review of Sanctions, in: Vera Gowlland-Debbas (ed.), United Nations Sanctions and International Law, The Hague 2001, 83, 89; de Wet/Nollkaemper, *supra* note 37, 181-184; Orakhelashvili, *supra* note 35, 423-485.

Council is solely limited by *ius cogens* norms is premature since the Council could be restrained by broader limitations.⁷⁴

First, there might be non-derogable rights which are not within the purview of peremptory norms. Second, even in the event of a threat or breach to the peace the Security Council is not automatically *legibus solutus* since derogations are only permissible “to the extent strictly required by the exigencies of the situation”.⁷⁵ Consequently, derogations of the Security Council from human rights obligations are subject to a strict proportionality test.

This requirement to adhere to the principle of proportionality also under Chapter VII is explicitly provided for by Article 42 UN Charter which solely allows the Council to take measures to the extent that these are necessary to restore international peace and security. The Security Council has acted in line with such an interpretation in numerous resolutions under Chapter VII where it authorized member States to take “all necessary means” to maintain or restore international peace and security. Similarly, the European Court of Justice did not refrain from an examination of the compatibility of a European Union regulation implementing Security Council sanctions against the FRY but instead concluded that the impounding of a Yugoslav aircraft was a proportionate measure to attain the fundamental objective of putting an end to the state of war and the massive violations of human rights and international humanitarian law in the Republic of Bosnia-Herzegovina.⁷⁶

3.3. Who Shall Review Security Council Decisions On Grounds of Human Rights – Targeted Financial Sanctions Against Terrorist Suspects as the Litmus Test?

Having established that the Security Council has to abide by fundamental human rights even if it acts under Chapter VII, the question of control and judicial review must finally but most importantly be addressed. Whether the ICJ possesses authority to review the legality of Security Council decisions is an extremely controversial and unresolved question.⁷⁷ In the light of the unwillingness of the ICJ, it might rest with other domestic, regional or international tribunals to decide upon

⁷⁴ See *supra* 2.2.

⁷⁵ Article 4 para. 1 ICCPR.

⁷⁶ ECJ, Case-84/95, *Bosphorus Hava Yollari Turizm ve Ticaret AS v. Minister for Transport, Energy and Communications and Others*, Judgment of 30 July 1996, ECR I-2953, paras. 19-27. The case concerned a reference for a preliminary ruling of the Irish Supreme Court on the validity of Article 8 of EU Regulation 990/93 implementing the Security Council sanctions regime against the FRY.

⁷⁷ See for instance José E. Alvarez, *Judging the Security Council*, 90 *American Journal of International Law* (1996), 1; Bernd Martenczuk, *The Security Council, the International Court of Justice and Judicial Review: What Lessons from Lockerbie?*, 10 *European Journal of International Law* (1999), 517.

the validity of Council resolutions. Apart from the ICTY,⁷⁸ this task has so far been primarily addressed by Courts of the European Union in the context of complaints against EU legislation enforcing the Security Council sanctions regime against terrorist suspects with similar cases pending before domestic courts in Belgium, Italy, Switzerland, The Netherlands, Pakistan, Turkey, Canada and the United States of America.⁷⁹

3.3.1. The Decisions of the European Court of First Instance

Departing from the *Bosphorus*-judgment rendered by the ECJ almost a full decade earlier, the European Court of First Instance (ECtFI) in a line of decisions on the validity of EU legislation implementing the UN individual sanctions regime against terrorist suspects did not examine the compatibility of the pertinent EU regulations with fundamental human rights because “the resolutions of the Security Council at issue fall, in principle, outside the ambit of the Court’s judicial review and ... the Court has no authority to call in question, even indirectly, their lawfulness in the light of Community law”.⁸⁰ However, the ECtFI went on:

“None the less, the Court is empowered to check, indirectly, the lawfulness of the resolutions of the Security Council in question with regard to *jus cogens*, understood as a body of higher rules of public international law binding on all subjects of international

⁷⁸ Appeals Chamber of the ICTY, *Prosecutor v. Tadic*, Appeal on Jurisdiction, Case IT-94-1, 2 October 1995, <<http://www.un.org/icty/tadic/appeal/decision-e/51002.htm>, para 28>.

⁷⁹ See “Third Report of the Analytical Support and Sanctions Monitoring Team Appointed Pursuant to Resolution 1526 (2004) Concerning Al-Qaida and the Taliban and Associated Individuals and Entities”, Annex to the Letter dated 2 September 2005 from the Chairman of the Security Council Committee established pursuant to resolution 1267 (1999) concerning Al-Qaida and the Taliban and associated individuals and entities addressed to the President of the Security Council, UN. Doc S/2005/572, paras 50-1: “The Team is aware of 15 lawsuits filed around the world challenging Member States’ implementation of some aspect of the United Nations Al-Qaida/Taliban sanctions. In addition ... the chairman of the Al-Haramain Islamic Foundation has brought a case in the United States, and a national court in Brussels ruled that because two listed applicants had not been criminally indicted after a lengthy investigation, the Government of Belgium should petition the United Nations for delisting.”; see also: Strengthening Targeted Sanctions Through Fair and Clear Procedures – White Paper Prepared by the Watson Institute Targeted Sanctions Project, Brown University, 30 March, 2006, available at <http://watsoninstitute.org/pub/Strengthening_Targeted_Sanctions.pdf>, 6, 10.

⁸⁰ ECtFI, Case-T-306/01, *Ahmed Ali Yusuf and Al Barakaat International Foundation v. Council of the European Union and Commission of the European Communities*, Judgment of 21 September 2005, available at <<http://curia.eu.int>>, para. 276. See the similar decisions of the ECtFI in Case-T-315/01, *Yassin Abdullah Kadi v. Council of the European Union and Commission of the European Communities*, Judgment of 21 September 2005; Case-T-49/04, *Faraj Hassan v. Council of the European Union and Commission of the European Communities*, Judgment of 12 July 2006; Case-T-253/02, *Chafiq Ayadi v. Council of the European Union and the Commission of the European Communities*, Judgment of 12 July 2006, all decisions are available at <<http://curia.eu.int>> and are currently being appealed before the European Court of Justice; for a summary and brief comment on the *Yusuf and Kadi* cases see Mielle B u l t e r m a n, Fundamental Rights and the United Nations Financial Sanction Regime: The Kadi and Yusuf Judgments of the Court of First Instance of the European Communities, 19 *Leiden Journal of International Law* (2006), 753-772.

law, including the bodies of the United Nations, and from which no derogation is possible.”⁸¹

The Court subsequently examined the legal status of the alleged human rights violations ensuing from the procedures adopted by the Security Council’s 1267 Sanctions Committee⁸² in listing individuals as terrorist suspects,⁸³ who were subjected to financial measures such as the freezing of their assets. It found that the pertinent human rights, i.e. the right to property, the right to fair hearing and the right to an effective judicial remedy, did not constitute *ius cogens* norms and were thus inapplicable in the present case.⁸⁴

It is therefore apparent that the approach taken by the ECtFI differs substantially from the ECJ’s proportionality test in *Bosphorus* and has been subject to considerable critique in academia as too stringent.⁸⁵ With all four cases of the ECtFI pending before the ECJ, it is, given the importance the ECJ attaches to the protection of fundamental rights, not unlikely that these judgments are going to be reversed and that the proportionality test will be reintroduced as the ECJ might argue that the Security Council is bound by all generally accepted human rights, regardless of whether they constitute *ius cogens* or not.⁸⁶ Not only would such a re-introduction of the principle of proportionality constitute an important doctrinal shift from the narrow position of *ius cogens* obligations towards significantly broader human rights obligations of the Council, but also the practical effects of such a judgment would be far-reaching. Taking the proportionality principle seriously, the ECJ would ultimately have to insist that the sanction regime has to util-

⁸¹ ECtFI, Case-T-306/01, *Ahmed Ali Yusuf and Al Barakaat International Foundation*, *supra* note 80, para. 277.

⁸² Security Council Committee established pursuant to Resolution 1267 (1999) concerning Al-Qaida and the Taliban and associated individuals and entities. The sanctions regime has been modified and strengthened by subsequent resolutions, primarily by SC Resolutions 1333 (2000), 1390 (2002), 1455 (2003), 1526 (2004), and 1617 (2005), so that the sanctions now cover individuals and entities associated with Al-Qaida, Usama bin Laden and/or the Taliban wherever located. For a depiction of the evolution of the 1267-sanctions regime see Simon Chesterman, *The Spy Who Came In From the Cold War: Intelligence and International Law*, 27 *Michigan Journal of International Law* (2006), 1071, 1111-1118; on the sanctions regime and its implementation in EU law Bulterman, *supra* note 80, 754-760.

⁸³ See: Guidelines of the Committee for the Conduct of Its Work, adopted on 7 November 2002, amended on 10 April 2003, revised on 21 December 2005 and amended on 29 November 2006, available at <http://www.un.org/Docs/sc/committees/1267/1267_guidelines.pdf> and further information on the work of the Sanctions Committee (“1267-Committee”) including the list of individuals and entities belonging to or associated with the Taliban and Al-Qaida available at <<http://www.un.org/Docs/sc/committees/1267Template.htm>>.

⁸⁴ ECtFI, Case-T-306/01, *Ahmed Ali Yusuf and Al Barakaat International Foundation*, *supra* note 80, paras. 284-347. For an analysis whether these rights constitute *ius cogens* norms see Larissa van den Herik/Nico Schrijver, *Human Rights Concerns in Current Targeted Sanctions Regimes from the Perspective of International and European Law*, in: *Strengthening Targeted Sanctions Through Fair and Clear Procedures*, *supra* note 79, 9, 20-21.

⁸⁵ Mehrdad Payandeh, *Rechtskontrolle des UN-Sicherheitsrates durch staatliche und überstaatliche Gerichte*, 66 *ZaöRV* (2006), 52; Kumm, *supra* note 18, 290-291.

⁸⁶ Cf. van den Herik/Schrijver, *supra* note 84, 22.

ize the least restrictive means to achieve its goal. It seems to be self-evident that this is under the current system not the case.

In reality, the least restrictive means to attain the objective of effectively combating terrorist groups and individuals would allow for certain safeguards such as the right to a fair trial and an effective remedy. However, in order to guarantee the effectiveness of targeted sanctions such procedural rights can only be applied retrospectively. When the Security Council established the ICTY and the ICTR both tribunals came up with elaborate protection for the accused which by and large are fully compliant with international human rights standards. Consequently, it seems legitimate to ask why the Council applies double standards and does not grant listed individuals any due process rights which it does provide in The Hague and Arusha.⁸⁷ Defenders of the current sanctions system often contend that financial sanctions do not amount to criminal punishment but are merely precautionary measures which do not affect the concerned persons' right to property in their financial assets substantively but only their use thereof.⁸⁸ However, in the light of several targeted individuals having their assets frozen over more than a couple of years without any review or possibility of appeal this position seems tenuous since financial sanctions over such a long time period amount to a *de facto* confiscation with an inherent punitive character.⁸⁹

In its decisions from July 2006 the ECtFI has already slightly recalibrated its position and, while in principle still adhering to the *ius cogens* approach, held that EU member States have upon request of the affected persons a duty under European Community law to exercise diplomatic protection on behalf of their nationals or residents within their territory who have been listed by the 1267-Sanctions Committee.⁹⁰ Thus, "[t]he member States must ... ensure, so far as is possible, that interested persons are put in a position to assert their point of view before the competent national authorities when they present a request to be removed from the list".⁹¹

3.3.2. Regional and Domestic Courts as Successful Tools for Soft-balancing Against US Predominance In the UN

3.3.2.1. European Judges Coining European Foreign Policy

The developments regarding the indirect review of the Security Council's 1267-Sanctions regime in domestic and regional courts reflect a general desire of UN

⁸⁷ Chesterman, *supra* note 82, 1113-1115.

⁸⁸ *Ibid.*; cf. ECtFI, Case-T-306/01, *Abmed Ali Yusuf and Al Barakaat International Foundation*, *supra* note 80, para. 299.

⁸⁹ Cf. Strengthening Targeted Sanctions Through Fair and Clear Procedures, *supra* note 79, 40-43. Such a reliance upon the confiscatory nature of the sanctions was however once more rejected in ECtFI, Case-T-49/04, *Faraj Hassan*, *supra* note 80, paras. 104-5.

⁹⁰ ECtFI, Case-T-49/04, *Faraj Hassan*, *supra* note 80, paras. 109-122.

⁹¹ *Ibid.*, para. 117.

member States to curb the Council's assertiveness or at least to add commensurate guarantees of accountability to its constantly extending powers. It has become clear that the Security Council is neither infallible nor untouchable. The sanctions regime is not an isolated case, so one cannot lean back and argue "one swallow does not make a summer". In fact, the Security Council has accumulated criticism throughout a panoply of fields including peace operations and transitional administrations.⁹² Undermining the Security Council's effectiveness is the major caveat against national and supranational courts' possible willingness to review the legality of Council action. Yet, the Council must not rely on the ICJ's reluctance to examine its resolutions and is well advised not to overdo things. Otherwise it is not only risking the complete loss of its already stricken credibility but it would also imperil the functioning of the entire UN security system which is fundamentally predicated upon the member States' compliance with binding Security Council resolutions. Although they clearly indicate their concerns, at least between the lines,⁹³ European Courts have so far addressed this very serious issue with due diligence and subtly circumvented the underlying tensions for the sake of the whole. This cautious approach is exemplified by the recent decision of the ECtHR in the *Behrami* case concerning the conduct of KFOR which was found attributable to the UN and thus incompatible *ratione personae* with the provisions of the European Convention on Human Rights.⁹⁴ However, other courts might not be as diplomatic but more reluctant to quasi-immunize UN authorized operations and take a more contentious stance.

In any event, European scholars were swift in proffering doctrinal concepts underlying the bugbear that European courts might review and annul Council decisions: Alluding to the similar conflict between the European Union and the Federal Constitutional Court of Germany in the 1970s and 1980s, some proposed to revitalize the *Solange*-formula meaning that European Courts and/or national courts have a duty under European constitutional law (domestic constitutions respectively) to review Security Council decisions as long as no institution within the UN system (be it the ICJ or a special tribunal) is equipped to do so.⁹⁵

⁹² With respect to peace operations see for instance SC Res. 1593 (2005) on the referral of the situation in Darfur to the ICC which was criticized for its full-scale immunity of UN peacekeeping personnel; see for instance Matthew Happold, Darfur, The Security Council, and the International Criminal Court, 55 *International and Comparative Law Quarterly* (2006), 226, 231-235. For recent developments in the discussion of the human rights accountability of UNMIK see *infra* 3.3.3.

⁹³ See for example ECtFI, Case-T-306/01, *Ahmed Ali Yusuf and Al Barakaat International Foundation*, *supra* note 80, para. 285, para. 340; ECtFI, Case-T-49/04, *Faraj Hassan*, *supra* note 80, para. 92.

⁹⁴ ECtHR, *Behrami*, *supra* note 16, paras. 144-152; as this decision of the ECtHR was rendered after the present contribution had been substantially concluded, the full ramifications of this case cannot be elaborated here any further. However, it can be expected that the wary and controversial findings of the Strasbourg court will be subject to considerable future debate.

⁹⁵ Payandeh, *supra* note 85, 58 et seq.; Markus Kotzur, Eine Bewährungsprobe für die Europäische Grundrechtsgemeinschaft – Zur Entscheidung in der Rs. Yusuf u.a. gegen Rat, *Europäische Grundrechtezeitschrift* (2005), 26; similar, with regard to national courts already de Wet/Nollkaemper, *supra* note 37, 190.

At the same time it is remarkable to observe the activities within the UN which the European Court of First Instance's subtle but open criticism has already triggered. In the wake of the more forthright statements of the judgments of 12 July 2006 EU member States are now even under an EU law obligation to intervene and use diplomatic channels on behalf of their nationals and residents who are on the Sanctions Committee's blacklist if these request a review of their case. Responding to incremental pressure from both EU and non-EU member States the Sanctions Committee has started to revise the guidelines for the conduct of the work of the 1267 Committee and initiated a process of consultation and negotiation.⁹⁶ It is noteworthy to what respectable extent these multilateral negotiations were boosted by juridical decisions. Whereas concerns of UN member States on the procedural framework of the various sanctions committees of the Security Council constantly evaporated or were rebuffed in previous years, the decisions of the ECtFI and the looming decisions on appeal of the ECJ have brought diplomats in New York to the negotiating tables in order to find more transparent and accountable procedures for listing and de-listing individual terrorist suspects. While expectations on the outcome of that process should not be too ambitious, it is important to recognize the role domestic and supranational courts can play in multilateral diplomacy.

The thesis that judicial institutions can increase the clout of States in negotiations with other States is nothing novel but a standard feature of international law deconstructed as a two-level game. What appears to be unprecedented, is that European courts become influential in the delicate area of international security because they have so far engaged at an international level almost exclusively in the field of international economic law.⁹⁷ It might not be a coincidence that the approach taken by the European Court of First Instance runs parallel to the increasing attention European foreign policy pays to human rights.⁹⁸ It remains to be seen whether the decisions by the ECtFI regarding UN imposed financial sanctions on individuals are merely a flash in the pan or European courts will indeed become a valuable and more effective tool in European "soft balancing" against U.S. hegemony in international affairs and particular in UN matters.⁹⁹

⁹⁶ For various proposals to improve human rights accountability of the 1267-Committee see *infra* 3.3.2.2.

⁹⁷ See Piet Eeckhout, *External Relations of the European Union – Legal and Constitutional Foundations*, Oxford 2004, 347-395.

⁹⁸ In order to promote human rights in its Common Foreign and Security Policy (CFSP) the EU has established a Personal Representative for Human Rights in the area of the CFSP. The post, which serves as an advisor to the EU High Representative for the CFSP, Mr. Javier Solana, is currently held by Mrs. Riina Kionka from Estonia who succeeded Danish diplomat Mr. Michael Mathiesen on 29 January 2007; see also Barbara Brandtner/Allan Rosas, *Human Rights and the External Relations of the European Community: An Analysis of Doctrine and Practice*, 9 *European Journal of International Law* (1998), 468; Toby King, *Human Rights in European Foreign Policy: Success or Failure for Post-modern Diplomacy?*, 10 *European Journal of International Law* (1999), 313; Eeckhout, *supra* note 97, 464-485.

⁹⁹ On "Soft Balancing against the U.S." as an umbrella term for institutional and diplomatic strategies which are intended to constrain U.S. power see for instance Robert A. Pape, *Soft Balancing*

3.3.2.2. Reform of the UN Sanctions Regime

Views on reform proposals of the UN sanctions regime, especially the work of the 1267-Sanctions Committee, differ substantially and range from the establishment of independent tribunals guaranteeing due process rights for every single blacklisted complainant to mere minor adjustments of the pertinent Committee guidelines echoing amendments which have been made repeatedly in previous years. While negotiations have been intensified behind the closed doors of the Security Council in fall 2006, academia, NGOs and think tanks have also proffered reform proposals, the most comprehensive one being a White Paper report of Brown University's Watson Institute for International Studies (hereinafter Watson White Paper).¹⁰⁰

In order to address the shortcomings of existing Security Council sanctions committee procedures the paper recommended the following proposals with regard to listing, procedural issues and review mechanisms: First, in order to ameliorate the transparency and preciseness of the listing process the Watson White Paper suggests to establish detailed, but non-exhaustive criteria in Security Council resolutions, set up best practices including checklists and standardized forms on listing information, extend time for review of listing proposals from two or three to five or ten working days for all sanctions committees and, to the extent possible, inform the targeted individual of the measures imposed by a UN body.¹⁰¹

As regards procedural issues, the white paper calls primarily for better standards and criteria for de-listing including the creation of a focal point within the Secretariat to receive requests for de-listing, increased transparency and publicity as well as a biennial review of listings instead of the open-ended sanctions which render the freezing of assets a *de facto* confiscation of assets.¹⁰²

Finally, the Watson White Paper comes up with the following options for a review mechanism varying in particular with respect to their institutional mechanisms as well as to their elements securing an effective remedy: Basically, the paper distinguishes between mechanisms established under the authority of the Security Council such as a monitoring team, an ombudsman or a panel of experts, an independent arbitral panel considering delisting proposals and full judicial review of Security Council decisions.¹⁰³ In the latter case, it is suggested that the Security Council should create a judicial institution like the United Nations Administrative Tribunal with full competence to review the decisions of sanctions committees which have been subject to de-listing requests.¹⁰⁴

against the United States, 30 International Security, No. 1 (Summer 2005), 7, 36-45 and T.V. Paul, Soft Balancing in the Age of U.S. Primacy, 30 International Security, No.1 (Summer 2005), 46, 58-71.

¹⁰⁰ Strengthening Targeted Sanctions Through Fair and Clear Procedures, *supra* note 79.

¹⁰¹ *Ibid.*, 38-40.

¹⁰² *Ibid.*, 40-43.

¹⁰³ *Ibid.*, 44-47.

¹⁰⁴ *Ibid.*, 47.

In sum, the Watson White Paper provides a broad range of suitable amendments ranging from minor adjustments to fundamental but obviously unlikely carried out large-scale improvements such as most notably the establishment of a specific judicial institution. Although the paper remains deliberately vague in ranking or sequencing the options, it appeared to be helpful in demonstrating the variety of ways in which the status quo of the sanctions regime could be reformed. Thus, the document circulated within the Security Council's Informal Working Group on General Issues on Sanctions which rendered its final report in late 2006.¹⁰⁵ The Security Council took up numerous recommendations of the Working Group's report and amended the listing and de-listing procedures in various ways.

The Council, following a core proposal of the Watson White Paper, has amended the de-listing procedure and established, within the Secretariat, a focal point to receive de-listing requests.¹⁰⁶ Thus, petitioners seeking to submit a request for de-listing can do so now either through a newly created focal point process or through their State of residence or citizenship. In addition, the Council further elaborated the listing procedure requiring that a member State's proposal of an individual's listing includes a statement of the case with as much information as possible.¹⁰⁷ Furthermore, the Council enhanced attempts to continue to develop, adopt and apply guidelines regarding the de-listing of individuals and entities and extended the mandate of the New York based Monitoring Team, appointed by the Secretary-General pursuant to SC resolution 1617 (2005).¹⁰⁸

While one has to acknowledge that the adopted reform measures of the Security Council signify small and useful adjustments, as was to be expected they fail to reform the sanctions regime to an extent which could bring its procedure into compliance with international human rights standards. The debate on future avenues for improvement both within and outside of the Security Council will therefore continue, making the reform of the sanctions regime an enduring work in progress which could be expedited with additional wind in the sails coming from the direction of the European Court of Justice and possibly other (not least domestic) courts.

3.3.3. The Human Rights Advisory Panel to UNMIK – A Cautious Improvement

As shown above, the lacking accountability of UNMIK has also attracted substantial criticism towards the UN.¹⁰⁹ Although UNMIK and KFOR have been exercising control over Kosovo as an international administration similar to a State, there was, aside from an Ombudsperson institution, no independent institution to

¹⁰⁵ SC Res. 1732 (2006).

¹⁰⁶ SC Res. 1730 (2006).

¹⁰⁷ SC Res. 1735 (2006), para. 5.

¹⁰⁸ SC Res. 1735 (2006), paras. 13, 14 and 32.

¹⁰⁹ See *supra* the references in note 23.

which aggrieved Kosovars could complain.¹¹⁰ Series of academic contributions and debates have come up with reform proposals to enhance the accountability of the UN as well as of KFOR. The so-called Venice Commission proffered various suggestions including the creation of an *ad hoc* Human Rights Court for Kosovo.¹¹¹

Due to resistance within UNMIK and KFOR the Human Rights Court has not been created, however an interim solution crafted by the Venice Commission has been implemented by UNMIK (but not by KFOR). UNMIK has established a Human Rights Advisory Panel within its own organizational structure which possesses the competence to receive human rights complaints from persons within the entire territory of Kosovo.¹¹² The decisions (“findings”) of the Panel are only advisory, leaving the ultimate responsibility of the UN Special Representative intact.¹¹³ Nonetheless, the publicity of the decisions and the authority of its members could provide the Panel with the opportunity to become a decisive factor for a credible and meaningful protection of human rights in Kosovo.¹¹⁴ It is obvious that the Human Rights Advisory Panel represents a compromise which carries, as interim solutions always do, the danger that they become permanent.¹¹⁵ Though, the Panel is an amelioration of the previous situation and entails some added value to the relatively weak Ombudsperson institution.¹¹⁶

4. Conclusion

This contribution has tried to provide a better grasp of the human rights obligations of the Security Council. After sketching the empirical and normative background of the Council’s human rights responsibilities it has attempted to materialize the actual scope of these often very blurry responsibilities. Thereby, the article dismissed the argument that the Security Council is unbound as a result of Article

¹¹⁰ Nolte, *supra* note 23, 246.

¹¹¹ European Commission for Democracy through Law (Venice Commission), Opinion (No. 280/2004) on Human Rights in Kosovo – Possible Establishment of Human Rights Mechanism (CDL-AD 2004/033), adopted by the Venice Commission at its 60th Plenary Session (Venice, 8-9 October 2004), available at <[http://www.venice.coe.int/docs/2004/CDL-AD\(2004\)033-e.pdf](http://www.venice.coe.int/docs/2004/CDL-AD(2004)033-e.pdf)>, paras. 101-112; see Nolte, *supra* note 23, 253-256.

¹¹² UNMIK Regulation No. 2006/12 on the Establishment of the Human Rights Advisory Panel.

¹¹³ See Section 1.3. UNMIK Reg. 2006/12: Upon completion of an examination of a complaint, the Advisory Panel shall submit its findings to the Special Representative of the Secretary-General. The findings of the Advisory Panel, which may include recommendations, shall be of an advisory nature.

¹¹⁴ Nolte, *supra* note 23, 257.

¹¹⁵ Pending the outcome of the negotiations on the future status of Kosovo at the time of writing, it is clear that UNMIK and thus also the Panel will cease to exist sooner or later. In this respect, it will be interesting to see what kind of human rights protection an envisaged post-UNMIK international supervision presumably including sweeping powers for the European Union will provide for.

¹¹⁶ Irrespective of its extremely restricted competences, the Ombudsperson institution helped to create awareness for the complete lack of human rights accountability within UNMIK and KFOR, see *supra* note 24.

103 UN Charter. It has also been shown that while Article 39 UN Charter is a legitimate ground for the Security Council to derogate from its human rights obligations, it cannot simply rely on a threat to or breach of the peace to justify an absolute immunity from its responsibilities. In fact, it was argued here that the most appropriate standard to assess the Security Council's human rights obligations is the principle of proportionality which provides the indispensable leeway required by the Council to fulfill its difficult but unprecedented tasks.

While the human rights debate on the Security Council has regrettably often been over-simplistic, it has nevertheless provoked attempts to improve both transparency and accountability of the UN's primary organ for the maintenance of peace and security. Notwithstanding the cautious and controversial *Behrami* decision recently rendered by the European Court of Human Rights, leverage seems today to be increasingly coming from regional and domestic courts which have indicated that they do not accept Security Council resolutions any longer to be sacrosanct but that they are willing to spur the Council's transparency and accountability. As the amendments of the UN sanctions regime or the establishment of the Human Rights Advisory Panel exemplify, the discussion has triggered some, yet still too moderate, achievements.

Nonetheless, one must keep in mind that also little strokes fell big oaks. It is clear that change within the United Nations does not come overnight. This holds particularly true for the mighty Security Council which has in general acknowledged the fundamental inter-dependence of international peace and security and human rights. The realization that inner-institutional human rights ignorance is anathema to the pursuit of international peace and security seems, albeit gradually, to be coming to the fore, when the Security Council decides on its working procedures behind often closed doors. Institutional change rarely evolves from the inside of an international organization but heavily relies upon external factors and leverage. In this regard, international, regional and domestic courts and tribunals, might, to an incremental amount, play a more pertinent role by pursuing their precious mandate to enhance the international rule of law.