UNIVERSITY OF BEDFORDSHIRE

Thesis

United Nations Sanctions and the Individual: A Proposal For An International Judicial Review/Appeal Procedure

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Abstract

Currently the United Nations (UN) through its Security Council (UNSC) have issued a number of Resolutions that required member states to implement immediately, legislation which places severe restrictions such as assets freezing and travel bans on a number of individuals, groups and other entities who are believed to be involved in or connected to international terrorism, particularly those affiliated with Al Qaida. Those subjected to these sanctions have no ability to seek an independent judicial review or appeal capable of offering just satisfaction of their particular case at either national regional or international level due to the supremacy of the UN charter in international law. The UN itself currently has no judicial review or appeal mechanism capable of hearing complaints by those subjected to this system of 'targeted' or 'smart' sanctions. In most cases, with one notable exception national and regional Courts have given supremacy to the UN's decision over human rights concerns due their own obligations under the UN Charter. In particular the right to have an effective method of judicial review has been ignored. This study will concentrate on the inability of those subjected to these measures imposed on them under UN sanctions to have a suitable judicial review mechanism for violations of internationally accepted human right norms. This study will suggest a theoretical solution, which is however grounded in international law, to counter this inherent lack of judicial review at the level of the United Nations. It will contend that the measures currently employed by the UN appear to run counter to internationally accepted human rights norms and the accepted international standards for the rule of law that the UN has through its own rhetoric set for itself and the wider international community.

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Abstract

Acknowledgments

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Appendix A

Table of Abbreviations

AI	Amnesty International
AJIL	American Journal of International Law
AMIS	African Union Observer Mission in Sudan
AU	African Union
AYBIL	Australian Yearbook of International Law
BYIL	British Yearbook of International Law
CRC	Convention on Rights of the Child
CPPCG	Convention on the Prevention and Punishment of the Crime of Genocide
CSCE	Conference on Security and Cooperation in Europe
CTC	UN Counterterrorism Committee
CY	Conference on Yugoslavia
DJILP	Denver Journal of International Law and Policy
DPRK	Democratic People's Republic of Korea
DRC	Democratic Republic of the Congo
EC	European Community
ECOMOG	Monitoring Group of the Economic Community of West African States
ECOWAS	Economic Community of West African States
EJIL	European Journal of International Law
EU	European Union
FRY	Federal Republic of Yugoslavia
FRYSM	Federal Republic of Yugoslavia (Serbia and Montenegro)
GA	General Assembly
GEMAP	Governance and Economic Management Assistance Program
GIA	Governor's Island Agreement
GRL	Goods Review List

GYIL	German Yearbook of International Law
HILJ	Harvard International Law Journal
IAEA	International Atomic Energy Agency
IATA	International Air Transport Association
ICAO	International Civil Aviation Organization
ICC	International Criminal Court
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
ICFY	International Conference on the Former Yugoslavia
ICIR	International Commission of Inquiry on Rwanda
ICISS	International Commission on Intervention and State Responsibility
ICJ	International Court of Justice
ICLQ	International and Comparative Law Quarterly
ICRC	International Committee of the Red Cross
ICTR	International Criminal Tribunal for Rwanda
ICTY	International Criminal Tribunal for Yugoslavia
IFOR	Multinational Implementation Force
IGAD	Intergovernmental Authority on Development
ILJ	International Law Journal
ILM	International Legal Materials
ILR	International Law Review
JIL	Journal of International Law
KFOR	International Security Forces in Kosovo
LAS	League of Arab States
LR	Law Review
LURD	Liberians United for Reconciliation and Democracy
MODEL	Movement for Democracy in Liberia
MONUC	United Nations Organization Mission in the DRC
NATO	North Atlantic Treaty Organization

NJIL	Nordic Journal of International Law
NPT	Treaty on Non Proliferation of Nuclear Weapons
NTGL	National Transitional Government of Liberia
NYUJILP	New York University Journal of International law and Politics
OAS	Organization of American States
OAU	Organization of African Unity
OFFP	Oil-for-Food Programme
OHCHR	Office of the High Commissioner for Human Rights
OIP	Office of the Iraq Programme
OSCE	Organization for Security and Cooperation in Europe
PCASED	Economic Community of West African States Programme for Coordination and Assistance for Security and Development
Res.	Resolution
RUF	Revolutionary United Front
SADC	Southern African Develop Community
SAM	Sanctions Assistance Mission
SAMCOMM	Sanctions Assistance Missions Communications Centre
SC	Security Council
SCOR	UN Security Council Official Records
SICI	Sudan International Commission of Inquiry
SLA	Sudan Liberation Army
TLCP	Transnational Law & Contemporary Problems
UK	United Kingdom
UN	United Nations
UNAMSIL	United Nations Assistance Mission in Sierra Leone
UNASOG	United Nations Aouzou Strip Observer Group
UNCC	United Nations Compensation Commission
UNCLOS	United Nations Convention on the Law of the Sea
UNCIO	United Nations Conference on International Organization

UNGA	United Nations General Assembly
UNGAR	United Nations General Assembly Resolution
UNHCR	United Nations High Commissioner for Refugees
UNIIIC	United Nations International Independent Investigation Commission
UNITA	National Union for the Total Independence of Angola
UNITAF	United Task Force
UNMAS	United Nations Mine Action Service
UNMICI	United Nations Mission in Côte d'Ivoire
UNMIH	United Nations Mission in Haiti
UNMIK	United Nations Mission in Kosovo
UNMIL	United Nations Mission in Liberia
UNMIS	United Nations Mission in Sudan
UNMOVIC	United Nations Monitoring Verification and Inspection Commission
UNOCI	United Nations Operation in Côte d'Ivoire
UNOL	United Nations Office in Liberia
UNOMIL	United Nations Observer Mission in Liberia
UNOMSIL	United Nations Observer Mission in Sierra Leone
UNOSOM	United Nations Operation in Somalia
UNPREDEP	United Nations Preventive Deployment Force
UNPROFOR	United Nations Protection Force
UNSC	United Nations Security Council
UNSCOM	United Nations Special Commission
UNSCR	United Nations Security Council Resolution
UNSG	United Nations Secretary-General
US	United States
VJIL	Virginia Journal of International Law
WCO	World Customs Organization
WEU	Western European Union
WMD	Weapons of Mass Destruction

CHR	United Nations Commission on Human Rights
DPRK	Democratic People‘s Republic of Korea (North Korea
DRC	Democratic Republic of Congo
ECOSOC	United Nations Economic and Social Council
EU	European Union
G-77	The Group of 77
GA	United Nations General Assembly
GRULAC	Group of Latin American and Caribbean Countries
HRC	United Nations Human Rights Council
HRW	Human Rights Watch
IBP	Institution Building Package of the United Nations Human Rights Council
IDP	Internally Displaced Persons
IE	United Nations Independent Expert
IHL	International Humanitarian Law
ILO	International Labour Organisation
LMG	Like-Minded Group
NAM	Non-Aligned Movement
NGO	Non-Governmental Organisation
OHCHR	Office of the High Commissioner for Human Rights
OIC	Organisation of the Islamic Conference
OPT	Occupied Palestinian Territories
SC	United Nations Security Council
SR	United Nations Special Rapporteur
UDHR	Universal Declaration of Human Rights
UK	United Kingdom of Great Britain and Northern Ireland
UN	United Nations
UNESCO	United Nations Educational, Scientific and Cultural Organisation
UNHCHR	United Nations High Commissioner for Human Rights
UPR	Universal Periodic Review
US	United States of America
USSR	Union of Soviet Socialist Republics
WEOG	Western European and Others Group

Appendix 1

The following diagram shows how the Charter-based and Treaty-based bodies work within the framework of the United Nations for the promotion and protection of international human rights. **NOTE HUMAN RIGHTS COMISSION IS NOW REPLACED BY THE HUMAN RIGHTS COUNCIL**.

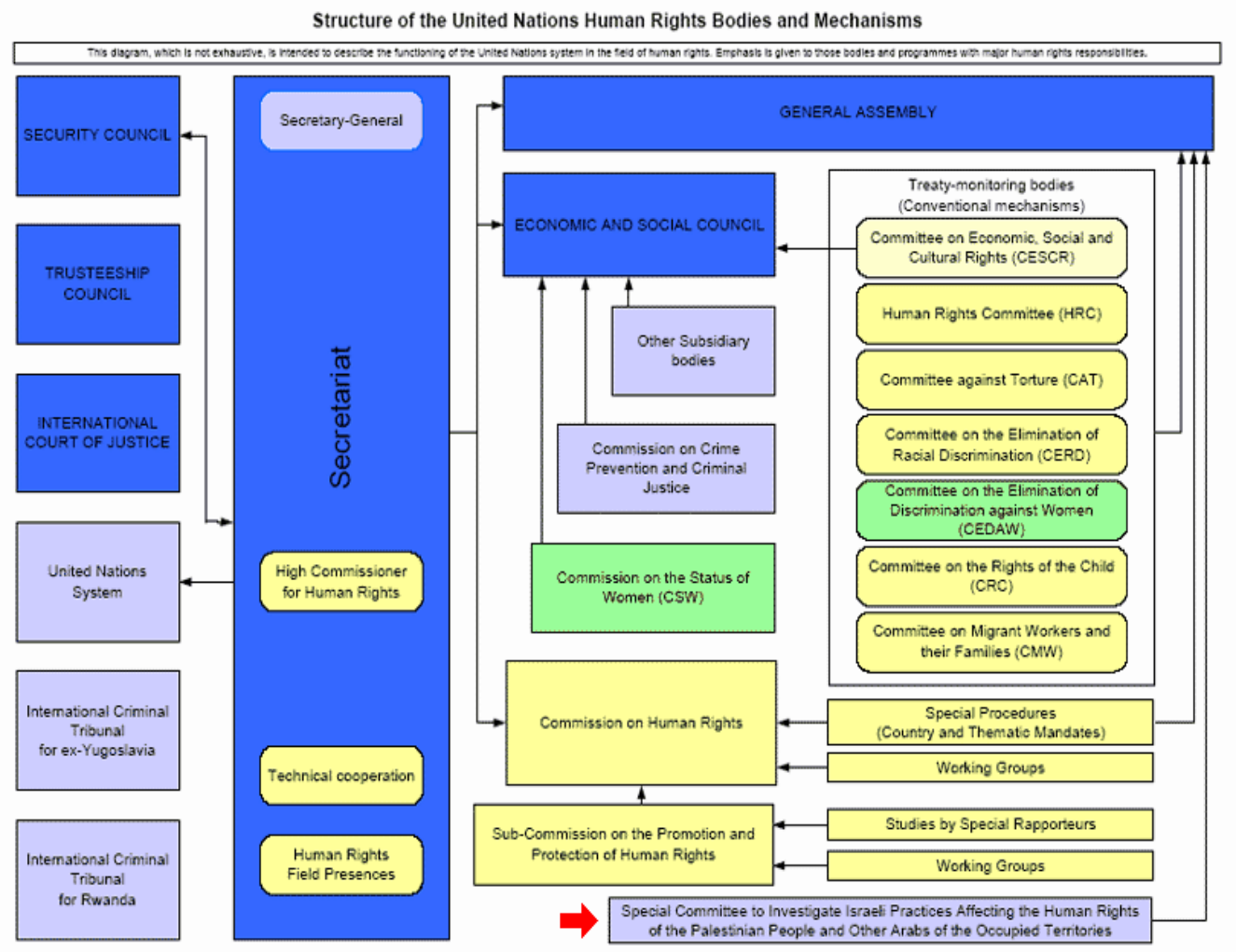

Diagram courtesy of the Human Rights Education Association, available at; http://www.hrea.org/index.php?doc_id=437, accessed Jun 2012

Appendix 2

Summary of Litigation relating to individuals and entities on the Consolidated List as of 2011[1].

The legal challenges involving individuals and entities on the Consolidated List known to the Monitoring Team to be pending or recently concluded are described below.

Canada

1. On 7 June 2010, Abu Sufian Abd al-Razziq (QI.A.220.06) filed a suit in the Federal Court in Ottawa, Canada, to challenge the implementation of the sanctions against him by Canada. Specifically, Abd al-Razziq challenges the application of the implementing regulations against him adopted by Canada, known as the "United Nations Al-Qaida and Taliban Regulations", and requests that the Court find these to be *ultra vires*: in violation of the rights of association under section 2(d) and of liberty and security under section 7 of the Canadian Charter of Rights and Freedoms; in violation of sections 1(a) and 2(e) of the Canadian Bill of Rights; and in violation of international law[2]. (See chapter 3)

European Union

2. The General Court of the European Union, in a September 2010 ruling, ordered the annulment of the sanctions against Yasin Abdullah Ezzedine Qadi (QI.Q.22.01)[3] after adopting a "full and rigorous" standard of judicial review. The Court found that the European Union authorities had not provided Qadi access to the evidence against him or addressed the "exculpatory evidence" he had provided. It criticized the wholesale adoption by the European Union of the 1267 Committee summary of reasons for listing that it found contained "general, unsubstantiated, vague and unparticularized allegations", preventing Qadi from "launch[ing] an effective challenge to the allegations against him". The Court concluded that Qadi's fundamental rights, namely his right to defend himself, his right to an effective judicial review and his right to property, had been infringed. The European Union authorities and one Member State have appealed the decision.

[1] Taken from UN monitoring team first report to the General Assembly dated Nov 2010

[2] Abdelrazik et al v. Attorney-General of Canada (T-889-10); information provided by the Government of Canada.

[3] Judgement of the General Court of the European Union, case T-85/09, *Kadi v. Commission*, 30 September 2010 (available at http://curia.europa.eu).Now superseded by decision of UNSC 5 Oct 2012 delisting Mr Kadi see chap 6

3. The General Court of the European Union decided in September 2010 on the matter of the challenges brought in 2006 by Abd al-Rahman al-Faqih (QI.A.212.06), Sanabel Relief Agency Limited (QE.S.124.06), Ghuma Abd'Rabbah (QI.A.211.06) and Tahir Nasuf (QI.N.215.06)[4]. Following the argument of the decision in the joint cases *Yassin Abdullah Kadi and Al Barakaat International Foundation v. Council of the European Union and Commission of the European Communities*,[5] the General Court annulled the sanctions regulations with respect to these parties.

4. Cases brought by Shafiq ben Mohamed ben Mohamed al-Ayadi (QI.A.25.01),[6] Faraj Faraj Hussein al-Sa'idi (now de-listed),f Saad Rashed Mohammad al-Faqih (QI.A.181.04) and Movement for Islamic Reform in Arabia [7](QE.M.120.05)[8] challenging the application of the sanctions against them remain pending before the General Court.

5. Abdelrazag Elsharif Elosta, Abdulbasit Abdulrahim and Maftah Mohamed Elmabruk had filed cases challenging the sanctions measures in the European Union courts. However, the Committee removed their names from the List on 22 December 2010.

European Court of Human Rights

6. The case brought by Youssef Mustapha Nada (now de-listed) in the European Court of Human Rights before the Grand Chamber. The Court found violations, inter alia, of article 8 right to privacy and family life and article 13 concerning an effective remedy of the Convention for the Protection of Human Rights and Fundamental Freedoms[9].

Pakistan

7. The action brought by the Al Rashid Trust (QE.A.5.01) remains pending in the Supreme Court of Pakistan on the Government's appeal from a 2003 adverse decision. The challenge

[4] Judgement of the General Court of the European Union in Joined Cases T-135/06, *Al-Faqih v Council*; T-136/06, *Sanabel Relief Agency Ltd v. Council*; T-137/06, *Abdrabbah v. Council*; T-138/06, *Nasuf v. Council*, 29 September 2010 (available at http://curia.europa.eu).
[5] Judgement of the Court of Justice (Grand Chamber) of the European Union, Joined Cases C-402/05 P and C-415/05 P, *Yassin Abdullah Kadi and Al Barakaat International Foundation v. Council of the European Union and Commission of the European Communities* (available at http://curia.europa.eu).
[6] Case T-527/09, *Ayadi v. Commission* (available at http://curia.europa.eu).
[7] Case T-322/09, *Al-Faqih and MIRA v. Council and Commission* (available at http://curia.europa.eu).
[8] Case T-4/10, *Al Saadi v. Commission* (available at http://curia.europa.eu).
[9] Nada v. Switzerland (no. 10593/08) (available at www.echr.coe.int). final judgment given in September 2012, see chap 5.

brought by Al-Akhtar Trust International (QE.A.121.05) remains pending before a lower court. In a case brought by Hafiz Saeed (QI.S.263.08), the Supreme Court quashed the Punjab government's restrictive measures taken under the maintenance of public order act owing to "insufficient evidence"[10].

United Kingdom of Great Britain and Northern Ireland

8. The Supreme Court of the United Kingdom decided on 27 January 2010 the consolidated cases of Hani al-Sayyid al-Sebai (QI.A.198.05) and Mohammed al-Ghabra (QI.A.228.06). The decision found against the Government on the grounds that the implementing order was ultra vires because it did not provide for a judicial remedy. According to the opinion, while the creation of the Office of the Ombudsperson and other improvements "are to be welcomed", they failed to provide an "effective judicial remedy"[11].

United States of America

9. Al-Haramain Foundation (United States of America) (QE.A.117.04) has appealed the decision against it in the United States District Court for the District of Oregon of 6 November 2008,l in which the District Court upheld the designation of Al-Haramain Foundation as "rational and supported by the administrative record". The appeal is currently pending before the United States Court of Appeals for the Ninth Circuit[12].

10. On 16 January 2009, Yasin Abdullah Ezzedine Qadi (QI.Q.22.01) filed a lawsuit challenging his designation in the United States District Court for the District of Columbia.[13] The complaint alleges, among other things, that his designation and the freezing of his assets is a violation of the Administrative Procedure Act and of his First, Fourth, and Fifth

[10] Information in this paragraph was provided by the authorities of Pakistan.

[11] Judgement of the Supreme Court of the United Kingdom, *Her Majesty's Treasury (Respondent) v. Mohammed Jabar Ahmed and others (FC) (Appellants) Her Majesty's Treasury (Respondent) v. Mohammed al Ghabra (FC) (Appellant) R (on the application of Hani El Sayed Sabaei Youssef) (Respondent) v. Her Majesty's Treasury (Appellant)*, 27 January 2010 (2010) UKSC 2 (available at www.supremecourt.gov.uk). para. 78.See chap 6

[12] United States District Court for the District of Oregon, Civil Case No. 07-1155-KI, *Al Haramain Islamic Foundation, Inc. and Multicultural Association of Southern Oregon vs. United States Department of the Treasury, Henry M. Paulson, Office of Foreign Assets Control, Adam J. Szubin, United States Department of Justice, and Alberto R. Gonzales*.

[13] United States District Court for the District of Columbia, Case 1:09-cv-00108, *Yassin Abdullah Kadi v. Henry M. Paulson, Adam J. Szubin, United States Department of the Treasury, Office of Foreign Assets Control*.

Amendment rights under the United States Constitution.[14]The case is fully briefed but had not been decided at the time of writing. United States District Court for the District of Columbia, Case 1:09-cv-00108, *Yassin Abdullah Kadi v. Henry M. Paulson, Adam J. Szubin, United States Department of the Treasury, Office of Foreign Assets Control*. First Amendment rights to freedom of speech and freedom of association; Fourth Amendment right to be secure against unreasonable search and seizure; Fifth Amendment rights to due process and to just compensation for the taking of property.

[14] First Amendment rights to freedom of speech and freedom of association; Fourth Amendment right to be secure against unreasonable search and seizure; Fifth Amendment rights to due process and to just compensation for the taking of property.

Appendix 3

Example of a Model Communication form. Taken from UN Information sheet No 7. As an example of the details that would be required for a Judicial Review/Appeal against imposition of being placed on any list of terrorist suspects by the United Nations.

model communication

Date: .....

Communication to:
The Human Rights Committee
c/o OHCHR-UNOG
1211 Geneva 10, Switzerland,
submitted for consideration under the Optional Protocol to the International Covenant on Civil and Political Rights.

I. Information concerning the author of the communication

Name ..... First name(s)
.....

Nationality..... Profession
.....

Date and place of birth
.....

Present address
.....

Address for exchange of confidential correspondence (if other than present address)

.....

Submitting the communication as:

(a) Victim of the violation or violations set forth below
.... /_/

(b) Appointed representative/legal counsel of the alleged victim(s)
..... /_/
(c) Other ..... /_/

If box (c) is marked, the author should explain:

(i) In what capacity he is acting on behalf of the victim(s) (e.g. family relationship or other personal links with the alleged victim(s)):

.....

(ii) Why the victim(s) is (are) unable to submit the communication himself (themselves):

.....

An unrelated third party having no link to the victim(s) cannot submit a communication on his (their) behalf.

II. Information concerning the alleged victim(s) (if other than author)

Name ..... First name(s)
.....

Nationality..... Profession
.....

Date and place of birth
.....

Present address or whereabouts
.....

III. State concerned/articles violated/domestic remedies

Name of the State party (country) and the relevant International Covenant or Optional Protocol against which the communication is directed:

.....

Articles of the allegedly violated:

.....

Steps taken by or on behalf of the alleged victim(s) to exhaust domestic remedies-recourse to the courts or other public authorities, when and with what results (if possible, enclose copies of all relevant judicial or administrative decisions):

.....

If domestic remedies have not been exhausted, explain why:

.....

IV. Other international procedures

Has the same matter been submitted for examination under another procedure of international investigation or settlement (e.g. the Inter-American Commission on Human Rights, the European Commission on Human Rights)? If so, when and with what results?

.....
.....

V. Facts of the claim

Detailed description of the facts of the alleged violation or violations (including relevant dates)*

.....
.....
.....

....
....

Author's signature: ....

CHAPTER 1
INTRODUCTION AND RESEARCH METHODOLGY

3 Outline of chapters

3.1 Chapter 1

The first chapter will explain the aims of this research and the methodology employed throughout the study including a rational for choosing the particular methodology employed.

3.2 Chapter 2

This chapter provides an introduction and discussion into the development of the UN sanctions system from its use against states to the development of the smart or targeted system used against individuals and other entities allegedly involved in terrorism together with a discussion of the 'rule of law' and the United Nations.

3.3 Chapter 3

This chapter will discuss in detail those United Nations Security Council (UNSC) Resolutions in relation to those suspected of international terrorism, in particular Al Qaida and the Taliban and how over time the violation of internationally accepted human rights norms has led to a change of policy including modification of the sanctions system to include a delisting procedure and the introduction of an Ombudsperson to assist with de-listing requests, however it will also suggest that even with these measures in place the present system is still lacking basic safeguards for those who are subjected to these measures and that they currently fall short of internationally accepted human rights norms.

3.4 Chapter 4

This chapter will consist of various case studies considering a number of different national and regional jurisdictions that have considered the matter of UN sanctions or UN supremacy, over national or regional jurisdiction, However the purpose of this study is not simply to clarify and re-state settled law but to show how current jurisprudence is failing to uphold international human rights standards in favour of maintaining peace and security, and the problems imposed by the UN Charter.

3.5 Chapter 5

This study will focus on the lack of an effective judicial remedy available at the international level for those subjected to targeted sanctions by the United Nations and indeed more generally for those individuals that have no regional protection when states fail to comply with their international human rights obligations. The imposition of these measures and the lack of effective remedy undoubtedly breaches a number of fundamental human rights at the international level, such as the right to be heard and the right to have a competent tribunal which is capable of giving an effective remedy, it is therefore necessary at the outset to discuss in detail basic elements from various jurisdictions of what exactly is meant by a judicial review and for the purposes of this thesis and as importantly to define the concept and to consider what this study means by 'human rights'. This last element will be dealt with by considering some of the ideals and ideologies which underpin contemporary concepts of human rights throughout the world and condense them into internationally accepted norms, whilst acknowledging some of the difficulties in doing so.

3.6 Chapter 6

This chapter has a dual purpose. Firstly, it outlines the functions and powers of the United Nations bodies in the field of human rights, including the availability and ease of individual access to those bodies. Secondly, and more importantly, it analyses the existing international mechanisms or procedures available to individuals, including the limitations or weaknesses of these procedures. Although there is not the slightest intention to overlook or diminish the strengths and benefits of the procedures, the author is of the view that a full analysis of their limitations is crucial for the purpose of this entire study to explain why the current systems available are unsuitable for any individual or entity to seek an effective remedy for the imposition of sanctions from the UN Security Council as well as in the wider context of the individual and their respective state.

3.7 Chapter 7

This chapter continues from the previous discussion in that it appears that individuals who claim to be the victims of human rights abuses recognised by international standards, even those who live and reside in States which do normally offer adequate legal procedures for defending their human rights, have little chance to obtain fair redress under the existing international channels for any violation caused by the UN itself, or nationally where

adherence to UN resolutions is uncompromising even when human rights appear to be contravened.[15]. As has previously been discussed States are unwilling to run counter to these resolutions even when clearly in contravention of human rights safeguard**s** due to Article 103 of the UN Charter[16]. The conflict between these institutions will be considered throughout.

3.8 Chapter 8

In this chapter the author contends that international judicial review is necessary in order to complement and strengthen the other existing international procedures for dealing with individual complaints of human rights violations as none of the existing procedures allow an individual or entity to challenge any acts of the United Nations level in a legal manner, even though it has been shown the Security Council has taken on a quasi-judicial role as law maker as can be shown when it has by naming individuals and entities to be included in its international list of those suspected of a connection to international terrorism. The chapter proposes that the International Court of Justice be empowered to allow individuals to have a judicial review mechanism involving breaches of international human rights such as those caused by imposition of UNSC 'targeted' sanctions.

3.9 Chapter 9

This chapter gives the ideas for further study and research suggesting that whilst the proposed changes to the ICJ statute is indeed only theoretical, it has an highly analogous to the ICC and should not be dismissed as purely an exercise in academic fantasy over pragmatic reality and is intended to contribute to the wider academic debate on the need to find a balance between the human rights and peace and security dichotomy that is grounded in the rule of law**.** Proposals are outlined for some form of procedure to enable a judicial review/appeal to take place at the level of the UN as well as the wider implications for terrorism.

4 Aims of this doctrinal research and the contribution to learning

This thesis has several aims which can be outlined as follows;

[15] B.G. Ramcharan, *The Concept and Present Status of the International Protection of Human Rights*, Martinus Nijhoff Publishers: Dordrecht Boston, 1989, p. 267.
[16] See for example cases from the European Court of Human Rights sho: Behrami v France ; Saramati v France, Germany and Norway (2007) 45 EHRR SE 85 , para 149

1. To consider**,** through a detailed discussion**,** the background to the UN policy regarding the targeting of individuals and other entities at the level of the UN with 'targeted' or 'smart' sanctions that restrict the movements and freeze the assets of those named.
2. To examine how this policy has evolved legally with reference to the wider implications for the 'Rule of Law' doctrine.
3. To analyse from a human rights perspective whether the UN can under its charter obligations balance the competing needs of maintaining peace and security whilst upholding fundamental human rights.
4. To discuss some of the leading cases at the national and regional level that involves these conflicts of interests and by examination of relevant judicial decisions discuss and the current legal position with regard to upholding fundamental rights and freedoms. Cases such as *Kadi v Council of European Union* will be compared with how the USA, Canada and the UK have dealt with the similar situations involving targeted sanctions regime through incorporation into their respective national and regional laws and how these have been dealt with.
5. Examination of the various legal issues involving UN sanctions by examination of legislation and leading cases. At the regional level the role of the European Court of Human Rights (ECtHR) will be considered and how this court has perceived the balance of upholding human rights over the need for peace and security in light of UN sanctions.
6. A detailed examination of current international mechanisms for human right protections will be examined to see how current practice fails to allow an individual to bring any form of action against the UN Security Council.
7. Finally this research will suggest that if national and regional courts are either reluctant or unable to counter decisions of the UN that run contrary to accepted international human rights norms then a theoretical legal solution is suggested, grounded in international law, which would allow the International Court of Justice to perform the act of judicial review or appellate function in this specific instance.

5 Methodology

5.1 Introduction

This chapter will explain in detail the methodology to be adopted for the completion of the thesis and why certain approaches have been considered and discarded. Although Silverman argues that '*without theory there is nothing to research,*[17]*'* this author feels this statement is not the end but the beginning of the inquiry. Since "most researchers would accept that it is sensible to use a mixture of methods"[18] this section will show the combination of approaches that will be taken in the body of the thesis. Although not all researchers agree, the author contends that legal research is in itself unique. Professor Brownsword supports this concept when he emphasises that legal researchers rarely start with a sharply specified research question, they do not have some hypothesis to be tested, they do not have a clearly articulated methodology and they do not have a clear sense of where their inquiry might lead. Much of the time, he states they are reacting to a rapidly changing legal landscape and trying to say something helpful or interesting about what is going on from a legal perspective, but they will often be able to put their research into some recognisable mould only when they have all but perhaps completed their inquiry.[19]This has certainly been true when completing this thesis; changes to the law and major case decision**(s)**, (and/or lack of them) have meant that conclusions are in constant flux. Cryer *et al*[20]noticed that law students in general tend to be less methodologically self-aware and less adept at articulating the approach underpinning their thesis than those in other social science disciplines.

There are of course a myriad of socio-legal methodologies which could have been considered in relation to this work, and many could have been partially successful. However, as Professor Reza Banakar suggests:

> 'Despite the social make-up of law and the kinship between legal theory and social theory, the former being a branch of the latter and despite the efforts of socio-legal

[17] D. Silverman, *'The logic of qualitative research'* in Miller & Dingwell (Eds) '*Context & Methods in Qualitative Research'* Sage publishing, 2007, 87.
[18] P. McNeill., & S. Chapman., Research Methods, Routledge; London, 2005, 22.
[19] R. Brownsword (Ed) In "*What the World Needs Now: Techno-Regulation, Human Rights and Human Dignity"* in (Vol IV of Global Governance and the Quest for Justice), Hart:: Oxford, 2004.
[20] R. Cryer, T. Hervey, B. Sokhi-Bulley and A. Bohm, *Research Methodologies in EU and International Law,* Hart Publishing, Oxford , 2011.

scholars over the past hundred years to integrate legal and sociological ideas, law and sociology remain apart.'[21]

Indeed, Schmidt and Halliday argue that scholars within the socio-legal sphere referred to by Banakar not only want to change the way that law is regarded in terms of research, but further "believe that law's claim to autonomy and superiority must be laid bare."[22]There exists, therefore, a clear tension between some of the legal approaches to research and some of the sociological approaches. There are also areas of overlap and where appropriate this is where the study will sit, using a combination of methods.

This difficulty in defining legal research can pose problems for individuals undertaking their PhD when it comes to their *viva voce* which often consists of questions regarding the methodology used, such as why did you choose the particular project and what is so important about it. Answering these questions at the PhD level requires the student to be more explicit regarding theoretical assumptions about the nature and quality of law, and in this case current International law to be more specific.

5.2 Methodology adopted and rational for its choice

As much of this research will span several legal systems, including the systems used by the United Nations and other international organisations, so as well as International law generally one specific method adopted out of necessity will be to incorporate the use of comparative law[23]. This is an academic study of separate legal systems, each one analysed in its constituent elements; how they differ in the different legal systems, and how their elements combine or could combine into a single system of law. Comparative law is a very important discipline in communication between legal systems. It helps mutual understanding and prevents misinterpretation. In this globalising world as observed in this study, comparative law is important as it provides a platform for intellectual exchange in terms of law and it

[21] R. Banakar, Law *Through Sociology's Looking Glass: Conflict and Competition in Sociological Studies of Law*, in A. Denis, & D. Kalekin-Fishman, eds., *The New ISA Handbook in Contemporary International Sociology: Conflict, Competition, And Cooperation*, London: Sage 2009.
[22] P. Schmidt, and S. Halliday., *Introduction: Beyond Methods – Law and Society in Action*, in Halliday, S. and Schmidt, P., eds., Conducting Law and Society Research: Reflections on Methods and Practices, Cambridge: Cambridge University Press, 2009 4.
[23]For a full explanation and discussion on comparative law see for example; M. Reimann. and R. Zimmermann,,*The Oxford Handbook of Comparative Law*, Oxford University Press, 2008; Peter De Cruz, *Comparative Law in a Changing World*, (3rd Ed) London: Routledge-Cavendish: London 2007.

cultivates a culture of understanding in a diverse world[24]. Furthermore, comparative law helps in broadening horizons for law reformers and legislators around the world. Comparative law is different from purely comparing the study of one of the branches of international law; comparative law helps inform all of these areas of normatively. For example, comparative law can help international legal institutions, such as those of the United Nations, in analysing the laws of different countries regarding their treaty obligations. Comparative law may also contribute to legal theory by creating categories and concepts of general application.[25] This is very helpful when trying to define terms which can have widely different meanings such as the rule of law, judicial review and even human rights.

5.3 Philosophical approaches that underpin this study

Whilst this research project is grounded firmly in the principles of international law considered from a purposeful human rights approach, it has been rooted in a post-modernist philosophy. This term describes a range of conceptual frameworks and ideologies that are defined in opposition to those commonly attributed to modernism and modernist notions of knowledge and science, such as, materialism, realism, positivism, formalism, structuralism, dogmatism and reductionism. Postmodernist approaches are critical of the possibility of objective knowledge of the real world, and consider the ways in which social dynamics such as power and hierarchy affect human conceptualizations of the world to have important effects on the way knowledge is constructed and used. In contrast to the modernist paradigm, postmodernist thought often emphasize idealism, re-constructivism, relativism, pluralism and skepticism in its approaches to knowledge and understanding[26].

This is not a philosophical movement in itself, but rather, incorporates a number of philosophical and critical methods that can be considered 'postmodernism', the most familiar include feminism and post-structuralism. Put another way, postmodernism is not a method of doing philosophy on its own, but rather a way of approaching traditional ideas and practices in non-traditional ways that deviate from pre-established ‘super structural’ modes.

[24]For a further discussion on globalisation democracy and governance see for example: Transnational Democracy; John S. Dryzek, “Deliberative Democracy” and “Transnational Democracy”: *Beyond the Cosmopolitan Model”, Deliberative Democracy and Beyond: Liberal, Critics, Contestations*, Oxford: Oxford University Press, 2001, Chs 4-5; W, Twinning. Globalisation and Legal Theory. London Butterworths 2000:
[25] Peter De Cruz, supra note 23.
[26] Christopher Butler, *Postmodernism: a very short introduction*, Oxford University Press, 2002

Postmodernism postulates that many, if not all, apparent realities are only social constructs and are therefore subject to change. It emphasises the role of language, power relations, and motivations in the formation of ideas and beliefs. In particular it attacks the use of sharp binary classifications such as male versus female, straight versus gay, white versus black, and imperial versus colonial; it holds realities to be plural and relative, and to be dependent on who the interested parties are and the nature of these interests. It claims that there is no absolute truth and that the way people perceive the world is subjective. Modernism and postmodernism are also understood as cultural stances or sets of perspectives. In critical theory, "Postmodernism" has influenced marketing, business and**,** of interest to this author**,** the interpretation of law, culture, and religion in the late 20th and early 21st centuries. Postmodernism, particularly as an academic movement, can be understood as a *reaction* to modernism in the Humanities. Whereas modernism was primarily concerned with principles such **as:** identity, unity, authority, and certainty, postmodernism is often associated with difference**:** plurality, textually, and skepticism.

5.4 Sources used by this study

The approach taken during this research will focus on primary and secondary texts as key sources of information. The basis of this work is in law; namely, the policy and legislation which forms the backbone of the regulatory structure surrounding targeted asset-freezing of individuals by the United Nations. Part of this research will uncover how 'legislation' the clearest mechanism by which policy makers give effect to their policies, has changed over time, discussing subsequent amendments and, where applicable, judicial interpretation of the legislation within a human rights framework.. One of the difficulties in considering this legislation and case law is that, as Becher and Trowler suggest, "…there is a constantly changing body of material arising from new legislation, and everything is in a state of flux."[27] However, bearing this constant flux in mind, there are several ways of discovering what the legislation means, and as Professor Cownie states:

> Traditionally law has been analysed from a doctrinal or 'black letter' perspective, which concentrates on examining statutory materials and the reports of judicial decisions as the sole means of understanding the law.[28]

[27] T. Becher., & P. Trowler., *Academic Tribes and Territories: intellectual inquiry and the culture of disciplines*, Open University Press,: Buckingham, 2001, 31
[28] F. Cownie., *Legal Academics*: Culture and Identities, Hart Publishing: Oxford, 2005, 35

In English law, black letter law is a term used to describe those areas of law characterized by technical rules, rather than those areas of law characterized by having a more conceptual basis. This doctrinal approach, which is also referred to as positivist[29,30] and Technocentric[31] has been criticised for being too narrow in its scope, and thus, as Adams and Brownsword argue:

> …to say black-letterism is concerned with describing the operation of the law would be to overstate its scope; for what it purports to describe is the content of the formal legal materials, not the operation of these rules in practice.[32]

Therefore only some aspects of the black letter approach will be retained as part of the "diversity of methods" and, in order to give effect to that approach, there are various other methods for interpreting the meaning of legislation which are used in case law. The three best-known approaches are the "literal", "golden" and "mischief" rules" and where appropriate these will be also be considered, as will the teleological approach favoured by the European Court of Justice. All these methods will consider the ultimate aim of the relevant UN sanctions that target individual and other entities and whether the fundamental human rights have been violated by the Security Council in obtaining this goal. This study will also utilise secondary sources where appropriate considering a wide range of commentators and their opinions in relation to the areas under consideration.

5.5 Concluding remarks

The type of methodology chosen for this study has been considered to give the opportunity to discuss proposal**s** beyond merely a black letter approach as the research is not just purely theoretical but does try to offer a pragmatic solution to a legal conundrum. The main idea of the study is to contribute to the wider discussion of the issues outlined, as the internationally accepted legal view adapts and changes to consider the real threats posed by terrorism against protecting human rights and the rule of law post 9/11 and the death of Osama Bin Laden.

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[29] Positivism, in short, takes the view that "there is a body of knowledge that existed independently of whether people knew it or not, and that the task of the scientist was to uncover that knowledge piece by piece, building up a more complete understanding of the laws of nature." Source: P. McNeill, & S. Chapman, 2005, ibid *note* 18, 116

[30] "The positive study of laws is concerned with the specific content of laws." Source: G. Pendlebury., *Action and ethics in Aristotle and Hegel: escaping the malign influence of Kan*t, Ashgate Publishing Limited: Farnham, 2002, 64

[31] P. A. Thomas, *Socio-Legal Studies: The Case of Disappearing Fleas and Bustards*, P. A. Thomas., ed., Socio-Legal Studies, Aldershot: Dartmouth, 1997.

[32] J. Adams., & R. Brownsword., *Understanding Law,* Sweet & Maxwell: London 1999, 30

CHAPTER 2
UN SANCTIONS REGIME AND THE RULE OF LAW

1 Preliminary Remarks

Whilst the term 'UN sanctions' is now in common use within our modern lexicon, it is easy to forget that there was once a time when the United Nations Security Council could not easily employ the 'sanctions' tool. For example from 1946 until the middle of 1990, due to Cold War politics, the Security Council were only able to impose the coercive sanctions provided for in Article 41[33] of the United Nations Charter on two occasions[34]. In 1966 the Council imposed sanctions against Southern Rhodesia[35] and in 1977 it applied them against South Africa.[36] By contrast, the post-Cold War period has witnessed a dramatic increase in UN sanctions. Since August 1990 the Security Council has added twenty-three additional UN sanctions regimes[37]. Whilst it is generally accepted that UN sanctions form an important tool in international relations, this chapter will discuss their development from an instrument used against states for a variety of reasons to one employed against individuals and other entities in an attempt to defeat or supress international terrorist activities. This chapter will also discuss some criticisms of the UN sanction system and the UN's view on the 'rule of law' suggesting that there is a lack of application to that principle when dealing with those sanctions concerned with terrorism and the individual[38].

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[33] Article 41 UN Charter, "The Security Council may decide what measures not involving the use of armed force are to be employed to give effect to its decisions, and it may call upon the Members of the United Nations to apply such measures. These may include complete or partial interruption of economic relations and of rail, sea, air, postal, telegraphic, radio, and other means of communication, and the severance of diplomatic relations." Available at http://www.un.org/en/documents/charter/chapter7.shtml, accessed Jan 2010.

[34] James M. Farrall, *United Nations Sanctions and the Rule of Law*, (Cambridge Studies in Comparative Law) Cambridge University Press. 2007, 1.

[35] See UNSC Resolution S/RES/232/1966, for a full list of all UN SC Resolutions see; http://www.un.org/en/sc/documents/resolutions/index.shtml, accessed February 2013.

[36] See UNSC Resolution S/RES/421/1977.

[37] See n 35 above.

[38] See for discussion on actions regarding terrorism and UN sanctions see; Andrea Bianchi, *Assessing the effectiveness of the UN Security Council's anti-terrorism measures*: *The quest for legitimacy and cohesion*. E.J.I.L. 2006, 17(5), 881-919, T. Biersteker, *Targeted Financial Sanctions: a Manual for the Design and Implementation. Contributions from the Interlaken Process* (2001); M. Brzoska, *Design and Implementation of Arms Embargoes and Travel and Aviation Related Sanctions: Results of the Bonn-Berlin Process* (2001); P. Wallensteen, C. Staibano, and M. Eriksson, *Making Targeted Sanctions Effective Guidelines for the Implementation of UN Policy Options* (2003), Cameron, *UN Targeted Sanctions, Legal Safeguards and the European Convention on Human Rights*, 72 Nordic J Int'l L (2003) 159, at 164.

6 Historical and Political Development of UN Sanctions

While from the historical perspective the end of Cold War allowed the resurgence of sanctions, two other factors have contributed to their rise. In the first instance, sanctions can often represent the least aggressive of the coercive alternatives available to the UN Security Council when faced with the task of taking action to maintain or restore international peace and security. From a political perspective, it can be extremely difficult to get the support necessary to authorise collective military action under Article 42[39] of the UN Charter, as the governments which would be expected to shoulder the burden of collective forceful action are reluctant to assume responsibility for the serious financial, political and humanitarian consequences that are likely to flow from the use of military sanctions. The imposition of non-military sanctions, by contrast, is generally thought to entail fewer costs than the use of force. By authorising sanctions, the Security Council can be seen to be taking strong symbolic action against threats to international peace and security, without having to assume the responsibility for, or incur the costs of, using force[40]. Secondly, there is the perception that the potential of sanctions to achieve their policy objectives has increased with advances in international technology, communications and trade[41]. Globalisation has fostered a climate of growing interdependence, in which states are increasingly reliant upon trade and communication links with the international community. In such an interdependent economic environment, a stringent UN sanctions regime has the power to devastate a target economy and to curtail targeted political elites[42].

[39] United Nations Charter Article 42 which states: Should the Security Council consider that measures provided for in Article 41 would be inadequate or have proved to be inadequate, it may take such action by air, sea, or land forces as may be necessary to maintain or restore international peace and security. Such action may include demonstrations, blockade, and other operations by air, sea, or land forces of Members of the United Nations.

[40] See '*A More Secure World: Our Shared Responsibility'*, Report of the High-level Panel on Threats, Challenges and Change, New York, 2004 (UN Doc. A/59/565), para. 204: '[t]he effectiveness of the global collective security system, as with any other legal order, depends ultimately not only on the legality of decisions but also on the common perception of their legitimacy--their being made on solid evidentiary grounds, and for the right reasons, morally as well as legally.'

[41] See See Hurd, '*Legitimacy, Power, and the Symbolic Life of the Security Council'*, 8 Global Governance (2002) 35, quoting B. Russett and J.S. Sutterlin, '*The U.N. in a New World Order'*, 70 Foreign Affairs (1991) 69 and the seminal work of Claude Jr., '*Collective Legitimation as a Political Function of the United Nations'*, 20 Int'l Org (1966) 367.

[42] See for further discussion see James M. Farrall, *United Nations Sanctions and the Rule of Law*, Cambridge Studies in International and Comparative Law (No 56), Cambridge University Press: Cambridge, 2009; Al-Amir A. Anbari,, '*The Impact of UN Sanctions on Economic Development, Human Rights and Civil Society*', in Gowlland-Debbas (ed.), United Nations Sanctions and International Law, 371–380; Sydney. D. Bailey, *The Security Council and Human Rights*, St Martin's Press: New York, 1994.

The Security Council has employed a broad variety of sanctions, ranging from comprehensive measures which prevent the flow to and from a target of virtually all products and commodities,[43] to simple measures that target specific items, such as arms,[44] timber[45] or diamonds,[46] or particular activities, such as diplomatic relations[47] or travel[48]. UN sanctions have been applied around the globe, from Southern Rhodesia to Yugoslavia and from Haiti to North Korea. They have targeted nations, rebel groups and terrorist organisations this will be dealt with in further detail when discussing individual and entity sanctions later in this thesis[49]. The Council has imposed sanctions for a range of objectives, including compelling an occupying state to withdraw its troops,[50] preventing a state from developing or acquiring weapons of mass destruction,[51]countering international terrorism,[52]stemming human rights violations,[53]and even in promoting the implementation of a peace process[54].

Whilst the UN has deployed sanctions on a number of occasion and for a wide variety of reasons, their use has often been criticised for an array of reasons. Pape denounced the use of sanctions as ineffective[55]whilst others warn that sanctions can be counterproductive as they can incite opposition to UN intervention and strengthening the target government's position of power.[56]Sanctions are also criticised due to the impact they can have on the innocent

[43] See Resolution 232 Southern Rhodesia, 757 Federal Republic of Yugoslavia (Serbia-Montenegro) (FRYSM), 820 Bosnian Serb and 841 Haiti for details of their sanctions regimes.
[44] See Resolutions 418 South Africa, 713 Yugoslavia, 733 Somalia, 788 Liberia, 918 Rwanda, 1160 Federal Republic of Yugoslavia (FRY) and 1298 Eritrea and Ethiopia for details of these sanctions regimes.
[45] 1343 and 1521 Liberia sanctions regimes.
[46] See Resolutions 864 UNITA, 1132 Sierra Leone, 1343 and 1521 Liberia and 1572 Côte d'Ivoire sanctions regimes.
[47] See Resolutions 748 Libya and 1054 Sudan sanctions regimes
[48] See Resolutions 232 Southern Rhodesia, 661 Iraq, 748 Libya, 841 Haiti, 864 UNITA, 1054 Sudan, 1132 Sierra Leone, 1267 Taliban and Al Qaida, 1343 and 1521 Liberia, 1493 DRC, 1556 Sudan, 1572 Côte d'Ivoire, 1636 Hariri, 1718 North Korea and 1737 Iran sanctions regimes.
[49] See for example the following Resolutions which targets Rebel groups, 820 (Bosnian Serb), 864 (UNITA) and those of 1132 Sierra Leone and 1493 DRC sanctions regimes.
[50] See for example Resolution 661 sanctions regime against Iraq
[51] See for example Resolutions 418 (South Africa), 1718 (North Korea) and 1737 (Iran) sanctions regimes, this was also the primary reason for maintaining resolution 661 Iraq sanctions regime after the conclusion of 1991 Gulf War hostilities.
[52] Preventing and responding to international terrorism was an objective of resolution 748 against Libya, 1054 against Sudan and 1636 Hariri sanctions regimes
[53] This was seen as an objective of the following Resolutions: 232 (Southern Rhodesia), 418 (South Africa), 841 (Haiti), 1160 (Federal Republic of Yugoslavia (FRY)) and 1556 (Sudan) sanctions regimes.
[54] See Resolution 788 and 1521 Liberia, 864 UNITA, 918 Rwanda, 1132 Sierra Leone, 1493 DRC and 1572 Côte d'Ivoire sanctions regimes in respect of promoting the peace process.
[55] Robert A. Pape, *Why Economic Sanctions Do Not Work* (1997) 22 International Security 90–136
[56] Johan Galtung, *On the Effects of Economic Sanctions: With Examples from the Case of Rhodesia*, in Miroslav Nincic and Peter Wallensteen (eds.), *Dilemmas of Economic Coercion* (Praeger: New York 1983), 17–60, 46.

civilian populations,[57]with John and Karl Mueller describing them as 'the UN's weapon of mass destruction'.[58]

Whilst sanctions of all types have their critics Farrall suggest that no matter how ineffective, counterproductive or indiscriminate sanctions may appear, the Security Council is not about to remove them from its peace and security toolkit any time soon[59]. As Secretary-General Kofi Annan observed in his 2005 report 'In Larger Freedom', sanctions constitute 'a necessary middle ground between war and words'. Enthusiasm for sanctions he suggests may wax and wane, but the Council may continue to implement sanctions when diplomacy is failing and other policy options are unpalatable or impractical[60].

7 Defining UN sanctions

The term 'sanction' can mean different things, to different people. In the national sphere, sanctions generally represent a range of action that can be taken against a person who has transgressed a legal norm.[61] Thus, a person who has committed the crime of manslaughter might receive the sanction of a term in prison. The nature, scope and length of potential national sanctions are generally determined by legislatures. The sanctions are then applied to specific cases by judiciaries or juries, and they are then enforced by police forces and penal systems. National sanctions may serve a number of purposes, including defining the limits of permissible behaviour, punishing wrongdoers and deterring potential future wrongdoers.[62] But whatever specific purpose a particular sanction may serve, the essence of national sanctions lies in their nexus with legal norms. This nexus separates sanctions from simple acts of coercion. In the national context, sanctions are imposed in order to enforce the law and they therefore aim to reinforce the rule of law.

[57] Geoffrey Simons, *Imposing Economic Sanctions: Legal Remedy or Genocidal Tool?* (London: Pluto Press, 1999); George E. Bisharat, *Sanctions as Genocide* (2001) 11 TLCP 379–425.
[58] Denis Halliday, *Iraq and the UN's Weapon of Mass Destruction* (1999) 98 Current History 65–68; John Mueller and Karl Mueller, *Sanctions of Mass Destruction* (1999) 78(3) Foreign Affairs, 43–53.
[59] James M. Farrall, *United Nations Sanctions and the Rule of Law*, 34.
[60] UN General Assembly, *In larger freedom : towards development, security and human rights for all : report of the Secretary-General*, 21 March 2005, A/59/2005, UN Publications available at: http://www.unhcr.org/refworld/docid/4a54bbfa0.html, accessed 2 April 2012.
[61] Hans Kelsen, *The Law of the United Nations*: *A Critical Analysis of its Fundamental Problems*, Stevens & Sons: London1951, 706.
[62] Margaret P. Doxey, *International Sanctions in Contemporary Perspective*, 2nd ed, St Martin's Press: New York, 1996, 7.

In the international sphere, however, the term 'sanctions' is commonly used to describe actions that often bear only a slight resemblance to their domestic relative. Media commentators, diplomats and scholars employ the term to refer to a wide range of actions, taken for a variety of purposes, by a range of actors against a variety of targets.[63] The spectrum of action commonly described as 'sanctions' includes military and non-military action. The term 'sanctions' can be used to describe action which aims to place physical restrictions upon the ability of a target to engage in the use of force itself, or to depict action which seeks to restrict the target's freedom in other respects, such as in relations of an economic, financial, diplomatic or representative, sporting or cultural nature[64].

The fundamental difference between the meaning of sanctions in the national context and the popular understanding of sanctions in the international context is that the action commonly referred to as sanctions in the international sphere does not necessarily serve the purpose of enforcing a legal norm.[65] The term 'sanctions' is widely used to refer to action which seeks either to coerce the target into behaving in a particular manner, or to punish it for behaviour considered unacceptable by the sender. The motive for imposing sanctions may be to respond to a breach of a norm or to prevent such a breach, but it may also be to pursue a foreign policy agenda or to gain some advantage over the target.[66] Some commentators have even employed the term 'positive sanctions' to refer to acts of a non-coercive nature which seek to induce a particular type of behaviour.[67]

[63] Galtung and Doxey both provide useful summaries of the different types of international 'sanctions': Galtung, 'On the Effects of Economic Sanctions', p 21; Doxey, International Sanctions, p 15.

[64] In fact, the resolutions concerning individuals and other entities discussed later in this study seems to fit the definition given by Yem, 'legislative acts have three essential characteristics: they are unilateral in form, they create or modify some element of a legal norm, and the legal norm in question is general in nature, that is, directed to indeterminate addressees and capable of repeated application in time': E. Yemin, *Legislative Powers in the United Nations and Specialized Agencies* (1969), 6.

[65] This can be said to be the case with UN sanctions, as it is not a requirement that they be applied in response to a violation of Charter obligations. Thus they can be interpreted as 'political measures' which the Security Council has the 'discretion' to apply in order to maintain or restore international peace and security. See Kelsen, ibid n 61,733.

[66] The US sanctions regime against Cuba is one example of a 'sanctions' regime imposed in pursuit of a foreign policy agenda. Since it first adopted a resolution on the subject in 1992, the UN's General Assembly has condemned on an annual basis the continued application of US 'sanctions' against Cuba. For the initial resolution, see A/RES/47/19 (24 November 1992). For the most recent resolution, see A/RES/58/7 (18 November 2003). For the annual resolutions in between, see A/RES/58/7 (18 November 2003), preambular para. 6.

[67] Peter A. G. Van Bergeijk, *Economic Diplomacy, Trade and Commercial Policy: Positive and Negative Sanctions in a New World Orde*r, Brookfield: Edward Elgar Publishing, 1994.

The range of actors who impose sanctions on an international basis includes individual states, groups of states, the international community as a whole, and non-state actors. When one state initiates coercive action, its actions are commonly referred to as 'unilateral sanctions'. A prominent example of unilateral sanctions is the regime which has been maintained against Cuba by the United States since the Cuban missile crisis.[68] When action is initiated by a group of states, the action becomes 'multilateral' or 'regional' sanctions. Examples of multilateral/regional sanctions regimes include those imposed against Haiti by the Organization of American States[69] and against the former Yugoslavia by the European Union.[70] When action is taken by a majority of states, it is referred to as 'collective' or 'universal' sanctions. These terms have generally been reserved to describe sanctions applied by the League of Nations or the United Nations.[71] Finally, even non-forceful coercive activities initiated by non-state actors, such as citizen-initiated boycotts, are sometimes described as sanctions.[72] The range of actors who could potentially be the target of sanctions generally mirrors the actors who can impose sanctions. In practice, forms of sanctions have been imposed against one state, a group of states, and extra-state entities.

In this study, the focus is upon the 'collective' or 'universal' sanctions applied by the United Nations against the non-state actor. The term 'UN sanctions' denotes binding, mandatory measures short of the use of force that are applied against particular state or non-state actors by the UN Security Council, as envisaged by Chapter VII and Article 41 of the UN Charter.[73] As provided in Article 41, 'UN sanctions' thus fall within the following description: The Security Council may decide what measures not involving the use of armed force are to be

[68] For a comprehensive list of instances of unilateral sanctions, see Gary Clyde Hufbauer, Jeffrey J. Schott, and Kimberly Ann Elliott, *Economic Sanctions Reconsidered*, 2nd ed (1990)Washington, DC: Institute for International Economics.

[69] For a detailed account of the Haiti sanctions, see Elisabeth D. Gibbons, *Sanctions in Haiti: Human Rights and Democracy Under Assault* (Westport: Praeger, 1999), especially chapt 3.

[70] See for example on the EU sanctions regime against the Former Yugoslavia, Christine Chinkin, '*The Legality of the Imposition of Sanctions by the European Union in International Law'*, in Malcolm D. Evans (ed.), *Aspects of Statehood and Institutionalism in Contemporary Europe* (Brookfield: Dartmouth, 1997), pp. 183–213; Jean-Pierre Puissochet, '*The Court of Justice and International Action by the European Community: The Example of the Embargo Against the Former Yugoslavi*a' (1997) 20 Fordham ILJ 1557–1576.

[71] M. S. Daoudi and M. S. Dajani, Economic *Sanctions, Ideals and Experienc*e: Routledge, London 1983, 56–90.

[72] See for further discussion, Hersch Lauterpacht, '*Boycott in International Relations*' (1933) 14 BYIL 125–140; Maged Taher Othman, *Economic Sanctions in International Law: A Legal Study of the Practice of the USA* ,Ann Arbor: University Microfilms International, (1982), pp. 19–25.

[73] Like the general term 'sanctions', the term 'UN sanctions' can also be used to refer to a variety of measures. Without further qualification, UN sanctions may denote: military or non-military action; action that is authorised by the Security Council or the General Assembly; and action that is requested and thus 'voluntary' or action that is binding and thus 'mandatory'.

employed to give effect to its decisions, and it may call upon the Members of the United Nations to apply such measures. To reinforce the point made earlier, these may include complete or partial interruption of economic relations and of rail, sea, air, postal, telegraphic, radio, and other means of communication, and the severance of diplomatic relations.[74]

Since the inception of the United Nations the Security Council has acted upon its Article 41 sanctions powers to create twenty-five UN sanctions regimes.[75] In addition to its actions establishing and modifying those twenty-five sanctions regimes, the Security Council has at times requested states to impose measures that might be described as 'voluntary sanctions'. In the cases of Southern Rhodesia and South Africa, prior to the eventual imposition of mandatory sanctions**,** the Council requested states to take certain action against Southern Rhodesia and South Africa, without requiring the application of such measures under Chapter VII[76]. Similarly, in the case of Cambodia, the Council requested states bordering Cambodia to prevent the import of timber products from Khmer-Rouge controlled areas. These instances are not covered as part of the current analysis, as the measures requested were neither imposed under Chapter VII nor framed in mandatory language.

The Security Council has also taken some other initiatives that might be interpreted to fall within the scope of Article 41, due to the fact that they involved action short of the use of military force taken under Chapter VII and after the Council had determined the existence of a threat to the peace. These initiatives include the creation of two international criminal tribunals,[77] which have in fact each determined that their establishment falls within the scope of Article 41.[78]

[74] Article 41, UN Charter. Article 41 was designed to be read in concert with Article 39, such that UN sanctions should be applied to maintain or restore the peace once the Security Council has determined the existence of a threat to the peace, breach of the peace or act of aggression.
[75] See n34 at Annex A
[76] M. McDougal, & M. Reismen, *Rhodesia and the United Nations: The Lawfulness of International Concern*. The American Journal of International Law, 1968, 62(1), 1-19
[77] In May 1993 the Council established the International Criminal Tribunal for the former Yugoslavia (the ICTY): SC Res. 827 (25 May 1993), paras. 1–2, annex. In November 1995 the Council established the International Criminal Tribunal for Rwanda (the ICTR): SC Res. 955 (8 November 1995), para. 1
[78] See Prosecutor v. Dusko Tadić, Case IT-94–1-AR72, Appeals Chamber, (2 October 1995), para. 36; Prosecutor v. Joseph Kanyabashi, Case No. ICTR-96–15-T, Decision on the Defence Motion on Jurisdiction (18 June 1997), para. 27.

The Security Council has also applied wide-ranging measures short of the use of force in an effort to prevent and suppress terrorism[79] and to prevent non-state actors from acquiring weapons of mass destruction and their means of delivery.[80] Whilst some suggest these instances are not to be treated as examples of UN sanctions regimes as they do not possess the key characteristics of UN sanctions regimes, which are applied traditionally against states[81] or particular, readily identifiable groups of non-state actors for the purpose of this study those measures deployed against individuals and entities in relation to terrorism will be the basis of this study.

8 The Rule of Law and the Security Council

This thesis contends that Security Council sanctions used against individuals and entities have been applied in such a way that they have undermined the rule of law, therefore weakening the authority and credibility of the UN Security Council and its sanctions tool[82]. The end result is that sanctions are less effective than they could be. Until the UN Security Council's sanctions practice can be reformed so that there is widespread confidence in its integrity, sanctions are less likely to serve as an effective tool for resolving international conflict. Without such reform, the UN sanctions system will be seen by some as a destabilising influence upon, rather than a symbol of, the rule of law in international society. The challenge is therefore to reform the UN Security Council's sanctions practice so that the Council and the UN sanctions system command such respect and inspire such confidence that

[79] In the wake of the 11 September 2001 terrorist attacks in the United States, the Council established a collection of mandatory counterterrorism measures to be taken against terrorists and terrorism and created a Counterterrorism Committee to monitor the implementation of those measures. See for example, SC Res. 1373 (28 September 2001). See chapter 3 for further discussion.

[80] In April 2004 the Council adopted resolution 1540 (2004), requiring states to take a range of measures designed to prevent non-state actors from acquiring weapons of mass destruction and their means of delivery. The Council also established the 1540 Committee to administer the measures. See SC Res. 1540 (28 April 2004).

[81] See: T. Biersteker, *Targeted Financial Sanctions: a Manual for the Design and Implementation. Contributions from the Interlaken Process* (2001); M. Brzoska, *Design and Implementation of Arms Embargoes and Travel and Aviation Related Sanctions: Results of the Bonn-Berlin Process* (2001); P. Wallensteen, C. Staibano, and M. Eriksson, *Making Targeted Sanctions Effective Guidelines for the Implementation of UN Policy Options* (2003);Chesterman, S., & Pouligny, B. (2003). *Are Sanctions Meant to Work? The Politics of Creating and Implementing Sanctions Through the United Nations. Global Governance*, 9(4), 503-518

[82] D. Schweigman, *The Authority of the Security Council under Chapter VII of the UN Charter: Legal Limits and the Role of the International Court of Justice* (2001); Lamb, 'Legal Limits to United Nations Security Council Powers', in G. Goodwin-Gill and S. Talmon (eds.), *The Reality of International Law: Essays in Honour of Ian Brownlie* (1999), at 361; 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), at 315.

both states, other international organisations for example the EU,[83] NGO's and those individuals and entities subject to these sanctions both desire and feel compelled to comply with these sanctions regimes and thus implement sanctions effectively.

This thesis will proposes a pragmatic model of how the UN Security Council practice can be modified to encompass the rule of law that is designed to be used in the context of Security Council decision-making on sanctions by enabling judicial review of the decisions they have made that affect the individual or entity concerned. If followed, this model would help to reassure the broader community of states that the Security Council is genuinely committed to the rule of law. By ensuring that its sanctions practice reinforces, rather than undermines, the rule of law, the Council could induce greater compliance with its sanctions regimes.

Whilst the rule of law is a fluid concept and there are a divergence of views as to its meaning or key aim this study proposes that primary aim of the rule of law is to prevent the misuse or abuse of power at whatever level by those who made administer interpret and enforce it[84]. It proposes five basic principles of the rule of law that seek to prevent the misuse or abuse of power: transparency, consistency, equality, due process and proportionality. To the extent that the Security Council and its sanctions practice respect and promote those five basic principles, they reinforce the rule of law.

In its role of overseeing peacekeeping operations, the Council frequently emphasises the importance of the rule of law, portraying it as one of the key building blocks of a stable society and routinely incorporating the objective of strengthening the rule of law in peace operation mandates. Yet when it comes to the decision-making process when imposing sanctions, the Council's practice tends to undermine the rule of law. Sanctions are often applied and modified in an ad hoc and selective manner. Decisions are generally made behind closed doors, with little or no public record of the decision-making process. Sanctions tend to have disproportionate effects upon civilian populations and third states, that is those not

[83] In the context of the Council of Europe see '*The European Convention on Human Rights, Due Process and United Nations Security Council Counter-Terrorism Sanctions'*, Report prepared by Professor Iain Cameron (6 Feb. 2006).
[84] H. Kelsen, *The Law of the United Nations. A Critical Analysis of Its Fundamental Problems* (2001), at 735, Wood, *'Comment on Erika de Wet's Contribution', The Security Council as a Law Maker: The Adoption of (Quasi)-Judicial Decisions*, in R. Wolfrum and V. Röben (eds.), *Developments of International Law in Treaty Making* (2005), at 227, 228.

directly or intentionally affected but who for example may find themselves unable to trade with or have an influx of refugees, as a result of sanctions imposed on a neighbouring state. Individuals subjected to sanctions are now subject to travel bans and assets freezing that affect not only them but their families and their ability to conduct genuine business activities. They are denied the availability of any effective form judicial review.

9 The relevance of the rule of law to the UN Security Council's activities

It has been suggested that at the formation of the United Nations, the inclusion of the rule of law within the UN Charter was effectively disregarded. Despite concerted efforts at the San Francisco Conference to ensure that the principles of justice and the rule of law would guide the action of the UN Security Council,[85] the concept of the rule of law is conspicuously absent from the provisions of the United Nations Charter. The UN Charter established the Security Council as a political organ, with primary responsibility for the maintenance of international peace and security.[86] Although threats to international peace and security may take the form of violations of international law, these two concepts do not necessarily overlap.[87] When acting in accordance with its power to maintain international peace and security, the Council does not necessarily respond to a violation of international law, or even to a violation of the UN Charter.[88] In fact, some commentators have interpreted the broad discretion granted to the Security Council for the maintenance of international peace and 'security to mean that the Security Council is 'a law unto itself' that it can do and should act above the law.[89] Why then should the Security Council be expected to take rule of law considerations into account when formulating its sanctions policy?

While the Security Council's political nature is undeniable,[90] it does not necessarily follow that the Council is or should be uninterested in the rule of law. There are two persuasive reasons why the Security Council might be expected to take rule of law considerations into account when formulating sanctions policy. Firstly, the Security Council has a close relationship with and reliance upon law and the rule of law. Secondly, the Security Council

[85] See for example Herbert Vere Evatt, *The United Nations*, Harvard University Press: Cambridge MA, 1948, 36
[86] See UN Charter, Chapters III and V
[87] Ibid n 61, 724-731
[88] Ibid n 61, 732-737
[89] John F. Dulles, *War or Peace*, Macmillan: New York, 1950, 194-195.
[90] See for example Rosalyn Higgans, *The Development of International Law Through the Political Organs of the United Nations*, OUP: Oxford, 1963.

has increasingly proclaimed the importance of the rule of law within the actions of various states.

1.2 *The Council's close relationship with and reliance upon law*

The relationship between the Security Council and law is complex and multifaceted. On the one hand, the Council is a political body which takes decisions in an environment that is highly charged. On the other, by virtue of its power to issue decisions that are legally binding upon UN member states,[91] and authorise mandatory non-military and military coercive action to maintain or restore international peace and security,[92] the Council is a body whose activities have profound legal implications.[93] The Council thus sits prominently at the juncture between politics and law in international affairs.

The Security Council's ability to create legal obligations that are binding on practically all states has led some commentators to describe aspects of the Council's activities as quasi-legislative in character.[94] Although the Council's law-making process may be less sophisticated than the legislative process in many national parliamentary or congressional legislatures, the legal consequences flowing from Council decisions can bestow upon those decisions a quality akin to legislation such as the basis of this thesis namely the Council's resolutions requiring states to take global action to counter terrorism, beginning with resolution 1373 (2001)[95]. Another example was its decisions in pressing for action to prevent the supply of weapons of mass destruction to non-state actors, commencing with resolution 1540 (2004). On occasion the Security Council has also declared certain activities to be illegal, thus interpreting and applying international law in a quasi-judicial manner.[96] Examples of the Council's interpretive activities include declarations regarding the illegality of claims of statehood in the cases of Southern Rhodesia and the 'Turkish Republic of

[91] See UN Charter, Articles 25 & 48 available at: http://www.un.org/en/documents/charter/, assessed Jan 2013.
[92] See UN Charter Chapter VIII, Articles 39, 41, 42 available as above
[93] See Articles 25 & 48 and 103 discussed later in chapter 3 and 4.
[94] See Paul C Szasz, *The Security Council Starts Legislating*, (2002) 96 AJIL 900-905; Jose E Alvarez, *International Organisations as Law Makers* (2005) Oxford, OUP pp. 184-198, De Wet, 'The Security Council as a Law Maker: The Adoption of (Quasi)-Judicial Decisions', in Wolfrum and Röben (eds.),
[95] This resolution together with others in connection with terrorism will be discussed further throughout this thesis and in particular in chapter 3 and 4.
[96] See for further discussion; Oscar Schachter, 'The Quasi-Judicial Role of the UN Security Council and the General Assembly (1964) 58 AJIL, 960-965; Bruno Simma (Ed), The Charter of the United Nations: A Commentary, 2nd Ed Oxford OUP (2002), 708

Northern Cyprus', as well as declarations concerning boundary delimitation, as in the case of the border between Iraq and Kuwait.[97]

That the Security Council has assumed a law-making role is particularly evident in sanctions practice where it has adopted both a quasi-legislative and a quasi-judicial role[98]. Whenever the Council applies sanctions, it takes on a quasi-legislative role. The mandatory provisions of its sanctions resolutions establish the contours of each sanctions regime, creating a new web of legal obligations. This amounts to legislation. The Council has also entered quasi-judicial mode in connection with its sanctions regimes. Indeed, prior to establishing its very first sanctions regime, the Council characterised the white minority regime in Southern Rhodesia as 'illegal' and described its purported declaration of independence as having 'no legal validity'. The Council has made other quasi-judicial proclamations in connection with its sanctions regimes against Iraq and Haiti. In 1990 it declared Iraq's attempted annexation of Kuwait to have 'no legal validity' and stated that Iraq was liable under international law 'for any loss, damage or injury arising in regard to Kuwait and third States' as a result of its 'invasion and illegal occupation' of Kuwait[99]. In 1994 the Council described as 'illegal' the de facto government which assumed control of Haiti following the ousting of the democratically elected government of President Jean-Bertrand Aristide.

In order for sanctions to be effective, the Security Council relies heavily upon the good will and good faith of states. UN sanctions are not self-implementing – it falls upon states to take the necessary steps to bring sanctions into effect. Article 25 of the UN Charter places a binding legal obligation upon states to implement the Council's sanctions decisions, but if states choose not to comply with the Council's decisions, sanctions will prove ineffective. The Council is therefore dependent upon the commitment of states to respect and act in conformity with the rule of law. The Council's reliance upon the rule of law raises the stakes in relation to its own rule of law performance. States are more likely to implement sanctions, and thus to act in accordance with the rule of law, if they perceive the Security Council to be acting in accordance with its own responsibilities under the rule of law.

[97] See supra note 35 for a link to the full list of UN Sanctions Resolutions
[98] See A. Reinisch, *Developing Human Rights and Humanitarian Law Accountability of the Security Council for the Imposition of Economic Sanctions*, 95 *AJIL* (2001) 851, at 858-859.
[99] G. A. Lopez, & D. Cortright, *Containing Iraq: Sanctions Worked. Foreign Affairs*, 2004, 83(4), 90-103. 94

10 The increasing emphasis upon the rule of law in Security Council practice

The expectation that the Security Council should respect the rule of law has also been prompted by the Council's own practice. Despite the failure of attempts at San Francisco to enshrine the rule of law in the UN Charter as a guiding principle for Security Council action, the concept has exerted surprising influence over the Council's activities. This influence, which has been particularly pronounced in the post-Cold War era, was foreshadowed at the Council's very first meeting. At the inaugural Council meeting, held on 17 January 1946, a number of Council members emphasised that they expected the Council to play a pivotal role in strengthening the rule of law. France, for example, observed that[100] :

> The Security Council's task is a heavy one, but it will be sustained by our hope, which is shared by the people, and by our remembrance of the sufferings of all those who fought and died that the rule of law might prevail.

As the Cold War settled in, this utopian vision of a Security Council that would actively promote the rule of law quickly dissipated. The Council's ability to fulfil its responsibilities under the UN Charter became severely circumscribed by the frequent failure of the Council's permanent members to achieve consensus. The Security Council began to function less as an effective agent for the maintenance of international peace and security and more as a platform for ideological battles between East and West. During this period, the UN's rule of law-related activities tended to focus on the creation and expansion of international legal agreements. This approach of equating the promotion of the rule of law with the codification of international law can be seen in General Assembly resolution 2627 (XXV), adopted in October 1970 to mark the UN's twenty-fifth anniversary. In that resolution, member states declared that: 'The progressive development and codification of international law. . . should be advanced in order to promote the rule of law among nations.'[101]

Following the end of the Cold War, the rule of law began its rise to prominence in the Security Council's rhetoric and practice. In January 1992, world leaders gathered in New York for the first ever Security Council summit meeting, where they discussed the theme

[100] See the statements made by Australia and France: *Security Council Official Records, First Year Series, January-February 1946*, at 6 & 9
[101] GA Res, 2627 (XXV) (24 October 1970), para. 3.

'The Responsibility of the Security Council in the Maintenance of International Peace and Security'.[102]

At that meeting, which set the agenda for UN action post-Cold War, leaders from countries with a broad range of political and socio-economic traditions underlined the importance of strengthening the rule of law in international affairs.[103]The President of the United States, George H. W. Bush, urged the Security Council to 'advance the momentous movement towards democracy and freedom. . . and expand the circle of nations committed to human rights and the rule of law'.[104]

The importance of the rule of law has subsequently been reinforced at multiple high-level UN meetings. In September 2000, the UN adopted the Millennium Declaration.[105] One of the first objectives from this declaration was strengthening respect for the rule of law in international affairs.[106] Five years later, at the 2005 World Summit, leaders reaffirmed the Millennium Declaration.[107] They acknowledged that 'good governance and the rule of law at the national and international levels' were 'essential for sustained economic growth' and they recognised that the rule of law belonged to 'the universal and indivisible core values and principles of the United Nations'. Leaders further reaffirmed their commitment to 'an international order based on the rule of law and international law'.[108]

Within the Security Council itself, mounting interest in the rule of law led to the establishment in September 2003 of a thematic agenda item entitled 'Justice and the Rule of Law'.[109] Discussion in the Council's debates on the rule of law has focused on the need to strengthen the rule of law within post-conflict societies. However, a number of speakers have taken the opportunity to emphasise that the rule of law is equally important in international affairs. The former Security General Kofi Annan, has observed that the Security Council has a 'heavy responsibility to promote justice and the rule of law in its efforts to maintain international peace and security'.[110]

[102] See UN Doc S/PV.3046 31 January 1992
[103] See for example UN Doc S/PV.3046 Jan 1992, pp. 8-107
[104] Ibid., 50
[105] UN Doc A/RES/55/2 16 September 2000
[106] Ibid., 9
[107] UN Doc A/RES/60/1 24 Oct 2005 *World Summit Outcome*
[108] Ibid., para. 134
[109] See UN Doc S/PV.4833 24 Sep 2003
[110] See UN Doc S/PV.4833 24 Sep 2003

UN member states have also stressed that the Council should not only promote, but respect, the rule of law. Mexico urged that, 'for the sake of justice and the rule of law, the Security Council must continue to act on the bases of legality that provide support for its mandate' whilst Chile has underscored that the rule of law offers the Council 'the possibility of basing its work on a concept that embodies the core values of the United Nations'. Austria has warned that a Security Council that is 'dedicated to the resolute implementation of international law' is 'the best incentive for the implementation of law at the national level'.[111] The Council's meetings on justice and the rule of law culminated in the adoption of two presidential statements devoted to the topic. Security Council presidential statements are adopted by the Council as a whole and must therefore be supported by all Council members. While they may not carry as much weight as Security Council resolutions, presidential statements nevertheless provide an important indication of the Council's position on a given matter. In the first of these statements, adopted on 24 September 2003, the Council reaffirmed the 'vital importance' of justice and the rule of law. The Council also recalled the 'repeated emphasis' given to justice and the rule of law in its own work, including with respect to the protection of civilians in armed conflict, peacekeeping operations and international criminal justice. In the second statement, adopted twelve months later, the Council stressed the importance and urgency of the restoration of justice and the rule of law in post-conflict societies. The Council also observed that justice and the rule of law at the international level were 'of key importance for promoting and maintaining peace, stability and development in the world'.

Although during the Cold War, the rule of law featured in Security Council resolutions only a handful of times, in the nine years from the beginning of 1998 until the end of 2006, the phrase 'rule of law' appeared in no fewer than sixty-nine Council resolutions.[112] The Council has invoked the rule of law in a range of ways. It has called upon parties to an international conflict to resolve their differences in accordance with the rule of law, as in the case of the dispute between the governments of the Former Yugoslav Republic of Macedonia and the Federal Republic of Yugoslavia. It has emphasised the importance of (re-)establishing the rule of law in post-conflict situations and it has incorporated the task of promoting and strengthening the rule of law in peace operation mandates, including those in Afghanistan.

[111] See UN Doc S/PV.4835 24 Sep 2003
[112] Ibid *note* 35 above for a full list of UN Resolutions.

Although the Security Council's resolutions have not drawn an explicit link between the application of sanctions and the promotion of the rule of law, this connection has been made during the Council's debates surrounding the potential establishment or modification of sanctions regimes. In August 1990, when the Council debated the application of sanctions against Iraq, the United States emphasised that the proposed sanctions aimed to prevent 'disregard for international law'.[113] Canada suggested that sanctions sought to 'safeguard respect for the rule of law' and the United Kingdom argued that sanctions would reinforce a 'world order based on respect for law'. In March 1992, when the Council met to consider applying sanctions against Libya, the United States argued that such a step would 'preserve the rule of law'. In October 2005, when the Council prepared to apply sanctions against suspects involved in the terrorist bombing that killed former Lebanese Prime Minister, Rafiq Hariri, Denmark observed that: 'At stake are the sovereignty and integrity of Lebanon, the principle of the rule of law and the credibility of the Security Council in following through on its own resolutions.' Sanctions have thus been portrayed in the Council's debates as an instrument which can be used to strengthen, reinforce and promote the rule of law[114].

Council debates also demonstrate concerns with the potential negative impact of sanctions upon the rule of law. Speakers have stressed that the Security Council should not engage in 'double standards' when choosing whether to impose sanctions and that, once sanctions are employed, they should be applied in a consistent and uniform manner.[115] They have also called for the Security Council and its sanctions committees to act transparently emphasising the need to ensure that sanctions are applied proportionately, so that the negative effects upon civilian populations and third states are minimised.[116]

The rule of law is therefore extremely relevant to the Security Council and its sanctions practice it is for this reason that it does seem inconceivable that the Security Council has imposed a sanctions regime against those suspected of involvement in terrorism that does not appear to comply with it. By not allowing those subjected to the considerable legal constraints of asset freezing and travel restrictions not to have any form of an effective judicial review or appeal to challenge these acts and to give legal protection to those placed under them The Council has increasingly championed the importance of the rule of law in its

[113] UN Doc S/PV.2933 6 Aug 1990, 18
[114] UN Doc S/PV.3063 31 Mar 1992, 67
[115] UN Doc S/PV.2977 13 Feb 1991, 27-28
[116] UN Doc S/PV.5297 31 Oct 2005, 15-17

own rhetoric and underline's that it expects states and non-state actors to comply with the rule of law. But in order to ensure that its own actions genuinely promote the rule of law, the Council should ensure that its own extraordinary powers are not themselves susceptible to misuse or abuse. This paper will suggest that the Council's rhetorical commitment to promoting the rule of law does not yet extend to its sanctions practice and that legal safeguards currently in place do not meet the criteria of internationally accepted norms standards for the protection of individuals and other entities affected by them.

CHAPTER 3
UN TERRORISM SANCTIONS INVOLVING INDIVIDUALS AND OTHER ENTITIES.

1 Preliminary Remarks

As was seen in the last chapter, following on from the cold war the UN has increasingly made use of sanctions in an attempt to maintain international peace and security with mixed success and various criticisms. As the new millennium approached the UN decided to turn its sanction tool for the first time towards a terrorist group and individuals having no official statehood or state control in an attempt to defeat or supress international terrorist activities.

2 Basis of UN intervention

Terrorism and terrorist activities are not a new phenomenon; over the years the UN through the General Assembly and the Security Council has played a major role in leading the fight to suppress terrorist activities[117]. What has changed since the end of the 20th C and into the new millennium is the 'globalisation' of terrorism and the understanding that it has to be dealt with on the world stage[118]. As previously stated under the UN Charter only the Security Council is 'responsible for the maintenance of international peace and security'[119] capable of making decisions that are binding on its members through Security Council Resolutions[120]. In response to global terrorism they have adopted a number of robust measures[121] requiring implementation by member states of various measures. These measures have included 'targeted' or 'smart' sanctions' against individuals and organisations and other entities have formed part of the on-going fight against terrorism both before and after, the terrorist attacks on the US World Trade Centre and Pentagon, collectively referred to as 9/11.

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[117] See for example The UN General Assembly resolution 49/60, (1994) entitled "*Measures to Eliminate International Terrorism*," adopted on 9 December 1994, this resolution contains inter alia a provision defining terrorism as: "Criminal acts intended or calculated to provoke a state of terror in the general public, a group of persons or particular persons for political purposes are in any circumstance unjustifiable, whatever the considerations of a political, philosophical, ideological, racial, ethnic, religious or any other nature that may be invoked to justify them."

[118] Jesica Almquist, '*A Human Rights Critique of European Judicial Review'*: *Counter-terrorism sanctions* ICLQ 2008 57(2), 303-331

[119] Article 23 UN Charter

[120] Article 25 UN Charter

[121] For example the UNSCR 1267 (1999) Which called for further international cooperation to suppress and defeat terrorism reminding states of the need to implement their obligations under previous anti-terrorism treaties and to suppress terrorism in all lawful ways possible including those that prevent the financing of terrorist activities.

3 UN Action

Under Article 41, the Security Council may decide what measures, not involving the use of armed force are to be employed to give effect to its decisions, and it may call upon the Members of the United Nations to apply such measures. Buried amongst a number of miscellaneous provisions in Chapter XVI, is article 103, which provides:

> In the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail.

As article 103 is concerned only with treaty obligations between member states it says nothing about the relationship between the Charter and the rights and freedoms of individuals in domestic law. Only treaty provisions that are incompatible with *jus cogens*, that is, a peremptory norm which is a fundamental principle of international law, accepted by the international community of states as a norm from which no derogation is ever permitted, (for example the prohibition on torture), are held to be void[122].

4 Historical development of terrorism measures

In 1998 the UN Security Council declared through SCR1189 that every State has the duty to refrain from organizing, instigating, assisting or participating in terrorist acts in another state or acquiescing in organised activities within its territory directed towards the commission of such acts. The bombing of United States embassies in Nairobi and Dar Es Salaam in 1999 showed that international terrorism could not be defeated by simply asking states to desist in all forms of terrorist activity. SCR 1267(1999) provided for the freezing of funds and other financial resources derived from or generated from property owned or controlled by the Taliban or by any undertaking owned or controlled by them. A sanctions Committee was established to oversee implementation of these measures, known as the 1267 Committee. SCR 1333(2000) took this process a step further, it provided by that all states should freeze funds and other financial assets of Usama bin Laden and individuals and entities associated

[122] See R (on the application of Al-Jedda) v. Secretary of State for Defence, Court of Appeal, Civil Division, Judgment of 29 Mar. 2006, where a UK national court held that would be wholly unqualified to express an opinion' on whether SC resolutions violate peremptory norms of international law. Along similar lines, the Court qualifies as 'arguments that a national court cannot entertain' the issue of whether the SC acted *ultra vires* and the problem of determining whether even human rights norms that have not attained the status of jus cogens should not be set aside by SC resolutions.(para 163) Oddly enough, the Court, in determining the proper scope of Article 103 of the Charter, preferred to rely on international legal scholarship as 'it would be … quite wrong for a national court to indulge in an interpretative exercise of its own'(para 172)

with him to ensure that no funds were made available for the benefit of any person or entity associated with him, including the Al-Qaida organisation[123]. Although previous practice did not go this far, it has not been suggested that it lay outside the powers of the Security Council under article 41 to direct the taking of collective measures at an international level against individuals. The wording of article 41 contains an enumeration of the type of non-military measures that could be taken was accepted as being illustrative and non-exhaustive[124]. However, the measures taken (especially) against bin Laden represented a sea change in policy by directing UN action in this manner.

SCR 1333(2000) was followed by a series of resolutions refining and updating the measures that were to be taken to deal with Al-Qaida, Usama bin Laden, the Taliban and other individuals, groups, undertakings and entities associated with them as designated by the committee established pursuant to SCR 1267. The preamble to SCR 1822(2008) declared that terrorism in all its forms and manifestations constitutes one of the most serious threats to peace and security. All states are required to take all the measures previously imposed by previous Resolutions with respect to Al-Qaida, Usama bin Laden and the Taliban " and other individuals, groups, undertakings and entities associated with them, as referred to in the list created pursuant to Resolutions 1267(1999) and 1333(2000) (the 'Consolidated List')" , including, the freezing of funds and financial assets. SCR 1822(2008) reiterated the obligation of all Member States to implement and enforce the measures and urged all states to redouble their efforts. All Member States were to submit to the 1267 Committee for inclusion on the Consolidated List names of individuals, groups, undertakings and entities participating by any means in the financing or support of acts or activities of Al-Qaida, Usama bin Laden and the Taliban and other individuals, groups, undertakings and entities associated with them. The persons on that list are the persons to whom the prohibitions in SCR 1267(1999) and subsequent resolutions applied. Provision was made for de-listing, review and maintenance of

[123] On the operation of the 1267 Sanctions Committee and its subsidiary bodies see Eric Rosand, '*The Security Council's Effort to Monitor the Implementation of Al Qaeda/Taliban Sanctions'*, 98 *AJIL* (2003) 745.
As regards Resolution 1267 and its progeny, numerous adjustments have been made to the original supervisory machinery, which solely revolved around the Sanctions Committee. By means of Resolution 1333 the Sanctions Committee was complemented by a 'Committee of Experts' with the task of consulting with the Member States. By the same resolution, the Sanctions Committee was asked to consider, when and where appropriate, visiting countries bordering Afghanistan or any other country as may be necessary to improve the full implementation of freezing orders. The unsatisfactory results produced in terms of effectiveness of the sanctions led the SC in Resolution 1363 to create both a 'Monitoring Group of Experts' based in New York as well as a 'Sanctions Enforcement Team', located in the territory of states bordering Afghan territory. Both organs were to report to the Council through the Sanctions Committee.
[124] Bruno Simma, *The Charter of the United Nations: A Commentary*. (2nd ed)., Oxford University Press: Oxford, 2007, 737.

the Consolidated List. Individuals, groups, undertakings and entities have the option of submitting a petition for de-listing directly to a body known as the Focal Point. The Committee is directed to work, in accordance with its guidelines, to consider petitions for removal from the Consolidated List of those who no longer meet the criteria established in the relevant resolutions. While Resolutions 1267 and 1333 were relatively narrow in scope and the blacklist attached to them was at least quantitatively comparable to previous ones, Resolution 1390 presented different features. It was the first resolution of an open-ended nature with no apparent link to any specific territory. The Sanctions Committee, established under the three resolutions, later supplemented by other ancillary organs, is in charge of listing and de-listing individuals and entities as well as of reviewing the implementation reports submitted by states[125].

5 Widening the Net

On 28 September 2001, as part of its response to 9/11, the Security Council broadened its approach to the problem still further. It decided that action was now required to be taken against everyone who committed or attempted to commit terrorist acts or facilitated their commission. It adopted SCR 1373(2001). The preamble to this Resolution recognised the need for states to complement international co-operation by taking additional measures to prevent and suppress, in their territories through all lawful means, the financing and preparation of any acts of terrorism. Provision was made for establishing another Committee of the Security Council, consisting of all its members, to monitor implementation of the Resolution. This in effect now produces two sanction committees, the original 1267 committee looking at specific groups and persons and this 1373 committee looking a terrorists generally.

Fassbender[126], discusses the issue of targeted sanctions and due process, and suggests that it is the responsibility of the UN Security Council to ensure that fair and clear procedures are made available to individuals and entities targeted with sanctions, however his report does not make clear any specific suggestions on how this can be done or how the fundamental right to be heard can be respected by an individual whose assets are frozen and travel

[125] See I. Cameron, *UN Targeted Sanctions, Legal Safeguards and the European Convention on Human Rights*, 72 *Nordic J Int'l L* (2003) 159, at 164.
[126] Dr Brian Fassbender, '*Targeted Sanctions and Due Process'*, The responsibility of the UN Security Council to ensure that fair and clear procedures are made available to individuals and entities targeted with sanctions under Chapter VII of the UN Charter, 2006 (UN Publication).

restricted. In his view the machinery of the UN Security Council whilst normally political had definitely become quasi-judicial and quasi-legislative in nature when issuing such resolutions that impact on an individual without the right to effective judicial review. This is area will be explored throughout the remainder of this thesis, which offers a theoretical solution aimed at balancing both parts of the security, human rights equation.

6 Role of the UN Ombudsperson

Following 9/11 whilst there was an appetite on the international stage, led mainly, unsurprisingly, by the USA, to give the UNSC a broad discretion in the measures it decided and the methods it employed to deal with international terrorism. However, there were concerns regarding the lack of judicial protection for those subjected to these regimes and a call for fundamental human rights to be upheld. Provision was finally made in Resolution 1822 (2008) for a de-listing procedure as well as a full review and maintenance of the Consolidated List. Individuals, groups, undertakings and entities were now given the option for the first time of submitting a petition for de-listing directly to a body known as the Focal Point. This Committee was directed by the UNSC to work, in accordance with the guidelines set by the Security Council[127], however these only required consideration for any petitions to be removed from the 'Consolidated List' those whom the committee felt no longer met the criteria established in the relevant resolutions. However none of these processes actually entitle any person subjected to these measures to the right to be heard, or for the committee to actually take any notice of the submissions made by those subjected to the measure, or in fact any state actor, petitioning on their behalf.

These reforms alone have not proved sufficient to satisfy the criticisms of those who advocate human rights including the European Court of Justice (ECJ). In the leading case involving UN sanctions, *Kadi v Council of Europe*[128] the ECJ was asked to consider the legality of Council Regulation (EC) No 881/2002 implementing UN sanctions, whilst this case is discussed further in the next chapter it should be noted that the ECJ found the denial of fundamental rights to Mr Kadi, in particular, the denial of the right to effective judicial review, was well founded.

[127] UN 1267 Sanctions Committee Guidelines see:
http://www.un.org/sc/committees/1267/pdf/1267_guidelines.pdf accessed 17 August 2011.
[128] Kadi v Council of the European Union and Commission of the European Communities (Joined Cases C-402/05P and C-415/05P).

In September 2009, the UN's own United Nations High Commissioner for Human Rights, in its report, entitled 'Human Rights and Fundamental Freedoms While Countering Terrorism[129]'commented that because individual listings are currently open-ended in duration, they may result in a temporary freeze of assets becoming permanent which, in turn, may amount to criminal punishment, due to the severity of the sanction. This, potentially, greatly exceeds the purpose of the United Nations to combat the terrorist threat posed by an individual case. In addition the report points out there are no uniform standards in relation to evidentiary criteria and procedures by member States. This poses serious human rights issues, as all punitive decisions should be either judicial, or subject to judicial review[130].

In light of the above issues, it appears that the UN had little option but to consider the process and procedure used by the Security Council and its committees when examining a request for de-listing by looking at ways it could attempt to be more transparent fair in its methods so that it complied with the rule of law.

6.1 Introduction of Ombudsperson

On 17 December 2009, the Security Council adopted SCR 1904(2009[131]) ('The Resolution'), which provides in para's 20 and 21 that when considering de-listing requests, the (1267) Committee would now be assisted by an Ombudsperson appointed by the Secretary-General. The Ombudsman would deal with requests for de-listing from individuals and entities in accordance with procedures outlined in Annex II to the above resolution[132].

The Secretary-General, in close consultation with the Committee, was asked to appoint an eminent individual of high moral character, impartiality and integrity with high qualifications and experience in relevant fields, such as legal, human rights, counter-terrorism and sanctions. In June 2010, the Security Council Sanctions Committee appointed Judge Kimberly Prost,[133] as the first ombudsperson in accordance with UNSCR 1904. She formally commenced her role on 17 July 2009. Although this role was seen by the UN as assisting the

[129] A/HRC/12/22: *Report of the United Nations High Commissioner for Human Rights on the protection of human rights and fundamental freedoms while countering terrorism,* dated 9 September 2009.
[130]Ibid, para 42.
[131] SCR1904(2009).
[132] Ibid, para 20-21
[133] The first Ombudsperson appointed under UNSCR 1904 is Judge Kimberley Prost. She has held many international judicial positions including Chief, Legal Advisory Section for the United Nations Office on Drugs and Crime (UNODC). Since 2006, she has been an ad litem judge of the International Criminal Tribunal for the former Yugoslavia.

Committee in its consideration of delisting requests received from individuals and entities subject to the Security Council's relevant sanctions measures, it did not give her any particular power or authority over that committee's decisions or its processes. It seemed that whilst the UN Security Council were trying to appease growing international concern over this individual sanctions system, at the same time they were only paying lip service to the rule of law in providing effective counter measures for those involved[134].

The Ombudsperson was simply required to perform these tasks in an 'independent and impartial manner' and not to seek nor receive instructions from any government, in accordance with the procedures outlined in Annex II of the resolution, which gave details of the time line to be followed when considering de-listing applications. Under this resolution now that this appointment has been made, it is the Ombudsperson, not the focal point mechanism established by SCR 1730 (2006) that receives any requests for removal from the 1273 Committee. The Focal Point would continue to receive requests from individuals and entities seeking to be removed from other sanctions lists established under SCR 1333, thereby creating a two tier de-listing procedure for those placed on sanctions under each committee. The initial period for the appointment of the 1267 Committee Ombudsperson was for eighteen months.

7 Delisting procedure

Petitioners seeking delisting could now present their case to an independent and impartial ombudsperson, who, after a period of information gathering and dialogue with the petitioner and relevant states, and with the help of a Monitoring Team, would present a comprehensive report to the 1267 Committee laying out the principal arguments concerning the delisting request based on an analysis of all the information available to the Ombudsperson and the Ombudsperson's observations.

The Committee saw the appointment of the ombudsperson as an important step in ensuring that the Sanctions Committee's procedures for removing individuals and entities from the 'Consolidated List' were seen by the international community as being both fair and clear, as

[134] Jared Genser and Kate Barth, *When Due Process Concerns Become Dangerous: The Security Council's 1267 Regime and the Need for Reform*, Boston College International and Comparative Law Review, vol. 33, No. 1 (2010), 12

called for by the General Assembly in October 2005[135]. Whilst the Committee may have seen this appointment as going some way in address the concerns regarding transparency and fairness, the inability of ombudsperson to compel the sanctions committee to de-list anyone regardless of the evidence she may produce, or her lack of authority to compel states to share with her any information or evidence that may have used to instigate listing in the first place has done little to alleviate the criticism that the appointment is nothing more than superficial 'window-dressing' and still fails to provide a competent tribunal.

8 Conflict over Ombudsman appointment and ability to satisfy the rule of law

Whilst giving judgement in the leading UK case involving UN sanctions, *HM Treasury v Ahmed*[136] (also discussed in the next chapter), Lord Hope commented that whilst the implementation of an ombudsperson by the UN was to be welcomed in relation to the listing of individuals, it did not in his opinion amount to any form of effective judicial protection from those placed on the UN sanction list. In fact the inability of the 1267 Committee's procedures to provide an effective remedy meant that those subjected to this regime were unable to have their case heard by a competent tribunal, capable of providing an effective judicial remedy[137]. (This is discussed further throughout the study).

In the present case he said was that what the complainants required was not a review from HM Treasury after the UK government had implemented the UN sanctions within its own domestic law and which due to the UK's obligations under the UN charter it powerless to 'un-designate', but an effective means of subjecting the 1267 Committee to judicial review, something which currently, even with the imposition of the ombudsperson, was not possible.[138]

8.1 The First reports of the Ombudsperson and Monitoring Team

The first mandate established under UNSC Resolution 1904 for both the Ombudsperson and the Monitoring Team expired on 17 June 2011, prior to it renewal, negotiations within the

[135] A/res/60/1, General Assembly of the UN Sixtieth Session dated 24 Oct 2005, para 109 full text available at: http://unpan1.un.org/intradoc/groups/public/documents/un/unpan021752.pdf, accessed 17 Jun 2012
[136] HM Treasury v Ahmed (and others) [2010] UKSC 2
[137] Ibid, at para 80
[138] Ibid, para 81

UN seemed to be focused on a number of recommendations made by the ombudsperson and the monitoring team in their recent reports[139].

The ombudsperson submitted her first biannual report to the Council on 21 January 2011. The report summarised the initial phase of her office, outlining the structure of her office and identification of the issues involved for the Council to consider. These included the need for the committee to provide reasons for its decisions on delisting persons from the targeted sanctions list. Also, she raised the practical need for the ombudsperson to be able to disclose the identity of the designating state to the petitioner and other relevant states[140].

The 1267 monitoring team submitted its report to the committee on 22 February 2011[141], it focused on two key issues, the first was how the committee could better promote peace and stability in Afghanistan and the second was the issue concerning the judicial process related to the sanctions regime. With regard to Afghanistan, the monitoring team recommended that the committee seek ways to expedite its consideration of delisting requests proposed by Afghanistan, for example, by creating a checklist of specific questions that the Afghan government would need to consider before submitting a delisting request. With regard to enhancing due process reforms to the regime, the monitoring team suggested that the committee increase transparency by publishing the ombudsperson's observations on delisting requests (and reasons that committee members disagree with those observations, when that occurs). The report also suggested requiring the committee to reaffirm, by consensus, listings that have been considered by the ombudsperson[142].

On 16 May 2011, the chairs of the 1267 Committee, the CTC (1373 Counter-terrorism committee) and the 1540 committee (non-proliferation of weapons of mass destruction and terrorism) addressed the Council in a regular biannual briefing[143]. The chair of the 1267 Committee, Ambassador Peter Wittig of Germany, said that the Committee had built on last year's review of the consolidated list by approving the most comprehensive set of updates to the list in its history. The Committee had recently agreed to 78 list amendments and to making publicly available almost 200 additional summaries of reasons for listing. The

[139] UN Doc S/2011/29 24 January 2011
[140] Ibid at para 52
[141] UN Doc S/2011/245 accessible from: http://www.securitycouncilreport.org, accessed 10 Jan 2012
[142] UN Doc S/2011/245 at 5
[143] UN Doc S/PV/6536 dated 16 May 2011; http://www.securitycouncilreport.org, accessed 15 September 2011

Committee is currently reviewing the listings of 48 individuals who are reported to be deceased and aims to conclude that review by the end of May 2011 before conducting other regular reviews requested in resolution 1904[144].

The informal group known as the 'like-minded countries' on targeted sanctions (which currently includes Austria, Belgium, Costa Rica, Denmark, Finland, Germany, Liechtenstein, the Netherlands, Norway, Sweden and Switzerland), Costa Rica sent a letter to the Council in April 2011[145] outlining several proposals to improve and strengthen the sanctions regime these include requiring the Committee take delisting decisions by majority vote rather than by consensus, that the ombudsperson be allowed to recommend de-listings, which would automatically become final after 30 days if the Committee did not re-confirm the listing and that members provide reasons to the petitioner (via the ombudsperson) for any rejection[146].

Council members Germany and Colombia stated support for one or more of the proposals circulated by this group of like-minded states. The UK urged consideration of the idea of splitting the consolidated list into two distinct lists, the first would deal specifically with the Taliban and the second would deal with Al-Qaida. France also advocated taking into account how the relationship between the Taliban and Al- Qaida has changed over time. Russia however strongly argued in favour for retaining a unified consolidated list as currently exists and for ombudsperson to continue under the original mandate agreed by SCR 1904. Wittig reported that to date the ombudsperson had received ten delisting requests and had submitted her first report on a specific delisting request to the committee in February. Two further ombudsperson reports on delisting requests were completed in April. He said the Committee is considering these delisting requests. He also recalled that resolution 1904 encourages committee members to provide reasons for objecting to delisting requests. He had insisted that the committee members do so promptly.

The Committee had reached consensus on the format in which reasons for the Committee's decision could be communicated on a case-by-case basis. The Committee will also be

[144] UN Doc S/2011/29 at para 52
[145] Document submitted to the Security Council by Switzerland and the Like-Minded States in April 2011, *'Improving fair and clear procedures for a more effective UN sanctions system',* http://www.news.admin.ch/NSBSubscriber/message/attachments/22759.pdf, accessed July 2011
[146] UN Doc S/2011/29 at 12

considering a draft checklist of necessary supporting documentation for delisting requests from the government of Afghanistan.

The Monitoring Team in its Eleventh Report to the 1267 Committee recommended that Member States treat listed Taliban and listed individuals and entities of Al-Qaida and its affiliates as two separate lists.[147]They also acknowledged that some form of judicial system was required to deal with the requests for de-listing they had received that would not be exactly the same as many national systems but would be unique to the Security Council.[148]

9 Renewal of Ombudsperson Mandate UNSCR 1988 & 1989 (2011)

On 17 June 2011, the Security Council unanimously adopted resolutions 1988 (2011) and 1989 (2011)[149] as a successor to resolution 1904 (2009). By adopting these two resolutions, the Security Council extended the office of ombudsperson and the monitoring team for a further period of eighteen months and split the Al-Qaida and Taliban sanctions regime into two separate lists as suggested by the like-minded countries and the monitoring team. Resolution 1989 (2011) stipulates that the sanctions list maintained by the Security Council Committee established pursuant to resolution 1267 (1999) will henceforth be known as the "Al-Qaida Sanctions List" and include only names of those individuals, groups, undertakings and entities associated with Al-Qaida. Of course it should not be forgotten that those subject to individual sanctions by the UNSC under any other resolution do not have any recourse to the office of the Ombudsman.

The latest resolution, 1989 (2011), in respect of the Ombudsperson recognises the administrative difficulties for that office and recommends that she is given more resources in order to fulfil her mandate which requires various actions to be completed within strict time limits that have been set. As far as extending her authority, the resolution makes it very clear

[147] Eleventh report of the Analytical Support and Sanctions Implementation Monitoring Team established pursuant to Security Council resolution 1526 (2004) and extended by resolution 1904 (2009) concerning Al-Qaida and the Taliban and associated individuals and entities, UN Doc S/2011/245, dated 13 April 2011.

[148] Ibid at para 36, New procedures have largely dealt with the issue of notification, and the narrative summaries of reasons for listing tell listed individuals why they are subject to the measures. However, the perception that listed persons continue to lack an effective remedy may yet require the Security Council to take further action. The Team believes that if that is so, there is room to develop the Ombudsperson process, but this will also require acceptance from the courts and Member States that an acceptable and equivalent level of review can be achieved through a system unique to the Security Council that does not precisely emulate a national judicial system.

[149] UNSC Res 1988 (17 June 2011) & 1989 (both dated 17 June 2011), http://www.un.org/Docs/sc/unsc_resolutions11.htm, accessed 2 Oct 2011

that although Member States should provide the relevant information to enable her to make the correct recommendations as to whether de-listing should take place, including, where appropriate, making available any relevant confidential information. When disclosing confidential information, the ombudsperson must still comply with any confidentiality restrictions which are placed on such information by the Member State providing it as she has been given no authority to decide herself what information may be released, effectively permitting the Ombudsperson to release only what the Member States allow.

9.1 Updated delisting procedure

Where multiple states have submitted names for inclusion on the sanctions list then the resolution insists there must be consensus amongst them all before de-listing can be recommended. States that have designated names for inclusion on the sanctions list are strongly urged, but not compelled, to allow the ombudsperson to reveal their identity as designating states.

This resolution further requests that Member States and relevant international organizations, for example the ECJ, are to encourage individuals and entities that are considering challenging, or are already in the process of challenging their listing, through the national and regional courts, to seek removal from the Al-Qaida Sanctions List by submitting delisting petitions to the Office of the Ombudsperson in the first instance. Whether this will occur in practice remains to be seen. Certainly, unless those subjected to this regime consider that the process offers sufficient judicial protection and the ability to offer an effective remedy, it is difficult to imagine why they would engage in the process. The message seems far more likely to be for the benefit of states and other international organisations, such as the EU, in trying to control and direct their approach in dealing with UN sanctions in the light of the recent judgments and criticisms of the system for sanctions.

Annex two of this resolution gives the mandate for the Ombudsmen in detail. It is similar in effect to the 1904 document. Annexe 2 outlines the specific time scales to be employed when considering an application for de-listing and the ombudsperson is given four months in which to gather information from the petitioner who wishes to seek de-listing, during which period she must contact and inform the petitioner as to the procedure under the resolution as well as requesting all the relevant information from the State(s) concerned.

On completion of this phase there is a two month dialogue process in which the ombudsperson discusses with the petitioner the information she is able to disclose. During this period she may ask specific questions of the petitioner and can if necessary extend this time period in order to fully explore the answers given. Alternatively, if she feels she has concluded her enquiries she can shorten the process. At the conclusion the ombudsperson should obtain a signed statement that the petitioner is not, or is no longer involved with Al-Qaida and nor will they be in the future. On completion of this phase, the ombudsperson compiles a written report for the committee in which she considers all the information available to her from the relevant member states and the petitioner. She then makes her recommendations to the Committee as to whether de-listing should take place or not. The committee then has fifteen days to review this report and a further fifteen days to consider its recommendations.

Should the ombudsperson recommend de-listing then the obligation of States to maintain sanctions on that petitioner will automatically cease after sixty days unless the Committee decides by consensus that the measures must remain. If consensus to maintain the petitioner on the list cannot be reached then a member of the committee may ask the chair to contact the Security Council for a decision, within a further sixty days, as to whether the petitioner should be delisted or not. If the Committee decides to reject a request for de-listing by the ombudsperson, then the Committee shall tell her their reasons for this decision. If the petitioner is not successful in their request, the ombudsperson should write to them explaining in as much detail as is allowed under the circumstances, the reasons for continued listing. Therefore, under this new resolution no matter before the committee should take more than six months to complete unless there are exceptional circumstances which will only be considered on a case by case basis. It is not made clear under what circumstances a petitioner may reapply for de-listing if unsuccessful this stage.

10 Concluding Remarks

Whilst the new UNSCRs' make some minor changes in terms of time lines for reporting and an assumption that individuals and entities will be removed from the list unless the Committee makes a positive decision to the contrary, they are unlikely to be seen as going far enough by many to satisfy the concerns over judicial protection of those subject to the regime. The idea, now adopted, of splitting the list into two has been muted by many within the General assembly for some time. The office of Ombudsperson, whilst clearly a step

forward in offering some protection to those subjected to sanctions, does not carry any additional authority of ability to compel the Committee to accept her recommendations, disclose information or even reveal the composite identity of the States involved.

The issues and concerns regarding judicial protection highlight the problems of having an essentially political body of the Security Council established under the UN charter to carry out the political acts of making and enforcing peace making what are essentially quasi-legislative decisions. This in itself what not be problematic if it was not for the fact that under the UN Charter there is no separation of powers; the Security Council having been given all three roles; legislative executive and judiciary. Devoid of any enforcement powers, the UN Ombudsperson may have some political leverage, in that the Committee is compelled to explain why it should not follow any recommendation to de-list made by her. Whilst many agree that there are still significant shortcomings in the judicial safeguards for listing and delisting there is still major disagreement of how these issues should be tackled.

Some members (including Germany) were supportive of imposing time limits or a sunset clause relating to listings (or at least certain categories of listings). However, the new resolution only requires review every three years it therefore it appears that long term inclusion on the list will remain the norm. Recent decisions emerging from the ECJ and other courts may be heralding a sea change, certainly of legal opinion, regarding sanctions that have been in place for nearly ten years post 9/11. With the recent death of Osama Bin Laden the mood to continue to allow the UN such unfettered autonomy to employing sanctions is slowly being challenged and eroded. It appears that many commentators within the international community are beginning to suggest that the UN cannot continue to impose measures contrary to its own charter obligations to uphold and promote human rights.

In 2008 the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism Professor Martin Scheinin suggested in a report to the General Assembly in that;

> At a minimum, the standards required to ensure a fair hearing must include the right of an individual to be informed of the measures taken and to know the case against him or her as soon as, and to the extent, possible, without thwarting the purpose of the sanctions regimes; the right to be heard within a reasonable time by the relevant decision-making body; the right to effective review by a competent and independent

review mechanism; the right to counsel with respect to all proceedings; and the right to an effective remedy[150].

Scheinin further advocates that In his assessment, the establishment of a some sort of quasi-judicial review body capable of giving an effective remedy to those requesting de-listing and composed of security classified experts serving in their independent capacity would be likely to be recognized by national courts, the EU court and regional human rights courts as sufficient analogous protection of due process, so that courts would exercise deference in respect of the outcome[151].

The High Commissioner for Human Rights has also echoed the need for some form of body to effectively deal with these situations when by arguing that the longer individuals and entities remain on these sanction lists, the more it appears to be more of a criminal sanction where there is a need for full judicial protection and review which is not currently available[152.]

In the previous chapter, the UN's wish to comply with the rule of law was discussed, this chapter has illustrated that in relation to individuals and the UN sanction system regarding counter-terrorist measures, and this has not taken place.

10.1 Strengthening the role of the Ombudsperson

Another consideration would be to consider if it is practical and feasible to increase the remit of the ombudsmen to take on the extra role or having full judicial review powers over those cases brought before it regarding targeted sanctions in order to address the rule of law concerns previously mentioned. Whilst this might seem an attractive idea at first glance on further analysis it is extremely unlikely for the following reasons:

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[150] Martin Scheinin, Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, address to the General Assembly on 22 October 2008 (available at www2.ohchr.org), accessed 10 April 2010.

[151] Ibid at 7.

[152] High Commissioner for Human Rights who, in a report to the General Assembly of the United Nations of 2 September 2009, entitled 'Report ... on the protection of human rights and fundamental freedoms while countering terrorism' (document A/HRC/12/22, point 42), makes the following statement: 'Because individual listings are currently open-ended in duration, they may result in a temporary freeze of assets becoming permanent which, in turn, may amount to criminal punishment due to the severity of the sanction. This threatens to go well beyond the purpose of the United Nations to combat the terrorist threat posed by an individual case. In addition, there is no uniformity in relation to evidentiary standards and procedures. This poses serious human rights issues, as all punitive decisions should be either judicial or subject to judicial review.'

The present role of the Ombudsperson is to investigate and report findings to the terrorism panel, the role perhaps analogous with that of the Advocate General within the EUCJ. In order to elevate the role from its present mandate into that of a decision maker would require a sea change in thinking at the highest level of the UN.

To enhance the role in order to fulfil the judicial review/appeal criteria this would in effect be to create a court of last instance, in other words a final decision making organisation without further appeal for those seeking redress against the UNSC. Therefore in accordance with judicial norms this would not be a role for a single judge and would require a panel of suitably trained international advocates to fulfil this role, with the additional burden of agreeing their selection, tenure, location and support.

There are currently no rules of procedure or practice for any such panel to take effect, therefore the UN would have to create a brand new organisation, without the necessary jurisprudence or gravitas with the additional problems of obtaining any such agreement from the Security Council which would require further Security Council resolutions authorising the formation of this panel and giving it the power to overturn its own previous decisions.

Whilst it can be seen that these issues are not insurmountable, and indeed the UN has authorised judicial tribunals through resolutions on previous occasion, there would be considerable difficulties in elevating the current ombudsperson into that sort of a judicial review panel with authority to scrutinise the legality of the Security Council and overturn previous decisions. However it is envisaged in this study, that the role of ombudsperson could be absorbed into the proposed procedure of utilising the International Court of Justice to take on the judicial review procedure, where the analogous role of the EUCJ AG fits much more comfortably. This role of the ICJ in this respect will be explored in chapter 7 and 8, particularly in relation to its standing with the UNSC.

The next chapter will examine various case studies at both national and regional levels which are indicative of the lack of protection available to individuals and other entities, subject to UN sanctions, under international human rights norms.

CHAPTER 4
CASE STUDIES INVOLVING THE UN'S TARGETED SANCTIONS AND THE INDIVIDUAL

1 Preliminary Remarks

The purpose of this chapter is to consider some of the leading cases that have involved national and regional courts with respect to dealing with issues involving conflicts with the UN charter in general and member state obligations with respect to 'targeted' or 'smart' sanctions in particular. This chapter is seen as giving a contextual background to the difficulties involved when dealing with conflicts between fulfilling UNSC resolutions and the protection of human rights that national and regional courts can offer[153]. It is not meant to be an in depth discussion of the plethora of issues such as the territorial reach or full extent of any particular regional or national human rights document, or the rulings generally by any court regarding the coverage of those rights but rather highlight the thread of this thesis that without a suitable mechanism for international judicial review being available to the individual at the level of the UN then difficulties in balancing the human rights and peace and security conundrum will continue unabated, with ever more judicial inveigling required in order to reach a rights based solution.

1.1 Background to the jurisdictional conflict

As stated previously following the formation of the United Nations, member states bound themselves through the UN's Charter to maintain international peace and security by taking collective measures for the prevention and removal of any threat to this peace and to promote and encourage respect for human rights and fundamental freedoms (Article 1)[154]. The United Nations Security Council (UNSC) was given primary responsibility for maintaining this peace and security and member states agreed through the charter to carry out the decisions or resolutions of the Security Council in order to achieve this end (Article 24).

1.2 Article 41 and 103

[153] For further discussion on cases involving challenging acts of the UN and other international organisations see for example; A. Reinisch (Ed), *Challenging Acts of International Organizations Before National Courts*, OUP, 2010; A. Tzanakopoulos, *Disobeying the Security Council:Countermeasures against Wrongful Sanctions*, Oxford, 2011

[154]The Charter of the United Nations, available at the UN website, http://www.un.org/en/documents/charter/, accessed 2 March 2012

Under Article 41 of the UN Charter, the Security Council may decide what measures not involving the use of armed force are to be employed to give effect to its decisions, and it may call upon the Members of the United Nations to apply such measures. Among a number of miscellaneous provisions in Chapter XVI is one of the most important charter articles, 103, which provides;

> In the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail.[155]

Generally only treaty provisions that are incompatible with *jus cogens*, such as the prohibition on torture are automatically considered void. Obligations under the decisions and enforcement measures of Chapter VII prevail over other commitments of the members concerned in international law[156].

2 Dealing with UN sanctions within the UK

3.1 Legislative background

Within the UK in order to give direct effect to its United Nation Charter obligations under domestic law, the UK under its 'dualist system' introduced the *United Nations Act 1946*[157]. This act allows the Government to introduce secondary legislation by making various orders in council to give effect to relevant SCR's. It should also be noted that prior to the events of 9/11 the UK Government had already enacted the Terrorism Act 2000 for the creation of a criminal regime dealing specifically with the funding of terrorism. In response to 9/11the Government introduced further legislation in the form of the Anti-terrorism, Crime and Security Act 2001. Part 2 of the 2001 Act provided specifically for the making of freezing orders. However following various UN resolutions discussed below the UK along with all

[155] For a full discussion of the implications and meaning of Article 103 see; Rain Liivoja, *The scope of the supremacy clause of the United Nations Charter,* International & Comparative Law Quarterly, 2008, 57(3), 583-612

[156] For Comment see: Bruno Simma, (Ed), *The Charter of the United Nations, A Commentary (*2nd Ed*)*, OUP, 2002, especially at 1295.

[157]The 1946 United Actions Act Section One states:" If, under article 41 of the Charter of the United Nations signed at San Francisco on 26 June 1945 (being the article which relates to measures not involving the use of armed force) the Security Council of the United Nations call upon His Majesty's Government in the United Kingdom to apply any measures to give effect to any decision of that Council, His Majesty may by Order in Council make such provision as appears to Him necessary or expedient for enabling those measures to be effectively applied, including (without prejudice to the generality of the preceding words) provision for the apprehension, trial and punishment of persons offending against the Order."

other member states were obliged to introduce further legislation in order to comply with their UN charter commitments.

3.2 The Terrorism Order (TO)

The previously discussed SCR 1373 was given effect in UK domestic law by introducing the Terrorism (United Nations Measures) Order 2001 (SI 2001/3365), in October 2001. The wording of its leading provision was modelled on that of the SCR, making it a criminal offence for any person who, except under the authority of a licence granted by the Treasury, makes any funds, financial or related services available directly or indirectly to or for the benefit of a person who commits, attempts to commit, facilitates or participates in the commission of an acts of terrorism. It also includes those people who may be controlled either directly or indirectly and those who act on behalf or at the direction of, anyone involved in terrorism. The lack of Parliamentary debate regarding the introduction of this major terrorist legislation is typical of the UK Parliament's response to any matter involving 'terrorism', which nearly always passes through both houses with little or no debate. Perhaps most infamously demonstrated by recalling the introduction of the 1911 Official Secrets Act which became law the same day it was introduced to Parliament, leaving the iniquitous Section 2 on the statute books for over sixty years.

3.3 The Terrorism (United Nations Measures) Order 2006

The Terrorism (United Nations Measures) Order 2006 (SI 2006/2657) (the TO) was also introduced as an order in council under the same act. It gave effect to SCR 1373(2001) and SCR 1452(2002), revoking the 2001 order. The new order allowed for the Treasury to give a direction as to who could be designated provided they are satisfied under the grounds of *reasonable suspicion* that the person is or may be, a person who commits, attempts to commit, participates in or facilitates the commission of acts of terrorism or merely a person identified in the Council Decision. The order also applies to those allegedly controlled either directly or indirectly, or acting on behalf of or at the direction of a designated person. Designation imparts a very onerous regime on those selected. No one including the designated person may deal with funds or economic resources belonging to, owned or held by a person referred to in the order, unless he does so under the authority of a licence granted by the Treasury. A person who contravenes the prohibition is guilty of an offence. The phrase "deal with" in this order was written in terms which are designed to catch every imaginable

kind of transaction in respect of funds and economic resources. The Treasury may authorise certain transactions under licence. These may be general or granted to a category of persons or to a particular person, they may be subject to conditions and may be of indefinite duration or subject to an expiry date. The Treasury may vary or revoke the licence at any time. This gave extraordinary power to HM Treasury in respect of a person's assets without that person being convicted, charged, arrested or even questioned, over their alleged involvement in terrorism.

On 10 August 2009 the Terrorism (United Nations Measures) Order 2009 (SI 2009/1747), came into force. Like the 2001 and 2006 Terrorism Orders, to give effect to SCR 1373(2001). It revoked the 2006 Order, but it provided that persons who had been designated under the 2006 Order were to remain subject to its terms until 31 August 2010, unless their designation was revoked by that date.

3.4 Differences between the 2006-9 Orders

There were some technical differences between the 2006 and the 2009 Orders, such as to the definition of dealing with an economic resource, which improved to a slight degree the difficult effects of the regime on spouses and other third parties who interacted with the designated person. The prohibitions that the 2009 Order imposed on making funds, financial services available for their benefit and on making economic resources available to them or for their benefit, apply only if the benefit that the person would obtain or is able to obtain is significant. An additional pre-condition for designation is that the Treasury must consider that the direction is necessary for purposes connected with protecting members of the public from the risk of terrorism. Subject to these minor adjustments, the impact of the regime on the designated person himself continued as rigorously as it was under the 2006 Order, and the phrase "*reasonable grounds for suspecting*" in the 2006 Order was retained in the 2009 Order.

3.5 The Al-Qaida and Taliban Order

The Treasury's response to the Security Council's directions that measures that were to be taken to deal with Al-Qaida, Usama Bin Laden, the Taliban and other individuals, groups undertakings and entities associated with them as designated by the committee established pursuant to SCR 1267 was to make the Al-Qaida and Taliban (United Nations Measures)

Order 2002 (SI 2002/111). It was replaced by Al-Qaida and Taliban (United Nations Measures) Order 2006, in November 2006 (AQO). As in the case of the Terrorism Order, this Order sets out a rigorous system of prohibitions and licences which is applied to persons who are designated persons for its purposes. The Treasury's may give a direction that a person identified in the direction is designated for the purposes of this Order, if they have *reasonable grounds for suspecting* that the person is or may be, Usama Bin Laden, a person designated by the Sanctions Committee, a person owned controlled by a designated person or a person acting on behalf of or at the direction of a designated person. The Treasury were given the power to vary or revoke these directions at any time.

3.6 The issues involved in both orders

The fundamental issue in HM Treasury v Ahmed [2010] UKSC 5 (SC) (the 'A' case) was whether or not the Treasury, in effect the executive were empowered by the United Nations Act to allow the introduction of both the Terrorism Order and the Al-Qaida Order, by Order in Council. The contention was that these Orders were *ultra vires* on three grounds. Firstly, they passed into effect without Parliamentary scrutiny, secondly, they lacked legal certainty and proportionality and thirdly, there was no procedure available to allow any challenge to their designation on the list in the first place. From a Human Rights perspective it was argued that both sets of Orders were incompatible under the European Convention of Human rights (ECHR) with articles 8, the right to family life, privacy and correspondence, article 1 of Protocol 1 which deals with the right to peacefully enjoy ones property. There was also a complaint under article 6 of the convention regarding the lack of access to a court for an effective remedy.

3.7 The Facts of the A Case

A, K and M are brothers with UK citizenship. In August 2007 they received letters which stated that under the Terrorism Order (TO) a direction had been made because the Treasury had reasonable grounds for suspecting that they were persons who facilitate or commit acts in the commission of terrorism. The restrictions they were placed under as a result of designation put a great burden on their wives and families, created significant mental health difficulties and ultimately have been blamed for the breakdown of their marriages.

It is important to reiterate that A, K and M, have never been charged with, or arrested for, any terrorism related offence. It was not until September 2007 that the Treasury provided some details about the factual basis for the decision to make the directions, although this was limited again due to the sensitive nature of some of the material.

G, another appellant, was also informed in December 2006 that a direction had been made against him under the TO. He was not told until later that his original listing had been at the request of the United Kingdom. It was not until March 2007 that he was told that his listing meant that he was now a designated person under the AQO.

3.8 The appeals procedure

They all issued proceedings in the Administrative Court, seeking to set aside the directions made against them in pursuance of the two orders made by the Treasury. In April 2008 Collins J held that the TO and the AQO were ultra vires and he quashed both Orders[158]. Following an appeal by the Treasury in October 2008, the Court of Appeal allowed the appeal in part. It held that the provisions of the AQO were lawful but stated that any person designated under these orders was entitled to seek judicial review of the merits of the decision. A, K, M and G were also given further leave to appeal following an application made in March 2009. The third proceedings were brought by HAY an Egyptian national, who also resident in the United Kingdom. His name was added to the Consolidated List by the 1267 Committee in September 2005. As a result he also became a designated person for the purposes of the AQO. Unlike G, the proposal that his name be added to the list was not made by the United Kingdom. It provided no information to the 1267 Committee in relation to its decision to add his name. Numerous attempts by Hay's legal team via the FCO failed to establish which state had in fact designated him, although it was understood not to be the UK. In fact the Foreign Secretary has made an application to the 1267 Committee for HAY's name to be removed from the list, as he considers that Hay's listing is no longer appropriate. The High Court[159]concluded that the AQO was ultra vires of the 1946 Act. The Court held that the practical effect of the AQO was to preclude access to the Court for protection of what Hay contended were his basic rights. The Treasury appealed against this decision. In response to representations made by Hay's solicitors the Treasury amended his licence conditions which have enabled his wife to obtain welfare benefits. However despite the Home

[158]HM Treasury v Ahmed (and others) [2008] EWHC 869 (Admin), [2008] 3 All ER 361.
[159] [2009] EWHC 1677 (Admin)

Secretary's intervention, Hay must remain subject to the AQO unless and until the 1267 Committee decides to remove him from the Consolidated List.

3.9 Considerations of the application of the orders

The TO and AQO impose extremely onerous regimes, every transaction, however small, which involves the making of any payments or the passing of funds or economic resources whether directly or indirectly, for the benefit of a designated person is criminalised. This affects all aspects of life, including the ability to move around at will by any means of private or public transport. However, a Treasury system of regulated licensing has evolved to enable payments to be made for basic living expenses. Although their interpretation of the sanctions regime, and of the system of licensing and the conditions that it gives rise to, is extremely rigorous. The overall result is very burdensome on all the members of the designated person's family. Sir Anthony Clarke MR accepted that the orders are oppressive in their nature and that they are bound to have caused difficulties for the appellants and their families[160]. Wilson LJ said that they imposed 'swingeing disabilities upon those who were designated.'[161] The House of Lords described the regime as it applied to HAY's wife as 'disproportionate and oppressive'. They continued that the invasion of the privacy of someone who was not a listed person as 'extraordinary.'[162]

3.10 The Judgment

The Supreme Court ruled by majority that both Orders were *ultra vires,* albeit on slightly different grounds. Lord Brown dissented on the grounds that the wording of the AQO was the same as the UNSCR and therefore was in direct compliance of the UNSCR which the UK was obliged to carry out as a member of the UN no matter what the Court felt. This meant in his opinion that, in the presence of a clear UN mandate, the principles governing the separation of powers and the protection of human rights within the UK would have had to defer to the need to fulfil UN Charter obligations.

The majority felt that there was no indication that Parliament had anticipated the adoption of

[160] [2009] 3 WLR 25 , para 25
[161] R(M) v HM Treasury [2008] 2 All ER 1097 para 152
[162] R(M) v HM Treasury [2008] 2 All ER 1097, para 15

such draconian measures when it enacted the 1946 Act.[163] On the contrary, the Court applied the "Simms principle[164]" which dictated that Parliament could only depart from fundamental rights through express and unambiguous language. When the measures required by a UN Resolution affect the rights of an individual so profoundly there were limits to their adoption by means of Orders in Council under the general enabling power of the 1946 Act.

3.11 The Courts reasoning

The Court held that the TO was ultra vires by introducing a "reasonable suspicion" test, it went beyond the requirements of Resolution 1373 and therefore beyond what is allowed under executive discretion granted by the 1946 Act (Lord Rodger dissenting). Only Parliament could properly decide to impose more stringent measures upon individuals than provided for in a UN measure, (Lord Rodger agreeing). Lord Brown would have allowed "reasonable grounds for believing[165]" and Lord Mance suggested proof on the 'balance of probabilities'.[166]Lord Rodger even accepted "reasonable suspicion" as "expedient" within section 1(1) of the 1946 Act, albeit only on a temporary basis pending rapid replacement by an Act of Parliament.[167] Lord Phillips suggested that the purpose of the Resolution extended only to freezing the assets of "criminals" and not mere "suspects",[168]an argument rejected by Lord Rodger as "an impractical approach which would emasculate the very international system the Security Council wished to create.[169]"

The court held that the orders went beyond their remit when even though the executive measure fell within the scope of a UNSC Resolution, the interference with fundamental rights was such that it could only be authorised by the democratically elected Parliament. In the absence of any effective and independent review at UN level it left no means to contest their designation. The Court did clarify that although Article 103 of the UN Charter displaced the applicants' ECHR rights and thus prevented any claim that the AQO was unlawful under the Human Rights Act, notwithstanding that the right of access to a court had long been recognised in the common law as fundamental to the rule of law, and could only be

[163] Lord Hope (with whom Lord Walker and Lady Hale agreed) para 61, Lord Phillips para 145-155 and Lord Mance para 239-241.
[164] R v. Home Secretary ex parte Simms [1999] 1 A.C. 69
[165] Lord Brown at para 199
[166] Lord Brown at para 230
[167] Lord Rodger at para 176
[168] Lord Philips at para 129-143
[169] Lord Rodger at para 170

overridden by clear Parliamentary wording.

Restrictions upon the rights of citizens were made conditional upon the explicit seal of the democratic process. Lord Brown, dissenting in part, identified a "clash of conflicting principles"[170] on the one hand, the UK's UN Charter obligations, and on the other the *Simms principle* that human rights infractions need to be explicitly sanctioned by Parliament. Lord Brown concluded that, while the TO was ultra vires of the 1946 Act, the AQO was not because it was categorically mandated by a UNSC Resolution. Lord Brown thus resolved the conflict by giving precedence to the UK's duty under Article 25 of the UN Charter to carry out UNSC Resolutions. The majority rejected such a conclusion; they felt that such restrictions upon individual rights always need Parliament's express consent. While Parliament can choose to legislate contrary to fundamental rights, it can also decide that certain measures required by a UNSC Resolution are too onerous to be given direct effect in the UK through secondary legislation.

3.12 The Treasury's response

The Treasury reacted to the Supreme Court's judgment by publishing the Draft Terrorist Asset-Freezing Bill 2010 and by securing the rapid passage of the Terrorist Asset-Freezing (Temporary Provisions) Act 2010. The latter deems all of the impugned Orders in Council under the 1946 Act to have been validly adopted and therefore retains in force all directions made under those Orders regardless of the fact that the Home Secretary wished Hay to be removed from the designated list. The Act expired in December 2010, and was replaced by the Terrorism Asset Freezing etc., Act 2010. This Act now provides a statutory basis for the UK's asset freezing regime. Under this new Act there are two designation powers available to the Treasury, final and interim. Interim designations are based on the lower 'reasonable suspicion' standard rather than the more generally accepted 'reasonable belief'. Interim designations only may last up to 30 days, but can be renewed, while final designations based on 'reasonable belief' expire one year from being made unless also renewed. There is a provision within the Act which provides for judicial review of any Treasury decision made but that is unlikely to help anyone placed on the UN's consolidated list. It would appear that victory of the successful applicants in the *Ahmed* case has proved extremely short-lived.

3.13 The first report into the operation of the Terrorism Freezing Etc; Act 2010

[170] Lord Brown at para 195

In December 2011 the first report into the operation of the Terrorism Freezing Etc; Act 2010 was published.[171] One positive note was that to incur designation now required both a necessity to protect the public and the burden of *reasonable belief* rather than *reasonable suspicion;* although it was found questionable if the required necessity test had been met in all cases[172]. There is a recommendation that the HM Treasury should be required to explain to Parliament the basis on which it considers the necessity test will be satisfied and that it is proportionate. The report recognises the lack of judicial input into designation process such as required in the use of control orders and unlike the procedure adopted in France and Ireland[173]. This gives wide powers to the executive and recommends that it should be a last option with prosecution being preferred with its inherent protections for the accused. Improved clarity in Treasury reports and its website is recommended to improve transparency of the Act as a whole. Licensing and compliance under the Act needs to be clearer in order assist those designated in understanding what they are and are not permitted to do[174]. There was also concern that the names of those designated are made public without the person being in a position to know the case against them or therefore to defend themselves from unknown allegations. The author of the report acknowledges many improvements over the previous regime and cooperation from the Treasury itself as well as a sharp decline in the number of people designated.[175]

3.14 Concluding remarks

Critics may argue that there was a lack of consistency in the Lordships judgments and that the decision itself in this case is divisive, however taken overall the Court has produced a coherent view. In the main, they have suggested that to implement such measures which directly affect in such a grave manner an individual's fundamental rights is a matter that should be put before Parliament and not left to the Executive alone. Unfortunately their reasoning that this would allow full democratic debate before implementation has proved hypothetical. Lord Rodger in his judgement stated that it really did not matter by what means the SCR's were introduced into our domestic law, as they inevitably will be because of our international obligations under the UN Charter. Whilst ultimately this has have turned out to

[171] David Anderson, First Report on The Operation of The Terrorist Assest Freezing ETC Act 2010, (Dec 2011), The Stationary Office, London.
[172] Ibid, 4.
[173] Ibid, 68.
[174] Ibid, 72.
[175] David Anderson,(n 171) states that the numbers have dropped from 149 at the start of 2009 to 38 in Sep 2011.

be true, perhaps the point is missed that under the UK's dualist system it should be for Parliament to discuss the ramifications to our democratic society of implementing international measures that have such a draconian effect on an individual's rights. There is a danger that by accepting these resolutions as 'incremental infringement' of our liberty there is a danger that Parliament will accept one type of control as necessary in one area of law to then justify its application to another[176].

This Court's ultimate decision to find both orders *ultra vires* does show an attempt to protect the individual from excessive executive power, whilst supporting the concept of Parliamentary supremacy and emphasises the respect of the judiciary for the separation of those powers, contrary to much recent media reporting. The Government in turn has shown unwavering support for almost unrestricted authority of the UNSC with their innate lack of effective judicial review or democratic accountability. The UN is essentially a political body that has none of the inherent safeguards we consider necessary to protect those subject to its decisions in a democracy. Surprisingly perhaps, although the ECtHR has effectively played no part in protecting an individual from the excess of any SCR, they have made clear in various judgments that under article 103, the UNSC will always take precedent over any other international agreement.

Whilst the primary aim of the UN is the maintenance of international peace and security, it seems that when doing so human rights are seen as secondary, there is a disregard for fundamental rights and an inherent lack of judicial protection available to those subjected to these sanctions as shown in '*A'* case. The view that peace and security and fundamental human rights are mutually exclusive is thought by some, if not all commentators to be simply untrue[177]. They argue that any lasting strategy for peace and security that is not anchored in respect for human rights and civil liberties is essentially a strategy of insecurity[178]. Whilst this is clearly only one view, it could be argued that whenever national or international security is threatened, states should uphold human rights not dispose of them on the grounds they are

[176] Richard Stone, *Civil Liberties & Human Rights*, (6th Ed): OUP, Oxford, 2006, 9.
[177] See for example those who advocate a strong human rights approach: Christina Pantazis, Simon Pemberton, *From the "old" to the "new" suspect community: examining the impacts of recent UK counter-terrorist legislation*, 2009, British Journal of Criminology; O Fiss, *The War Against Terrorism and the Rule of Law* (2006) 26 OJLS 235-256:; see for example those who suggest the more open a democracy, the more likely terrorists can operate within it; James Lutz & Brenda Lutz, *Democracy & Terrorism, Perspectives on Terrorism*, Journal of the Terrorism Research Initiative, 2010, Vol 4 No1 1
[178] Dora Kostakopoulou, How to do Things with Security Post 9/11, Oxford Journal of Legal Studies Vol: 28 (2) 317-342.

luxuries that cannot be supported. Fundamental rights such as: the right to a fair trial, family life, peaceful enjoyment of possessions and an effective judicial review are surely equally important to a strong democratic society as peace and security. These rights are clearly missing from the SCR now implemented into UK domestic law. One view is that by treating both security and human rights as equal, it may actually lead to a more 'rights' based democratic society, one possibly be less susceptible to cause and effect of terrorism in the first place.

The reasoning behind the sanctions imposed by the UN are of course laudable in their overall aims of attempting to maintain peace and security by suppressing international terrorism, one that operates without borders or even a substantive organisation to hold to account. However to use such a blunt international instrument as UN sanctions against individuals with its real and personal consequences as shown in the *A* case is something that Parliament was unlikely to have foreseen when it introduced the UN Act in 1946 and one that should have perhaps been debated more stridently by Parliament before introducing any new asset freezing legislation. Whilst this lack of real debate is disappointing it is not surprising when considered in the historical context of terrorism debates generally within Parliament.

Sir Anthony Clarke MR when overturning an earlier decision in this case accepted that the orders are oppressive in their nature and that they are bound to have caused difficulties for the appellants and their families[179]. Wilson LJ said in that they imposed swingeing disabilities upon those who were designated[180]. In *R(M) v HM Treasury* [2008] 2 All ER 1097 the House of Lords described the regime as applied to Hay's wife as disproportionate and oppressive and the invasion of the privacy of someone who was not a listed person as extraordinary[181]: As a permanent member of the Security Council it appears that the UK government has done little to uphold our own democratic principles within the asset freezing regime currently initiated by the UN. Although these sanctions are not supposed to be criminal in nature but a preventative civil measure, those subjected to them, many for over ten years now, they may have good grounds to suggest they are in effect a punitive measure with few safeguards available under national law. Generally speaking the UK has a robust human rights protective mechanism in form of the Human Rights Act enshrining rights agreed in ECHR, however the

[179] A, K, M and G v Her Majesty's Treasury [2008] EWCA Civ 1187, [2009] 3 WLR 25
[180] Ibid at para 152
[181] Ibid para 156

A case and the subsequent implementation of the new asset freezing legislation has highlighted the vulnerability to interference and erosion of those rights through instigating SCR at the international level, something perhaps we should all be concerned about.

4 The Regional Courts of Europe and UN targeted sanctions

4.1 Preliminary remarks

The European courts experience of dealing with issues involving the UN Resolutions and member states obligations under its charter, have taken two very distinctive paths. European Council's human rights court; the European Court of Human Rights (ECtHR) has habitually taken a subservient role to the UN when balancing cases involving member states obligations under both treaties, citing the supremacy of article 103 over any other international obligations that member states may have, this stance however seems to be changing as will be shown in recent developments in the *Al Jedda*[182] and *Nada*[183] cases. In contrast the European Union's Court, the European Court of Justice (ECJ) has recent taken a very dualist approach to dealing with the implementation of UNSC resolution, deciding that the EU is a separate organisation with a distinct legal system separate from that of the UN. It has taken stance very much in line with individual human rights when dealing with the issue of targeted sanctions and asset freezing as will be seen in the leading case of *Kadi*[184] that is discussed first.

4.2 Brief historical background to the European Court of Justice

The ECJ was set up under the Treaty of Paris (1951) to implement the legal framework of the European Coal and Steel Community (ECSC). When the European Community was set up under the Treaty of Rome (1957), the ECJ became its court. When the European Union was created under the Maastricht Treaty (1992), the ECJ's powers were again expanded to cover the broader legal remit of the EU. The Lisbon Treaty (2007) again extended the ECJ's remit to include, among other areas, Justice and Home Affairs, as well as renaming the courts the 'Court of Justice of the European Union'. The number of cases sent to the ECJ has grown dramatically since the institution was established. As a result, a Court of First Instance (CFI) was set up in 1989 to assist by dividing the workload. The Court of First Instance was

[182] Al Jedda v UK; ECtHR C27021/08
[183] Nada v Switzerland; ECtHR C10593/08
[184] Kadi v Council of the European Union (Joined Cases C-402/05P and C-415/05P) [2009] AC 1225

renamed the 'General Court' in the Lisbon Treaty. In addition to this the Civil Service Tribunal was set up in 2005 to adjudicate in disputes between the EU and its civil service. All three Courts are based in Luxembourg.

4.3 Development of the ECJ

In a world increasingly concerned with globalisation, the role of the European Union (EU) as a separate political and legal entity is seen as ever more important and with it has grown a larger role for its court, the European Court of Justice (ECJ) which is the only arbiter of EU law[185].

Within the EU legal order only the ECJ is capable of carrying out the function of *judicial review* of EU law in the form of the annulment procedure[186]. That means if any of the member states, certain organs within the EU such as, the Council, the Commission or (under certain conditions) the European Parliament believes that a particular EU law (that is regulation or directive) is illegal, they may ask the Court to annul it. Unlike most international law regimes EU law endows the individual with rights and grants *locus standi* under certain conditions for an individual to bring an action directly against the EU for breaches of their rights under EU law[187].

4.4 Development of human rights within the EU

[185] For a full discussion and explanation of the workings of the EU, from its inception to the present day see for example: Jo Steiner & Lorna Woods, *EU Law* (10th Ed) OUP, 2009;Paul Craig, Grainne de Burca, *EU Law: Text Cases and Materia*l, (5th Ed), Oxford, 2011; Catherine Barnard, *The Substantive Law of the EU: The Four Freedoms* (3rd Ed): OUP, 2010

[186] Article 230 states; The Court of Justice shall review the legality of acts adopted jointly by the European Parliament and the Council, of acts of the Council, of the Commission and of the ECB, other than recommendations and opinions, and of acts of the European Parliament intended to produce legal effects vis-à-vis third parties. It shall, for this purpose, have jurisdiction in actions brought by a Member State, the European Parliament, the Council or the Commission on grounds of lack of competence, infringement of an essential procedural requirement, infringement of this Treaty or of any rule of law relating to its application, or misuse of powers. The Court of Justice shall have jurisdiction under the same conditions in actions brought by the Court of Auditors and by the ECB for the purpose of protecting their prerogatives. Any natural or legal person may, under the same conditions, institute proceedings against a decision addressed to that person or against a decision which, although in the form of a regulation or a decision addressed to another person, is of direct and individual concern to the former. The proceedings provided for in this article shall be instituted within two months of the publication of the measure, or of its notification to the plaintiff, or, in the absence thereof, of the day on which it came to the knowledge of the latter, as the case may be.

[187] For a full explanation of Article 230 EC in relation to the individual see; Ewa Biernat, *The Locus Standi of Private Applicants under article 230 (4) EC and the Principle of Judicial Protection in the European Community*, EU Jean Monnet Chair NYU Law School: Jean Monnet Working Papers, accessed 4 Jan 2012. In relation to discussion of the individual post the Lisbon Treaty see: Agne Limante, Action for annulment before ECJ after the Lisbon treaty: Has the access to justice improved? Conference paper presented at EPGA conference Budapest 2011, accessed 10 March 2012

Under the original treaty of Rome[188] (which established the original European Community), there was no comprehensive list of 'Human Rights' to be protected under Community Law, the Community Court has developed its own case law in this area and in doing so has confirmed that human rights form an integral part of the Community legal order[189]. The introduction of further treaties has strengthened the awareness of human rights within the EU. Under Article 6 of the TEU, the EU 'shall respect fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms'[190].

The EU as an entity is not (yet[191]) a member of the Council for Europe and is therefore not an actual signatory to the European Convention on Human Rights (ECHR) in its own right, although all member States of the EU are and therefore bound to act within the terms contained of the ECHR[192]and the decisions made by its court (ECtHR). This has led historically to the development of two sets of jurisprudence, with occasional conflicts[193] however the ECJ has mostly accepted and referred to development of human rights from the ECtHR as part of their own case law[194]. Note, the EU is also not a signatory to the UN charter (yet) although all of its member states are.

5 UN targeted sanctions and the EU

Within the European Union (EU) the Security Council resolution 1390 (2002) which incorporated several previous UNSCR regarding the freezing of terrorist assets was incorporated by (EC) Regulation No 881/2002. It ordered the freezing of the funds and other economic resources of the person and entities whose names appeared on a list annexed to that regulation that was supplied by the UN.

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[188] Treaty of Rome established the European Community 1957, now replaced but still available at the EU Website, accessed 10 March 2012

[189] E. Ellis, & T. Tridimas, *Public Law of the European Community, Text, Materials and Commentary*, Sweet & Maxwell, London, 1995, 554

[190] Article 6 TEU states: "*The Union is founded on the principles of liberty, democracy, respect for human rights and fundamental freedoms, and the rule of law, principles which are common to the Member States. The Union shall respect fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms."*

[191] For a full discussion and explanation of the Treaty of Lisbon/Reform treaty and its full implications on this should it ever becomes ratified see; Jukka Snell, European Law Review, 2008,"*European constitutional settlement", an ever closer union, and the Treaty of Lisbon: democracy or relevance?* E.L. Rev. 2008, 33(5), 619-644.

[192]R. Smith, *Textbook on International Human Rights*, (3rd Ed), 2007, Oxford, 103.

[193] See the decision in: C-159/90 Society for the Protection of the Unborn Child v Grogan in the ECJ, compared with the result in Open Door Counselling and Dublin Well Women v Ireland (1992) Series A No 246, in the ECtHR, as an example of different finding within the Courts.

[194] For example in Case 36/75 Rutilli v Minister for the Interior the ECJ directly cited salient provisions of the ECHR. In case C-13/94 P v S and Cornwall County Council the ECJ referred to earlier decisions of the ECtHR

5.1 Kadi and Al Barakaat International Foundation v the Council of the European Union

The most significant case to come before the EU Courts is without doubt the conjoined cases of *Yusuf* and *Kadi*.[195] These are highly complex cases which have exercised many legal synapses over the last few years with much written on the subject matter. For the purposes of this study however, the author will only consider the cases in relation to the conflict between the UNSC wishes and the ECJ's determination to uphold human rights norms together with the proposition that only a fully constituted judicial review at the international level will alleviate future problems of this magnitude and complexity.

Yassin Abdullah Kadi, a resident of Saudi Arabia, and the Al Barakaat International Foundation, established in Sweden were designated by the UN Sanctions Committee as being associated with terrorist activities. Consequently, on October 19, 2001 the names of Mr Kadi and Al Barakaat were placed on the list of names annexed to the regulation. As the two cases are nearly identical, *Kadi* will be the one referred to throughout the article. In the background of the case are the sanctions originally established by the Security Council in its Resolution 1267 (1999) against the Taliban regime in Afghanistan. The sanctions regime was expanded by subsequent resolutions to the Al-Qaeda network and persons associated with it.[196] The Council set up a Sanctions Committee as its subsidiary body to monitor the implementation of sanctions, which maintained lists of suspected terrorists. UN member states were obliged to enforce sanctions against these listed individuals. Having this sanctions regime in place, the member states of the European Union (EU)[197] decided that instead of implementing this regime individually in their respective domestic legal systems, they should do so through EU mechanisms.

The EU Council thus adopted several common positions, as well as Regulation No. 881/2002, implementing the sanctions regime. Annexed to the Regulation, was the list of persons whose funds were to be frozen, on the basis of the lists made by the Sanctions Committee of the Security Council. As Community law, the Regulation had direct effect in the legal orders of

[195] Case T-306/01, Yusuf and Al Barakaat Int'l Found. v. Council and Comm'n, 2005 E.C.R. II-3533; Case T-315/01, Kadi v. Council and Comm'n, 2005 E.C.R. II-3649.
[196] *See generally,*Chia Lehnardt, *European Court Rules on UN and EU Terrorist Suspect Blacklists*, January 31, Volume 11, Issue 1 2007, The American Society of International Law, www.asil.org/insights070131.cfm, accessed 9 August 2011
[197] The terms, European Union (EU) and European Community (EC) will be used interchangeably throughout this paper, as will EU law, EC law and Community law.

the member states and took precedence over any contrary domestic legislation. The assets of the applicant in *Kadi* were frozen in this manner. He complained to the CFI, seeking to annul the implementing Regulation on the grounds that it violated his fundamental human rights as protected by primary EU law (that, under long-standing jurisprudence, protects as general principles a corpus of fundamental rights, including the rights enshrined in the ECHR), including the right to a fair hearing, the right to property and the right to judicial review.[198] One of his key arguments was that [T]he Security Council resolutions relied on by the [EU] Council and the Commission do not confer on those institutions the power to abrogate those fundamental rights without justifying that stance before the Court by producing the necessary evidence. As a legal order independent of the United Nations, governed by its own rules of law, the European Union must justify its actions by reference to its own powers and duties vis-à vis individuals within that order.[199]According to Kadi's argument, he was entitled to human rights protections under EU law, and that legal order "was independent of the United Nations." The Security Council resolution could not prevail over these rights, as it could not penetrate this independent legal order.[200]

The magnitude of this argument cannot be overemphasized, as it challenges the most fundamental operating assumption of Article 103 of the Charter. Like any hierarchical rule, it can only prevail over a norm *which is a part of the same legal order*. As the United States Constitution is the supreme law only in the United States legal system, but not in the legal orders of France or China, so Article 103 of the Charter is only superior law in the international legal system.

5.2 Decision of the Court of First Instance (CFI)

The CFI rejected all the pleas in law raised by Mr Kadi and Al Barakaat and confirmed the validity of the Regulation[201] however it did suggest in its reasoning that it could possibly review the actions of the UN, albeit in very limited circumstances as a violation of the legal

[198] *Kadi*, *2005 E.C.R. II-3649.* para. 59.
[199] Ibid., para. 140.
[200] Case Analysis, Kadi v Council of the European Union (C-402/05 P) and Al Barakaat International Foundation v Council of the European Union (C-415/05 P) 03 September 2008, European Court of Justice (Grand Chamber), 2008, 3 CMLR 41.
[201] Case T-315/01 Yassin Abdullah Kadi V Council of the European Union and Commission of the European Communities at para 118.

principle of '*jus cogens*'[202]. Brown suggests that the ability to consider 'any limit on the determinations of the Security Council is very encouraging[203]'. Bianchi considers the use of '*jus cogens'* to review these resolutions as a 'novel approach' as many commentators still consider the UN as a 'higher authority'[204]. The Courts reasoned that although it was not in a position to check whether the requirements of the Security Council action under Chapter VII[205] of the UN Charter had been met, nor if they were legitimate and proportionate, it affirmed that it should be able to control, at least to some extent, whether the Security Council had respected the area of human rights. To this end, it held that the Security Council is directed to act 'in accordance with the Purpose and Principles of the Charter[206] which includes compliance with human rights. The Court considered the main area of complaint, the right to property and the right to a fair hearing, then considered if these fell within the concept of '*jus cogens'*, however no matter how novel or remarkable this legal reasoning may have been, ultimately the CFI decided they did not.

5.3 Case Comment on CFI action

Whilst the outcome of the *Kadi* case is entirely predictable in that the traditional stance regarding supremacy of the UN charter by the CFI regards EU law as subservient, given that Member States are required to comply with UN Security Council resolutions by the terms of the UN Charter, which states it takes precedence over Community law. What *is* remarkable is that the CFI felt competent to even consider the decision of the Security Council under the concept of *jus cogens*. Almquist agrees that although the court might have had some difficulty in linking the deprivation of property to such a '*threat to life'* as to be part of '*jus*

[202] Latin meaning "compelling law." These are known as peremptory norms of general international law or *jus cogens*. The Vienna Convention on the Law of Treaties defines these norms as those "accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted". Oft cited examples are the prohibitions of slavery, genocide, aggression and crimes against humanity.[202] Contracting out of *jus cogens* is prohibited and any treaty that conflicts with *jus cogens* is void, Article 53 of the VCLT: "A treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm of general international law". In addition, Article 64 provides: "If a new peremptory norm of general international law emerges, any existing treaty which is in conflict with that norm becomes void and terminates". States or international organisations for that matter cannot contract out of it in their bilateral relationships. For further discussion see for example; R Smith, Textbook on International Human Rights, (3rd Ed), OUP, 2007, 7.

[203] R. Brown, 'Kadi v. Council of the European Union and Commission of the European Communities: Executive Power and Judicial Supervision at European Level' (2006) E.H.R.L.R. 456-469; cf C Tomushat, (2006) 42 C.M.L. Rev. 537-551.

[204] Andrea Bianchi, Human Rights and the Magic of *Jus Cogens*, 2008, European Journal of International Law, E.J.I.L. 2008, 19(3), 491-508.

[205] Chapter VII UN Charter deals with: Action with respect to threats to the peace, breaches of the peace, and acts of aggression.

[206] Article 24(2) UN Charter states that the UN must act in accordance with the Purposes and Principles of the United Nations, one of which is the respect for human rights.

cogens' as arrangements were in place to allow for humanitarian relief[207]. She does feel they might have had a made a more persuasive legal argument in asserting the lack of any forms of '*judicial review'* which was contrary all international human rights instruments[208]. This, she argues, is because they form part of the category of peremptory norms from which there can be some restriction but not total derogation and therefore may be part of '*jus cogens'*[209]. Bianchi states that regardless of their final outcome and the somewhat convoluted reasoning, what is important is that as an international tribunal it has considered judicial scrutiny of Security Council resolutions on the basis of *jus cogens* norms, this qualifies as constituting an international public order of sorts[210]. Ultimately perhaps the concept of '*jus cogens'* is, as Ian Brownlie observed, the vehicle that remains in the garage[211].

5.4 ECJ Grand Chamber

Kadi and Al Barakaat appealed the CFI decision and the case was heard before the Grand Chamber of the ECJ in September 2008. The ECJ accepted that the EU had to perform a balancing act between achieving its legitimate aims and the rights of an individual (or entity). They agreed that under the present Regulation of imposing freezing orders there was no need to provide either appellant with prior warning of the seizure, or allow them a right to be heard, prior to being placed on the list, as this, they said, could frustrate the very intention of the action[212]. As to the CFI decision on '*jus cogens'* the ECJ was critical of the lower Courts reasoning in the matter, but decided this was an irrelevant issue as the ECJ was capable of reviewing the UNSC sanctions when seen, not as an international agreement, but as being

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[207] Almquist, A Human Rights Critique of European Judicial Review': counter-terrorism sanctions' (2008) ICLQ 57(2), 303-331.

[208] Article 8 of the Universal Declaration of Human Rights (UDHR): right to an effective remedy, Article 14 of the International Covenant on Civil and Political Rights (ICCPR), rightof access to court, Article 2 of the ICCPR, right to remedies.

[209] Article 2, paragraph 3(ICCPR) of the Covenant requires a State party to the Covenant to provide remedies for any violation of the provisions of the Covenant. This clause is not mentioned in the list of non-derogating provisions but constitutes a treaty obligation inherent in the Covenant as a whole. Even if a State party, during a state of emergency, and to the extent that such measures are strictly required by the exigencies of the situation, may introduce adjustments to the practical functioning of its procedures governing judicial or other remedies, the State party must comply with the fundamental obligation, under Article 2, paragraph 3, of the Covenant to provide a remedy that is effective. The UN Human Rights Committee which is assigned to interpret the meaning and scope of ICCPR rights, has stated that '*a core of these rights must be protected under all circumstances'.*

[210] Andrea Bianchi, *Assessing the effectiveness of the UN Security Council's anti-terrorism measures: the quest for legitimacy and cohesion*. E.J.I.L. 2006, 17(5), 881-919.

[211] Ian Brownlie, Discussion Statement, in A. Cassesse and J. Weiler, (Eds.), *Change and Stability in International Law-making:* European University Institute, Berlin, 1988, 110.

[212] Kadi Ibid, 377.

part of EU law via the relevant regulations, so in effect they were not reviewing the SC but their own EU law as a separate legal system[213].

In light of the actual circumstances surrounding the inclusion of the appellants' names in the list of persons and entities covered by the restrictive measures contained in Annex I to the contested regulation, the *'rights of the defence'*, in particular the right to be heard and for an effective judicial review of those rights, the court felt were patently not respected[214]. Whilst it may have been necessary to act without their prior knowledge, they should have been told the grounds for their inclusion and allowed a judicial remedy as soon as was practicable, and this was not the case. The court felt that according to previous EU case law, the principle for an effective judicial protection is a '*general principle'* of Community law, stemming from the '*constitutional conditions'* common to the Member States, which has been enshrined in Arts 6[215] and 13[216] of the ECHR[217].

The AG, Poiares Maduro, argued that it would be wrong to conclude that, once the Community is bound by a rule of international law, the Community Courts must bow to that rule with complete acquiescence and apply it unconditionally in the Community legal order. The relationship between international law and the Community legal order is governed by the Community legal order itself, and international law can permeate that legal order only under the conditions set by the constitutional principles of the Community.[218]

The AG could see nothing in the EU and EC treaties that would absolve measures implementing UN Security Council resolutions from the fundamental rights guarantees of the Community legal order. The AG was furthermore not persuaded by the argument of the EU institutions and the United Kingdom (relying on *Behrami*[219]) that, in similar situations, even the European Court of Human Rights would not exercise jurisdiction. According to the AG, It is certainly correct to say that, in ensuring the observance of fundamental rights within the

[213] Ibid 342.
[214] Ibid 344.
[215] Article 6 ECHR, Which relates to the Right to fair trial.
[216] Article 13 provides for the right for an effective remedy before national authorities for violations of rights under the Convention. The inability to obtain a remedy before a national court for an infringement of a Convention right is thus a free-standing and separately actionable infringement of the Convention.
[217] Kadi v Council of the European Union (C-402/05) 344.
[218] Case C-402/05 Kadi v. Council and Comm'n, Opinion of Advocate General Poiares Maduro (16 Jan.2008), para. 24 (footnote omitted). Accessed 19 March 2011.
[219] See Behrami and Behrami v. France (C:71412/01) and Saramati v. France, Germany and Norway (C: 78166/01).

Community, the Court of Justice draws inspiration from the case-law of the European Court of Human Rights. None the less, there remain important differences between the two courts. The task of the European Court of Human Rights is to ensure the observance of the commitments entered into by the Contracting States under the Convention. Although the purpose of the Convention is the maintenance and further realisation of human rights and fundamental freedoms of the individual, it is designed to operate primarily as an interstate agreement which creates obligations between the Contracting Parties at the international level. This is illustrated by the Convention's inter-governmental enforcement mechanism. The EC Treaty, by contrast, has founded an autonomous legal order, within which States as well as individuals have immediate rights and obligations. The duty of the Court of Justice is to act as the constitutional court of the municipal legal order that is the Community. The European Court of Human Rights and the Court of Justice are therefore unique as regards their jurisdiction *ratione personae* and regards the relationship of their legal system with signatory states seen as creating obligations in public international law.

The AG proceeded to review the applicant's human rights claim on the merits, finding that there is no reason for any sort of circumscribed review,[220] and concluded that his right to be heard by EU institutions and his right to effective judicial review were infringed by the impugned regulation, taking into account the lack of a genuine and effective mechanism of judicial control by an independent tribunal at the UN level.[221] On appeal, the ECJ agreed entirely with the main strands of the AG's reasoning.[222] It first held that the Community is based on the rule of law, inasmuch as neither its Member states nor its institutions can avoid review of the conformity of their acts with the basic *constitutional charter*, the EC Treaty, which established a complete system of legal remedies and procedures designed to enable the Court of Justice to review the legality of acts of the member states. Therefore obligations imposed by an international agreement cannot have the effect of prejudicing the *constitutional* principles of the EC Treaty, which include the principle that all Community acts must respect fundamental rights, that respect constituting a condition of their lawfulness which it is for the Court to review in the framework of the complete system of legal remedies established by the Treaty.[223] The ECJ further noted that international law in no way prohibits

[220] *Ibid.* paras. 44-46.
[221] *Ibid.* paras. 54-55.
[222] Joined Cases C-402/05 P & C-415/05 P, Kadi & Al Barakaat Int'l Found. v. Council and Comm'n, Judgment, (Sept. 3, 2008)
[223] *Ibid.* at para. 285

the judicial review of domestic measures implementing a state's international obligations, including obligations stemming from Chapter VII resolutions of the Security Council.[224] The Court thus concluded that the review by the Court of the validity of any Community measure in the light of fundamental rights must be considered to be the expression, in a community based on the rule of law, of a constitutional guarantee stemming from the EC Treaty as an autonomous legal system which is not to be prejudiced by an international agreement.

For the AG and the ECJ, the EU legal order is not just autonomous, but also domestic, municipal, and, most importantly, *constitutional*.[225] According to the AG and the ECJ, it is Community law that determines how international law operates within it, not the other way around. For them, the annulment of a regulation implementing a Security Council resolution and violating fundamental rights is a purely domestic affair, just as it would be for a United States court to review the implementation of a statute against the Constitution. This is a familiar debate. For most international lawyers, EU law might not be "just" regional international law, and it is certainly to a large degree self-contained. But it still remains a derivative of international law, if for no other reason because its founding instruments are *treaties* concluded between *states*.[226]

In *Kadi*, the AG concluded his opinion by discussing the lack of judicial review at the UN level:

> Had there been a genuine and effective mechanism of judicial control by an independent tribunal at the level of the United Nations, then this might have released the Community from the obligation to provide for judicial control of implementing measures that apply within the Community legal order. However, no such mechanism currently exists. As the Commission and the Council themselves have stressed in their pleadings, the decision whether or not to remove a person from the United Nations sanctions list remains within the full discretion of the Sanctions Committee a diplomatic organ. In those circumstances, it must be held that the right to judicial review by an independent tribunal has not been secured at the level of the United

[224] *Ibid.* at paras. 298-99.
[225] *See* Comment by Andreas Paulus, in *Can the Security Council Displace Human Rights Treaties? (Al-Jedda, Part 2*) at: Opino Juris Blog, online at www.opiniojuris.org, accessed 3 Jan 2012.
[226] *See, e.g.*, Trevor Hartley, *International Law and the Law of the European Union –A Reassessment*, 72 Brit. Y.B. Int'L L.1, 2–3 (2001); Bruno Simma & Dirk Pulkowski, *Of Planets and the Universe: Self-contained Regimes in International Law*, 17 EUR. J. INT'L L. 483, 516 (2006); Alain Pellet, *Les fondements juridiques internationaux du droit communautaire*, 5 Collected Courses of the Academy of European Law 193, 249 (1994)

> Nations. As a consequence, the Community institutions cannot dispense with proper judicial review proceedings when implementing the Security Council resolutions in question within the Community legal order.[227]

In his opinion and that accepted by the Court Mr Kadi's claim was well founded and the regulation was annulled.

Following this landmark decision, the Commission attempted to amend the regulations to comply with the Courts ruling. On 28 November 2008, the Commission adopted Regulation (EC) No 1190/2008 amending for the 101st time, Regulation No 881/2002. The effect was that Mr Kadi remained on the sanction list and he therefore made a further complaint to the ECJ. Following a lengthy judgment by the ECJ on 2 September 2010, the main Court again upheld Mr Kadi's claim that his right to be heard by a competent tribunal and seek a suitable remedy had been denied. The Court dismissed the Commission's attempts to amend the regulation and once again annulled it. The Court stated in its findings that it was apparent from the examination of the second plea that the contested regulation was adopted without furnishing any real safeguard which would enable Mr Kadi to put his case to the competent authorities, in a situation in which the restriction of his property rights must be regarded as significant, having regard to the general application and duration of the freezing measures to which he is subject. The appeal from this case is currently before the Grand Chamber and a final decision is pending.

5.5 Concluding comments on the Kadi case

In On 5 October 2012, the Security Council removed Mr Kadi from the UN list, 'after concluding in its consideration of the delisting request submitted by this individual through the Ombudsperson that he should no longer we maintained on the list[228]'. A week later, the EU followed suit and finally removed Mr Kadi off its own list as well[229]. According to Larik the fact that it took close to eleven years to resolve this issue is perhaps more of a cause for critical reflection on the effectiveness of multilevel governance than a reason for

[227] Case C-402/05 P, Kadi v. Council and Comm'n, Opinion of Advocate General Poiares Maduro, para. 54 (Jan. 16, 2008), <http://curia.europa.eu/ jcms/jcms/j_6/home> Accessed 3 Jan 2012.
[228] SC/10785/2012 full text available at; http://www.un.org/News/Press/docs//2012/sc10785.doc.htm, assessed 1 December 2012.
[229] Commission Implementing Regulation (EU) No 933/2012 of 11 October 2012 amending for the 180th time Council Regulation (EC) No 881/2002 imposing certain specific restrictive measures directed against certain persons and entities associated with the Al Qaida network, full version available at; http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2012:278:0011:01:EN:HTML, assessed 18 December 2012

elation. Furthermore, neither is the fact, on its own, of the EU being compliant with international obligations a joyful occasion, nor is that of the UN finding a solution on its own terms. The UN appears to have diffused the situation by simply removing Mr Kadi rather than a thorough examination in a judicial fashion the processes involved[230].

The Kadi case raises many important legal issues[231]particular to the protection of the individual against the State. This more proactive stance taken by the ECJ can be viewed as extending human rights within the EU.[232]Professor Tridimas suggested that the ECJ's commitment to the protection of fundamental rights was to be applauded, but that as regards the exercise of finding a balance between the overriding interests of public security and the rights of the individual it marked the beginning rather than the end of the inquiry[233].

The *Kadi* case is perhaps a yardstick of just how far Europe is prepared to act in deference to this type of international law making. One drawback is although much has been discussed on the issue through the proceeding there is still no codification of *jus cogens* within international law, even though there is a wealth of material written about it.[234] However perhaps Kadi confirms that the Security Council does not enjoy limitless power, it should operate within the rule of law and the principles of its own charter to uphold and promote human rights.[235]

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[230] Joris Larik, Kadi Delisted, a cause for celebration? European Law Blog, 30 October 2012 at; http://europeanlawblog.eu/?p=1192, assessed 4 March 2013.

[231] For example, Rory Brown, Case Comment, *Kadi v Council of the European Union and Commission of the European Communities: executive power and judicial supervision at European level*, E.H.R.L.R. 2006, 4, 456: Giacinto Cananea, Case Comment, *'Return to the due process of law'*: *The European Union and the fight against terrorism*, E.L. Rev. 2007, 32(6), 896: Bothe also supports this view that the right to judicial review is a fundamental right: Michael Bothe, '*Security Council's targeted sanctions against presumed terrorists': the need to comply with human rights standards* Journal of International Criminal Justice 2008, 6(3), 541.

[232] Tawhida Ahmed & Israel De Jesus Butler, *The 'European Union and human rights'*; *an international law perspective* E.J.I.L. 2006, 17(4), 771.

[233] Professor Takis Tridimas, *Terrorism and the ECJ*: *Empowerment and democracy in the EC legal order* (2009) 34 EL Rev 103, 126.

[234]See for example, L. Hannikainen, *Peremptory Norms (jus cogens) in International Law; Historical Developments, Criterea, Present Status*, (Lakimieslition Kustannus/Finnish Lawyers' Publishing Company, Helsinki, 1988); G Gaja, '*Jus cogens beyond the Vienna Convention*' (1981) 172 Recueil des Cours 271;

[235] See S. Lamb, *Legal Limits to United Nations Security Council P*ower in GS Goodwin-Gill, and S Talmon, (Eds.), *The reality of International Law, Essays in Honour of Ian Brownlie*: OUP, Oxford, 1999, 261; K Zemanek, '*Is the Security Council the sole Judge of its Own Legality*?' in E Yapo and T Boumeda (Eds), Liber Amicorum Judge Mohammed Bedjaoui (Kluwer Law International, The Hague, 1999) 629.

In this respect as Cananea suggests only judicial review will provide the proper test for evaluating measures that collide not only with property, but also with human dignity[236]. Bothe[237] supports this argument by stating that the right to a remedy is a 'fundamental human right'. It applies, first of all, to the protection of the individual against the state. This proactive stance taken by the ECJ can only be seen as extending human rights not only within the EU but within the international plane as well.[238]

6 Brief background to the ECtHR

The European Court of Human Rights is an international court set up in 1959 by the Council of Europe[239]. It rules on individual or State applications alleging violations of the civil and political rights set out in the European Convention on Human Rights[240]. Since 1998 it has sat in Strasbourg as a full-time court and individuals can apply to it directly. In almost fifty years the Court has delivered more than 10,000 judgments. These are binding on the countries concerned and have led governments to alter their legislation and administrative practice in a wide range of areas. The Court's case-law makes the Convention a powerful living instrument for meeting new challenges and consolidating the rule of law and democracy in Europe.

6.1 The Behrami case

A starting point purely for this study is the *Behrami* case. In *Behrami*[241] the ECtHR had received a complaint regarding the actions and inaction of members of an international security force ("KFOR") that had been deployed in Kosovo pursuant to Security Council Resolution 1244(1999) following the breakup of the Balkans. This action had led the complainants to believe that there was a breach of their rights, under the ECHR, by signatories of that Convention in complying with their commitments under the UN resolutions. When the case came before the ECtHR, the Grand Chamber, it ultimately held

[236] Giacinto Della Cananea, European Law Review, 2007, Case Comment, *Return to the due process of law: the European Union and the fight against terrorism*, E.L. Rev. 2007, 32(6), 896-90.
[237] Michael Bothe, Legal Journals Index, *Security Council's targeted sanctions against presumed terrorists: the need to comply with human rights standards*, Journal of International Criminal Justice, J.I.C.J. 2008, 6(3), 541-555
[238] Tawhida Ahmed & Israel De Jesus Butler, *The European Union and human rights: an international law perspective*, E.J.I.L. 2006, 17(4), 771-801.
[239] The Council of Europe http://www.coe.int/ accessed 15 March 2012.
[240] The European Convention on Human rights http://www.echr.coe.int/nr/rdonlyres/d5cc24a7-dc13-4318-b457-5c9014916d7a/0/englishanglais.pdf, accessed 4 April 2012.
[241] Behrami v France ; Saramati v France, Germany and Norway (2007) 45 EHRR SE 85.

that the applications were not admissible on the ground that the Court was not competent *ratione personae*. This was because the individual respondents were to be treated as part of KFOR[242] and KFOR was exercising powers 'lawfully delegated under Chapter VII of the Charter by the UN Security Council'. In these circumstances the actions of the respondents were 'directly attributable to the UN, an organisation of universal jurisdiction fulfilling its imperative collective security objective'.[243] Under the heading "Relevant Law and Practice" the Court in *Behrami* made the following observations about article 103 of the UN Charter,

> 'The ICJ (International Court of Justice[244]) considers article 103 to mean that the Charter obligations of UN member states prevail over conflicting obligations from another international treaty, regardless of whether the latter treaty was concluded before or after the UN Charter or was only a regional arrangement'.

It should be noted at this point that the ICJ has also found Article 25 to mean that UN member states' obligations under a UNSC Resolution prevail over obligations arising under any other international agreement.*[245]*

Later in its judgment, the Grand Chamber under article 30 of the Vienna Convention on the Law of Treaties they found that treaties were to be interpreted in accordance with the Convention subject to article 103 of the UN Charter.[246] The ECtHR went on to make the following observations about the Convention and the UN acting under Chapter VII of its Charter, The Court first observed that nine of the 12 original signatory parties to the Convention in 1950 had been members of the UN since 1945, that the great majority of the Contracting Parties joined the UN before they signed the Convention and that all Contracting Parties were members of the UN. Indeed, one of the aims of the Convention was the collective enforcement of rights in the Universal Declaration of Human Rights of the General

[242] KFOR is the NATO led Kosovo Force which derives its mandate from UNSCR 1244 of 10 June 1999 and the Military-Technical Agreement (MTA) between NATO and the Federal Republic of Yugoslavia and Serbia. KFOR is operated under Chapter VII of the UN Charter and, as such, is a peace enforcement operation, which is more generally referred to as a peace support operation. Initially, KFOR's mandate was to deter renewed hostility and threats against Kosovo by Yugoslav and Serb forces, establish a secure environment and ensure public safety and order, demilitarize the Kosovo Liberation Army, support the international humanitarian effort and coordinate with and support the international civil presence. For further information see; http://www.aco.nato.int/kfor.aspx

[243] Behrami v France ; Saramati v France, Germany and Norway (2007) 45 EHRR SE 85, para 151.

[244] For a full discussion on the role and purpose of the ICJ including suggested amendments see chapter 8.

[245] Behrami v France ; Saramati v France, Germany and Norway (2007) 45 EHRR SE 85, para 27.

[246] Behrami v France ; Saramati v France, Germany and Norway (2007) 45 EHRR SE 85, para 35.

Assembly of the UN. More generally, the Convention had to be interpreted in the light of any relevant rules and principles of international law applicable in relations between its Contracting Parties. Lord Hope stated in the *HM Treasury v Others*[247] said that the ECtHR had made a very strong statement in Behrami[248]where it said that the Convention cannot be interpreted in a manner which would subject the acts and omissions of contracting parties which are covered by UNSCRs to the scrutiny of the court, as to do so would be to interfere with the fulfilment of the UN's key mission to secure international peace and security. Although the European Convention on Human Rights was a leading human rights instrument, article 103 of the UN charter clearly supersedes it and leaves no room for manoeuvre by its reference to '*any other international agreement'*.

6.2 Al Jedda & Nada cases at the ECtHR

The ECtHR has since altered its position considerably to the question of UN supremacy through article 103. This can be seen in the cases of *Al Jedda*, and *Nada* with Milanovic suggesting that the former represents a significant developments with regard to issues such as the dual attribution of conduct to states and to international organizations, norm conflict, the relationship between the ECHR and general international law, and the ability or inability of UN Security Council decisions to displace human rights treaties by virtue of Article 103 of the UN Charter[249]. In the case of *Nada v Switzerland* this is perhaps the next stage in the development of exerting human rights norms over UN Charter obligations and raises several interesting issues although ultimately the case has yet to be decided by the Grand Chamber of the European Court of human Rights (ECtHR).

6.3 Background to the Al Jedda case

The applicant was detained by British forces who were occupying Southern Iraq in 2004. He was detained not under the law of occupation, nor on a criminal charge in pre-trial detention, but under the authority to detain preventively which was arguably granted to the US and UK by the UN Security Council in Resolution 1546.[250] He claimed that his detention was

[247] HM Treasury v A (others) (Lord Bingham) para 74.
[248] Behrami v France ; Saramati v France, Germany and Norway (2007) 45 EHRR SE 85 , para 149
[249] Marko Milanovic, *The European Journal of International Law* Vol. 23 no. 1, 2012
[250] Acting under Ch VII of the Charter, the Council decided 'that the multinational force shall have the *authority to take all necessary measures* to contribute to the maintenance of security and stability in Iraq *in accordance with the letters annexed to this resolution* expressing, inter alia, the Iraqi request for the continued presence of the multinational force and setting out its tasks, including by preventing and deterring terrorism.' The letters

unlawful under Article 5 ECHR, which, absent any derogation, does not allow for such preventive security detention, without judicial review. The UK had argued that under Article 103 of the UN Charter, the grant of a detention authority in Resolution 1546 prevailed over the contrary prohibition in Article 5 ECHR. During the protracted judicial proceedings through the various Courts there were a number of significant developments. Firstly the imposition of targeted sanctions against suspected terrorists by the Security Council under resolutions 1267 and 1373 and the reliance by states on Article 103 to preclude any human rights-based challenge to these sanctions.

Secondly the ECtHR decided the *Behrami and Saramati* case,[251] which in many ways mirrored *Al-Jedda*. Specifically, Mr Saramati was detained by international forces in Kosovo (KFOR) on preventive grounds, on the basis of purported detention authority in Security Council resolution 1244, which was argued to prevail over Article 5 ECHR. In its decision, however, the Court did not reach the Article 103 issue, holding instead that the actions of KFOR troops were not attributable to individual troop contributing states, but to the UN, as by authorizing the military mission in Kosovo the UN Security Council supposedly exercised 'ultimate authority and control' over it. The *Behrami* ruling had been heavily criticized,[252] again not merely for its end result, but for its numerous methodological flaws and its failure either to apply or at least openly to disagree with the effective control rule codified in the draft Article 5, and now draft Article 7, of the International Law Commission's (ILC) Draft Articles on the Responsibility of International Organizations (DARIO)[253], as finally adopted by the ILC on second reading on 3 June 2011.[254] Indeed, the ILC itself considered and explicitly rejected *Behrami*.[255] Most importantly, from a law of international responsibility

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referred to were sent to the Council by the then U.S. Secretary of State, Mr Colin Powell, and the interim Prime Minister of Iraq, Dr. Ayad Allawi. Mr Powell's letter outlined the duties of the MNF forces, stating that these 'will include combat operations against members of [insurgent] groups, *internment where this is necessary for imperative reasons of security*, and the continued search for and securing of weapons that threaten Iraq's security': UN Doc S/RES/1546, para. 10.

[251] App. Nos. 71412/01 & 78166/01, *Behrami and Behrami v. France, Saramati v. France, Germany and Norway*C] (dec.), Judgment, 2 May 2007.

[252] See for example; Sari, '*Jurisdiction and International Responsibility in Peace Support Operations: The Behrami and Saramati Cases*', 8 *Human Rts L Rev* (2008) 151; Mujezinovic Larsen, '*Attribution of Conduct in Peace Operations: The "Ultimate Authority and Control" Test'*, 19 *EJIL* (2008) 509; Milanovic and Papic, *As Bad As It Gets: The European Court of Human Rights, Behrami and Saramati Decision and General International Law*, 58 *ICLQ* (2009) 267.

[253] Draft Articles on Responsibility of International Organisations adopted by the International Law Commission on 3 June 2011, http://untreaty.un.org/ilc/texts/instruments/english/draft%20articles/9_11_2011.pdf, accessed 3 April 2012.

[254] UN Doc. A/CN.4/L.778.

[255] See G. Gaja, UN Doc. A/CN.4/610, 27, *Seventh Report on Responsibility of International Organizations*, Mar. 2009, 10–12.

standpoint, *Behrami* did not even consider the possibility that attribution of conduct may be *dual* or even *multiple*, i.e., that the same action or inaction can be attributable both to a member state or states and to an international organization. Indeed, when it comes to troop contingents or other military assets that states put at the disposal of international organizations, for example in peacekeeping missions, the default rule of attribution continues to apply: being organs of the state, the conduct of the troops will be attributable to the state, under Article 4 of the ILC Articles on State Responsibility. The same conduct may also be attributable to an organization, but it requires more than mere attribution to the organization for that conduct to *cease* being attributable to state, and this is the scenario which the DARIO effective control criterion was meant to encapsulate.

When *Al-Jedda* came before the House of Lords [65] it raised three major issues. First, after *Behrami* was decided, the UK government started arguing that the acts of its soldiers in Iraq, which were after resolution 1511 (2003) there under Security Council authorization, were *not* to be attributed to the UK, but to the UN. Accordingly, if the acts of UK soldiers in Iraq were not attributable to the UK, then the UK could not have exercised Article 1 jurisdiction over Mr. Al-Jedda. Secondly, the Lords had to deal with Mr Al-Jedda's argument that Article 103 was inapplicable, since resolution 1546 merely *authorized* the UK to detain people considered to be security threats, but did not *oblige* it to do so, while Article 103 accords pre-eminence only to *obligations* under the Charter. Lord Bingham did not find that argument persuasive. He considered that both state practice and academic opinion clearly favoured the applicability of Article 103 to Council authorizations, because the importance of maintaining peace and security in the world could scarcely be exaggerated, and since authorizations have effectively replaced the system of collective security that was envisaged by the drafters.[256]
Thirdly, finding that there was indeed a norm conflict between resolution 1546 on one hand and Article 5 ECHR on the other, Lord Bingham held that pursuant to Article 103 that conflict had to be resolved in favour of the resolution, and that its prohibition of preventative detention was accordingly displaced or qualified. However, Article 5 could be displaced only to the absolute minimum necessary so that 'the detainee's rights under article 5 are not infringed to any greater extent than is inherent in such detention'.[257]

6.4 Al-Jedda Before the ECtHR

[256] *R (Al-Jedda) v. Secretary of State for Defence* [2007] UKHL 58, [2008] 1 AC 332 (hereinafter *Al-Jedda HL*) paras 33–34 (Lord Bingham). See also *Al-Jedda HL*,, at para. 115 (Lord Rodger, concurring)
[257] *Al-Jedda H* (para. 39) (Lord Bingham).

In Strasbourg, the applicant emphasized the ECtHR's own qualification of the ECHR as the 'constitutional instrument of European public order',[258] and the ECHR as a self-contained regime, which could give way to other norms only through derogation. Not only was resolution 1546 an *authorization,* rather than an *obligation,* under the Charter, which would render Article 103 inapplicable, but even if it did apply the Security Council could not just extinguish the ECHR on a whim. The applicant urged the Court to rely on the ECJ's decision in *Kadi,* and say that UNSC resolutions could not affect human rights protections under the ECHR as far as the ECHR itself is concerned, or rely on its own decision in *Bosphorus*[259] and say that UNSC resolutions could potentially displace the ECHR only if the UN provided equivalent protection of human rights, which it obviously does not in this particular instance. Both of these avenues, in effect, asked the Court to declare the ECHR to be independent of the UN Charter and general international law, requiring it to fragment the international legal order for the benefit of human rights.

On the issue of supremacy of the UN Charter under article 103, the apparent norm conflict between the ECHR and resolution 1546, the Court held that as follows:

> In its approach to the interpretation of Resolution 1546, the Court has reference to the considerations set out in paragraph 76 above. In addition, the Court must have regard to the purposes for which the United Nations was created. As well as the purpose of maintaining international peace and security, set out in the first subparagraph of Article 1 of the United Nations Charter, the third subparagraph provides that the United Nations was established to "achieve international cooperation in . . . promoting and encouraging respect for human rights and fundamental freedoms". Article 24(2) of the Charter requires the Security Council, in discharging its duties with respect to its primary responsibility for the maintenance of international peace and security, to "act in accordance with the Purposes and Principles of the United Nations". Against this background, the Court considers that, in interpreting its resolutions, there must be a presumption that the Security Council does not intend to impose any obligation on Member States to breach fundamental principles of human rights. In the event of any ambiguity in the terms of a Security Council Resolution, the Court must therefore choose the interpretation which is most in harmony with the requirements of the

[258] See for example; *Behrami*, para. 145.
[259] App. No. 45036/98, *Bosphorus Hava Yolları Turizm ve Ticaret Anonim Şirketi v. Ireland* [GC], Judgment, 30 June 2005.

> Convention and which avoids any conflict of its obligations. In the light of the United Nations' important role in promoting and encouraging respect for human rights, it is to be expected that clear and explicit language would be used were the Security Council to intend States to take particular measures which would conflict with their obligations under international human rights law.[260]

This is an important development from the ECtHR, here the Court has laid down a clear statement for interpreting UNSC resolutions that could go a long way in providing a meaningful human rights check on the Security Council. Sir Nigel Rodley argued for precisely such an interpretative rule in his separate opinion in the *Sayadi* case before the Human Rights Committee[261]. Since Article 5 therefore continued to apply in full force, the Court found that Mr. Al-Jedda was unlawfully detained.[262]

6.5 Case Implications and conclusion

This ruling is important in as far as is gives a clear indication that the ECtHR is prepared to join the growing calls for accountability of unbridled UNSC power and respect for the rule of law. Like that of the ECJ in *Kadi* and the UK supreme Court decision in Ahmed (& others) the ECtHR has recognised that if there is a conflict between the need for peace and security and upholding human rights, then at the very least it will require the UN to produce its Resolutions in clear and unambiguous language if it wishes remove human rights from them. This would require its members to take political responsibility for their actions. However the Court did not examine the fundamental question of whether resolution 1546 *could have* prevailed over the ECHR even if it *did* satisfy the presumption. Perhaps that argument can be taken as implicitly accepted, so that the UNSC could displace the ECHR, the 'constitutional instrument of European public order', of which the ECtHR is the ultimate guardian. The Court also did not address the issue of whether authorizations are capable of being covered by Article 103.[263] Therefore the issue regarding Article 103 remains unresolved on this issue, whilst bearing in mind the strong presumption that the Court has created. *Al-Jedda* is still likely to produce a ripple effect in all situations involving UNSC sanctions that may have an adverse impact on human rights, however, it is yet to be seen how far the ECtHR and other European domestic Courts will be prepared to take the *Al-Jedda* presumption.

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[260] *Al-Jedda GC* para. 102.
[261] *Nabil Sayadi and Patricia Vinck v. Belgium*, CCPR/C/94/D/1472/2006, 29 Dec. 2008,
[262] *Al-Jedda GC*, The Court awarded the applicant €25,000 in damages, para. 114.
[263] See, in that regard, the dissenting opinion by Judge Poalelungi.

6.6 Nada v Switzerland[264]

Another interesting case following on from Al Jedda in the UN Charter Article 103 and human rights compliance debate within Europe is that of Nada v. Switzerland. The application was lodged with the European Court of Human Rights on 19 February 2008. It was communicated to the Swiss authorities, with questions from the Court, on 12 March 2009. The Governments of France and the United Kingdom were authorized by the Chamber to intervene as third parties (Article 36 and 2 of the Convention).On 30 September 2010, the Chamber to which the case had been allocated relinquished jurisdiction in favour of the Grand Chamber.

5.6.1 Facts of the case

This case concerns an Italian national resident in the Italian enclave of Campione in Switzerland, who was placed at Switzerland's request on a terrorist suspect list by the UNSCR 1267 Committee, and subjected to targeted sanctions. Among these sanctions is a travel ban that Switzerland implemented through its domestic legal mechanisms. Accordingly, the applicant was denied permission to transit through Switzerland from Campione, thus rendering him unable to move even to other parts of Italy, let alone anywhere else, essentially confining him to the 1.6 square km of Campione. Mr. Nada complains that the Swiss travel ban violates his rights under Arts: 5 (personal liberty), and 8 (private life), of the ECHR.

5.6.2 Reasoned Outcomes

Prior to the final decision on the case in September 2012 many commentators speculated regarding what the ECtHR would do in these circumstances. It was thought that the Court could make several possible decisions which may affect dramatically the supremacy of UNSC Resolutions over regional human rights protection.

5.6.3 Non applicability

The simplest course would be for the Court could to say that Mr. Nada's ECHR rights are not even engaged. Alternatively, it could balance these rights away and justify this with Switzerland's need to comply with its obligations under the UN Charter.

[264] Nada v. Switzerland Application no. 10593/08 ECHR

6.7 Reading down of charter or ECHR obligations

The Court could have tried 'reading down' the relevant UNSC resolutions instead. As per Al Jedda, where the Court could employ an interpretative presumption to the effect that the UNSC should be presumed not to have intended to violate the basic rights of individuals in the absence of explicit language to the contrary; it is only if such language existed, that Art. 103 could be said to override contrary norms in human rights treaties. However, on the facts of *Nada*, it is unlikely that such a presumption can be employed with much effect. The UNSC resolutions are quite clear that member states have to take very specific measures against individuals listed by the Sanctions Committee. Only an exceptionally strong presumption that would require something like a 'notwithstanding clause' in UNSC resolutions (e.g.'states are required to apply these measures notwithstanding their obligations under applicable human rights treaties'), could do the necessary work, and it is doubtful whether courts generally, or herein, the European Court specifically, have both the gumption and the political legitimacy to devise it.

6.8 Asserting ECHR as a separate legal order concluding remarks

A third possible avenue of norm conflict avoidance would be an assertion, in a milder or more overt form, that the ECHR is an independent legal order beholden to no other, one that does not accept the supremacy claim in Art 103 of the Charter. As per the ECJ in *Kadi* when it asserted that EU law and EU guarantees of fundamental rights were independent from the UN Charter and international law. The Swiss government has already gone some way in indicating its intention to disobey the instructions of the Security Council in relation to individual sanctions when, in March 2010, the Swiss government informed the Security Council that it has been instructed by the Swiss Parliament to *disobey* the Security Council's instructions and cancel targeted sanctions against specific individuals on the basis of Swiss guarantees of human rights[265]. Finally, the Court might take the simplest route and accept that the UNSC has the power to override the ECHR pursuant to Art. 103 of the Charter, however given the ruling in *Al Jedda*, this seems remote.

6.9 Case Outcome

[265] See page 6 of letter of the attempted intervention in Nada by the CoE Assembly; <http://assembly.coe.int/CommitteeDocs/2010/07122010_blacklists.pdf> accessed 4 April 2012.

The applicant successfully argued, relying on the Al-Nashif v. Bulgaria[266] case that the competing interests of the protection of sources and information critical to national security, on the one hand, and the right to an effective remedy, on the other, could be reconciled through a specially adapted procedure. In the present case, however, no such procedure had been available, either before United Nations bodies or before the domestic authorities.

The Court observed that Article 13 guarantees under the ECHR the availability at national level of a remedy by which to complain about a breach of the Convention rights and freedoms. Therefore, although Contracting States are afforded some discretion as to the manner in which they conform to their obligations under this provision, there must be a domestic remedy allowing the competent national authority both to deal with the substance of the relevant Convention complaint and to grant appropriate relief. The scope of the obligation under Article 13 varies depending on the nature of the applicant's complaint under the Convention, but the remedy must in any event be "effective" in practice as well as in law, in particular in the sense that its exercise must not be unjustifiably hindered by the acts or omissions of the authorities of the State.

The Court would further refered to the finding of the ECJ that;

> "it is not a consequence of the principles governing the international legal order under the United Nations that any judicial review of the internal lawfulness of the contested regulation in the light of fundamental freedoms is excluded by virtue of the fact that that measure is intended to give effect to a resolution of the Security Council adopted under Chapter VII of the Charter of the United Nations[267]"

The Court was of the opinion that the same reasoning must be applied, *mutatis mutandis*, to the present case, more specifically to the review by the Swiss authorities of the conformity of the Taliban Ordinance with the Convention. It further found that there was nothing in the Security Council resolutions to prevent the Swiss authorities from introducing mechanisms to verify the measures taken at national level pursuant to those resolutions. Court found that the applicant did not have any effective means of obtaining the removal of his name from the list annexed to the Taliban Ordinance and therefore no remedy in respect of the Convention violations that he alleged. The Court dismissed the preliminary objection raised by the

[266] ECtHR case no. 50963/99, 20 June 2002.
[267] see the Kadi judgment, para 299

Government as to the non-exhaustion of domestic remedies and, ruling on the merits, found that there has been a violation of Article 13 taken together with Article 8 and awarded damages.

6.10 Concluding Remarks re Nada

According to Theinal[268], fundamentally, the Court considered that Switzerland had violated the applicant's rights under Article 8 (respect for private and family life and for the home) by failing to take measures in the applicant's favour within the constraints of the sanction's regime or ancillary to the sanctions regime. Thus, Switzerland ought to have alerted Italy (as the applicant's state of nationality) and, via Italy, the Security Council's Sanctions Committee, to the fact that there was no reasonable suspicion against the applicant. Switzerland was also required 'to adapt the sanctions regime to the applicant's individual situation' (para 196 of Nada) and to mitigate the effects of the sanctions on the applicant. This it had not done to any sufficient extent.

Having found a violation on this approach, the Court left undecided whether Switzerland was also obliged flatly to disobey the Security Council. It specifically left open whether the UN Charter did or did not trump the Convention. This general question under Article 103 of the Charter remains unanswered. The Court avoided the issue by concentrating on violations committed just outside the sanctions regime.

Regarding the right to an effective remedy (Article 13 ECHR), the problem was that the Swiss Federal Court had declined to strike down any of the UN sanctions as contrary to Swiss human rights law. In this regard, the Court followed Kadi in holding that UN law did not prevent judicial review of the domestic implementation of sanctions. In effect, it appears that the European Court has not taken a Kadi approach in itself, but has mandated domestic courts to take it in domestic law. If so, this is quite interesting. The Court appears to have overcome its own international limitations by putting itself in the shoes of a domestic judge, through a review of that judge's jurisdiction under Article 13. As always only time will tell what the future implications on human rights law will be and their implication for UN targeted sanctions.

[268] Tobias Theinal, The Netherlands School of Human rights Research, Invisible College Blog, article on Nada V Switzerland, September 12 2012, at: http://invisiblecollege.weblog.leidenuniv.nl/2012/09/12/nada-v-switzerland-the-ecthr-does-not-pu/, accessed 18 March 2013.

7 Concluding remarks on European regional courts

According to De Burca[269] the different approaches taken by the various European judicial courts to the question of UN Security Council accountability exhibit a fascinating range of responses to the question of the authority of international law within Europe's regional legal order. Ultimately and perhaps surprisingly, it was the ECtHR that initially displayed the greatest deference to the UN Security Council and an unwillingness to question Security Council measures by reference to European human rights norms. The ECJ has since adopted a strongly pluralist approach, treating the UN system and the EU system as separate and parallel regimes, without any privileged status being accorded to UN Charter obligations or UN Security Council measures within EC law. De Burca argues it would have been better to adopted a soft-constitutionalist approach which would seek to mediate the relationship between the norms of the different legal systems, and which would have perhaps involved the ECJ more in the process of shaping customary international law, however from a rights based approach, the ECJ has shown that the UN cannot simply act in a manner not in keeping with its own principles. The recent decision from the ECtHR in *Al Jedda* and the potential outcome in *Nada* has shown that there is a growing consensus in Europe's regional courts, at least, that protection of fundamental rights should be given more prominence in trying to balance both them and peace and security. The lack of an effective judicial procedure at the UN level only compounds this growing sentiment and is at the very heart of this thesis.

8 Other jurisdictions – the Canadian case of Abdelrazik

Mr Abdelrazik is a dual Canadian-Sudanese citizen who came to Canada as a refugee. Abdelrazik knew Ahmed Ressam, the so-called "Millenium Bomber," who was convicted in the US for plotting to blow up the Los Angeles Airport[270]. Abdelrazik was not implicated in the plot and voluntarily testified against Ressam.

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[269] Grainne de Burca "*The European Court of Justice and the International Legal Order After Kadi",* Harvard Law Journal Volume 51, No 1, winter 2010.

[270] United States v. Ressam, 474 F.3d 597 (9th Cir. 2007) Ressam was convicted of (1) conspiring to commit an act of terrorism transcending national boundaries, in violation of 18 U.S.C. 2332b(a)(1)(B); (2) conspiring to place an explosive in proximity to a terminal, in violation of 18 U.S.C. § 33; (3) possession of false identification documents in connection with a crime of violence, in violation of 18U.S.C. § 1028(a)(4) and (b)(3)(B); (4) use of a fictitious name for admission into the United States, in violation of 18 U.S.C. § 1546; (5) making false statements on a customs declaration, in violation of 18 U.S.C.§ 1001; (6) smuggling explosives into the United States contrary to law,in violation of 18 U.S.C. § 545; (7) transportation of explosives, in violation of 18 U.S.C. §§ 842(a)(3)(A) and 844(a); (8) possession of an unregistered destructive device, in violation of 26 U.S.C. §§ 5841, 5861(d), and 5871; and (9) carrying an explosive during the commission of a felony, in violation of 18 U.S.C. § 844(h)(2).

In March 2003, Abdelrazik travelled to Sudan whilst there he was arrested on suspicion of involvement in terrorism. Initially When Abdelrazik went to Sudan, he had a valid Canadian passport, which would have still been valid had he returned at the time of his arrest, but it expired during his period of detention. In 2004 he tried to return to Canada and whilst the Canadian authorities initially assisted him in purchasing a plane ticket, the airline refused to fly him back, as was now on the US "no-fly" list. In 2005, the Sudanese government issued a letter exonerating Abdelrazik, however the US government listed him on its US Department of Treasury as having high-level affiliations with al Qaeda and his name was added to the 1267 list.

Inclusion on the 1267 list as previously discussed carries with it a number of sanctions, including asset freezing and a global travel prohibition. Canada had instigated regulations under its own UN Act[271] implementing the UNSC resolution 1267[272], which, among other things, prohibits anybody from providing financial assistance to a person on the list. Abdelrazik sought help from the Canadian government in being taken off the list, and with apparent support from both CSIS and the Royal Canadian Mounted Police. Canada initially requested his removal from the list. The request was denied in 2007 with no reasons being given.

In April 2008, six years after his initial visit to Sudan, the Canadian Government obtained clearance from the 1267 Committee to provide expenses for Abdelrazik's basic necessities.
Whilst in Sudan, Abdelrazik had applied for a renewal of his Canadian passport. The initial application had been made in 2005, to which he received no response. He tried again in 2008, after the Canadian government publicly announced that it would provide emergency travel documents for him when he was cleared to travel. In August 2008, Abdelrazik was able to secure a flight back to Canada, but the Canadian government refused to issue a passport. He was notified that the reason was based on national security.

8.1 Abdelrazik v Minister of Foreign Affairs [2009] FC 580

In April 2009, Abdelrazik was again scheduled to leave on another confirmed flight, but Canada again denied his request for travel documents. Abdelrazik received the denial, with no explanation. Abdelrazik's continued to remain in Sudan with the Canadian government

[271] The United Nations (Canadian) Act 1985
[272] S/RES/1267 (1999)

blocking his return. This led to considerable publicity within Canada which has a strong human rights culture. In 2009, the case came before the Federal Court[273]. Citing Section 6(1) of the Canadian Charter of Rights and Freedoms[274], which expressly provides, among other things, that Canadian citizens have a right to enter Canada, the Court ordered the Canadian government to issue emergency travel documents and to help Abdelrazik arrange travel back to Canada. Justice Zinn said;

> I add my name to those who view the 1267 Committee regime as a denial of basic legal remedies and as untenable under the principles of international human rights. There is nothing in the listing or de-listing procedure that recognises the principles of natural justice or that provides for basic procedural fairness. … It can hardly be said that the 1267 Committee process meets the requirement of independence and impartiality when, as appears may be the case involving Mr Abdelrazik, the nation requesting the listing is one of the members of the body that decides whether to list or, equally as important, to de-list a person. The accuser is also the judge.[275]

8.2 The Canadian Federal Court decision

Justice Zinn found that Mr Abdelrazik's right to return had been denied to him because he was listed and that under that listing, the facilitating of his return by purchasing an airline ticket, even by others, was precluded by the ban on transferring assets to a listed entity. Therefore his right under the Canadian Charter of Rights and Freedoms, to return to his own country had been breached. He held that the remedy to which Mr Abdelrazik was entitled required the Canadian Government to take immediate action so that he be returned to Canada, which he was allowed to do.

After his returned to Canada Abdelrazik's remained on the 1267 list, this prohibited him from employment, and even those offering him financial assistance for living expenses faced the possibility of criminal prosecution. Abdelrazik was the only Canadian on the UN's list. Although Canada supported Abdelrazik's request early on, it later took a "neutral" position on his removal from the list. In December 2011, eight-and-a-half years after he first went to Sudan, Abdelrazik was removed from the 1267 list. He was not told why he was removed.

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[273] Abdelrazik v The Minister of Foreign Affairs [2009] FC 580.
[274] CONSTITUTION ACT, 1982 (80) 1982, c. 11 (U.K.), Schedule B, Part I, CANADIAN CHARTER OF RIGHTS AND FREEDOMS
[275] Abdelrazik v The Minister of Foreign Affairs [2009] FC 580 para 51.

8.3 Concluding remarks

The "case" against Abdelrazik highlights the problems of not having an effective international judicial review process. His case appears to have been based on nothing more than flimsy associational allegations. He knew somebody who was criminally prosecuted for terrorism, but he was not implicated, and he voluntarily helped the US government in its prosecution case. Abdelrazik's liberty had been deprived based on alleged associations with other people who were not even, themselves, ever proven to have any association with terrorism before a competent judicial body.

Eight-and-a-half years later, Abdelrazik is back in Canada, free, and removed from at least one of the blacklists, although he reportedly remains on the US lists. Canada has not charged him with any criminal offenses, further supporting an implication that there is no proof of any wrongdoing as Mary Duffy commented;

There is no equitable solution in this situation. Turning the life of an innocent man into a protracted nightmare with no proof of wrongdoing does nothing to keep anybody safer from terrorism. What it does is harm the credibility of those governments and entities that claim to be champions of human rights[276].

8.4 The USA case: Kindhearts[277]

Not surprisingly the US has been one of the main driving forces for the instigation of UN sanctions post 9/11. There are few cases involving individuals or entities successfully challenging the US government on their imposition within the USA. One case worth mentioning for the reasoning of the Court is that of the Charity 'Kindhearts' discussed below.

8.5 Case background

KindHearts v. US Treasury.[278]The US Treasury had frozen its funds and seized all KindHearts' assets in February 2006, pending an investigation into whether the group provided material support to Hamas, which has been designated as a terrorist organization by

[276] Maureen Duffy, *The Nightmare of Terror-Related Blacklisting*, JURIST (On line forum), University of Pittsburgh School of Law, 16 Feb. 2012.
[277] KindHearts for Charitable Humanitarian Development Inc v Timothy Geithner, Case 3.08c v 02400, 18 August 2009
[278] KindHearts for Charitable and Humanitarian Development, Inc. v Timothy Geithner, et al, Case No. 3:08CV2400 was initially filed in the United States in the District Court for the Northern District of Ohio Western Division on Oct. 9, 2008

the United States government. To date KindHearts has not been designated. Its efforts to defend itself have been hampered by lack of specific allegations to respond to and lack of deadlines or procedures for Treasury reconsideration. The Treasury has denied KindHearts' requests to have its funds released for aid through other organizations.

8.6 Court Decisions to date

In August 2009 the United States District Court for the Northern District of Ohio upheld a challenge to a provisional determination under President Bush's Executive Order No. 13224[279] of 24 September 2001 by the Office of Foreign Assets Control of the US Treasury Department that *KindHearts* was a specially designated global terrorist organisation on the ground that blocking access to its assets pending investigation was contrary to its Fourth Amendment right to be secure against unreasonable search and seizure[280]. The judge held that the Office's handling of *KindHearts'* request for access to blocked assets to pay counsel's fees had been arbitrary and capricious without individualised consideration of the facts of the case.

On May 10, 2010, based on his August 2009 ruling that the government violated KindHearts for Charitable Humanitarian Development's (KindHearts) Fourth and Fifth amendment rights in shutting it down "pending investigation" (into whether it should be listed as a supporter of terrorism), Judge James Carr of the Federal District Court for the Northern District of Ohio ordered new proceedings to remedy the lack of adequate notice and opportunity to defend and freezing of assets without a warrant.

8.7 Case comment

It is, of course, worth noting that the President's EO was issued before the Security Council adopted SCR 1373(2001) and therefore was not a direct challenge to the UN authority under its targeted sanctions policy, however there are similarities. The main question before the court was not whether or not KindHearts supported Hamas and was therefore a designated supporter of terrorism, but whether the legal process used in the process of freezing their assets was constitutional. Kindhearts is significant because it appears to be the first time in US case law that the taking of kind of action has been successful in the United States. Of

[279] US Dept of State: Executive Order No. 13224, 23 September 2001, at: http://www.state.gov/j/ct/rls/other/des/122570.htm, accessed 10 April 2012
[280] The USA Constitution; http://www.gpo.gov/fdsys/pkg/GPO-CONAN-1992/html/GPO-CONAN-1992-10-5.htm, accessed 10 April 2012.

course, the decision of the Court was not made under reference to an international human rights instrument such as the European Convention, however it does show that the USA's own constitution requires a high degree of 'due process'. In an earlier case of *Diggs v Shultz,*[281] the US Federal Court of Appeals had held that it lacked the authority to compel the President to comply with a UNSCR obligation regarding sanctions against Rhodesia, as subsequent legislation by Congress (which plainly contravened the SCR) had equal status to the obligations under the treaty. Whilst this authority is dated, it does appear to show that where necessary, even the USA can decide not to follow the will of the Security Council.

9 Concluding Remarks

Eight sanctions regimes imposed by the Security Council acting under Chapter VII of the UN Charter, have been established with the purpose, inter alia, of designating individuals and "entities" (as defined non-uniformly under the different regimes) as targets of sanctions. Usually, these sanctions encompass a travel ban, an assets freeze and an arms embargo. In five of the eight sanctions regimes, lists have been established with the names of designated individuals and entities. Of the various sanctions regimes, those established against individuals and entities belonging to, or associated with, Al-Qaida and/or the Taliban (Resolution 1267 of 15 October 1999 and following resolutions) are of particular interest to this study (see Chapter 3).[282]

This sanctions regime also differs from the others in that, after the Taliban were removed from power in Afghanistan, there is no particular link between the targeted individuals and entities and a specific country. Targeted individuals and entities are not informed prior to their being listed, and accordingly do not have an opportunity to prevent their inclusion in a list by demonstrating that such an inclusion is unjustified under the terms of the respective Security Council resolution(s). There exist different de-listing procedures under the various sanctions regimes (as explained in chapter 3), but in no case are individuals or entities allowed directly to petition the respective Security Council committee for de-listing. Individuals or entities are not granted a hearing by the Council or a committee. The de-listing procedures presently being in force place great emphasis on the States particularly involved ("the original designating government" which proposed the listing, and "the petitioned

[281] Diggs v Shultz, 470 F.2d 461 (DC Cir 1972) see also Whitney v Robertson 124 US 190 (1888).
[282] For an overview of the work and procedure of the 1267 Committee, see Eric Rosand, *The SecurityCouncil's Efforts to Monitor the Implementation of Al Qaeda/Taliban Sanctions*, in American Journal of International Law, vol. 98 (2004), 745-763, at 747-753.

government" to which a petition for de-listing was submitted by an individual or entity) resolving the matter by negotiation with the Ombudsperson acting as an impartial go between. Whether the respective committee, or the Security Council itself, grants a de-listing request is entirely within the committee's or the Council's discretion; no legal rules exist that would oblige the committee or the Council to grant a request if specific conditions are met.

As has been shown there are few effective opportunities provided for a listed individual or entity to challenge a listing before a national court or tribunal, as UN Member States are obliged, in accordance with Article 103 of the UN Charter, to comply with resolutions made by the Security Council under Chapter VII of the UN Charter. Even if exceptionally, a domestic or regional legal order did allow an individual directly to take legal action against a Security Council resolution as per *Kadi*, the United Nations enjoys absolute immunity from every form of legal proceedings before national courts and authorities, as provided for in Article 105, paragraph 1, of the UN Charter, the General Convention on the Privileges and Immunities of the United Nations (General Assembly Resolution 1/22A of 13 February 1946) and other agreements.[283]

On the basis of constitutional and statutory rules and practices common to most States and regions of the world, and as guaranteed by universal and regional human rights instruments, rights of due process, or "fair trial rights", have generally been recognized in international law as protecting individuals from arbitrary or unfair treatment by State organs[284]. Generally recognized 'due process' rights include the right of every person to be heard before an individual measure which would affect him or her adversely is taken, and the right of a person claiming a violation of his or her rights and freedoms by a State organ to an effective remedy before an impartial tribunal or authority. These rights can be considered as part of the corpus of customary international law, and are also protected by general principles of law in the meaning of the Statute to the International Court of Justice[285].

[283] See Michael Gerster & Dirk Rotenberg, Commentary on Art. 105 of the UN Charter, in Bruno Simma et al. (eds.), *The Charter of the United Nations: A Commentary*, 2nd ed., vol. II, Oxford University Press, Oxford 2002, 1314-1324, at 1318.
[284] See Raimo Lahti, 'Article 11', in Gudmundur Alfredsson & Asbjørn Eide (eds.), *The Universal Declaration of Human Rights*, The Hague: Martinus Nijhoff, 1999, 239-249, at 239.
[285] See Article 38, paragraph 1, lit. c, of Statute of the ICJ

The UN Security Council being a principal organ of the United Nations[286], a legal obligation of the Council to comply with standards of due process, or "fair and clear procedures", for the benefit of individuals and "entities" presupposes that the United Nations, as a subject of international law, is bound by respective rules of international law[287]. In accordance with the established system of sources of international law, the United Nations could be obliged to observe such standards by virtue of international treaties (including the UN Charter as the constitution of the United Nations), customary international law, or general principles of law recognized by the members of the international community[288].

As the United Nations is not a party in its own right to any universal or regional treaty for the protection of human rights, it could be argued that it is not directly bound by the respective treaty provisions guaranteeing rights of due process. The United Nations being an autonomous subject of international law, it does not follow from the fact alone that its Member States have ratified certain human rights instruments that an according obligation of the Organization has come into existence[289].

However, the emergence of "supranational" organizations of the type of the European Community has changed this traditional picture. The law of the European Community (European Union) has made both human rights treaty obligations of EC (EU) Member States as well as "constitutional traditions common to the Member States" sources of Community (Union) law from which direct obligations of the Community (Union) itself arise. There is good reason to expect that the law of other international organizations, including the United

[286] For full details see UN Website at; http://www.un.org/en/mainbodies/index.shtml, accessed March 2012

[287] For commentaries on Arts. 8 and 10, see Erik Møse, 'Article 8', and Lauri Lehtimaja & Matti Pellonpää, 'Article 10', *ibid*187-207 and 223-237, respectively. For an analysis of the *travaux préparatoires* of the Declaration's fair trial provisions, see David Weissbrodt, *The Right to a Fair Trial under the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights*, Martinus Nijhoff: The Hague, 2001, 5-33.

[288] See Christian Tomuschat, *Human Rights: Between Idealism and Realism*, OUP: Oxford, 2003, 90. See also Karel Wellens, *Remedies against international organisations*, Cambridge: Cambridge University Press, 2002, at 89: "[T]he lack of an appropriate remedial mechanism within the international organisation to carry out the legality test, let alone upon a private individual's request, leaves him or her without direct means of protection", and Gerster & Rotenberg. p. 1318: "*As long as alternative means of legal recourse* (internal appeal procedures; arbitration) *are at the claimant's disposal*, neither Art. 10 of theUniversal Declaration of Human Rights nor constitutional guarantees by States compel national courts to deny [the UN] immunity and to start legal proceedings against the UN" (emphasis added).

[289]For the interpretation of Article 14 of the ICCPR by the Human Rights Committee see Dominic McGoldrick, *The Human Rights Committee: Its Role in the Development of the International Covenant on Civil and Political Rights*, Oxford: Clarendon Press, 1994, pp. 395-458; and Alfred de Zayas, 'The United Nations and the Guarantees of a Fair Trial in the ICCPR and the Convention Against Torture', in David Weissbrodt & Rüdiger Wolfrum (eds.), *The Right to a Fair Trial*, Berlin: Springer, 1998, pp. 669-696. For an analysis of the *travaux préparatoires* of the ICCPR's fair trial provisions, see Weissbrodt, 35-91.

Nations, should be influenced by that development as they, too, begin to engage in "supranational" law making with a direct effect on individuals[290].

At present, customary international law does not provide for sufficiently clear rules which would oblige international (intergovernmental) organizations to observe standards of due process vis-à-vis individuals. To the extent that rules of customary law exist with respect to such standards, they address obligations of States in the sphere of domestic law, and not obligations of international organizations. However, a trend can be perceived widening the scope of customary law in regard to due process to include direct "governmental" action of international organizations vis-à-vis individuals[291]. To this development, the law of the European Community (European Union) has strongly contributed. The due process rights of individuals recognized as general principles of law are also applicable to international organizations as subjects of international law when they exercise "governmental" authority over individuals[292].

The development of international human rights law, to which the work of the United Nations has decisively contributed, has given grounds for legitimate expectations that the UN itself, when its action has a direct impact on the rights and freedoms of an individual, observes standards of due process, or fair and clear procedures, on which the person concerned can rely. This finding is in line with essential notions of the concept of international personality[293].

It was already anticipated by the drafters of the Universal Declaration of Human Rights that the respect for and observance of human rights and fundamental freedoms called for by the Declaration would not only be demanded from States but also from other bodies and

[290] See Iain Cameron, *The ECHR, Due Process and UN Security Council Counter-Terrorism Sanctions*, Report prepared for the Council of Europe, 6 February 2006, at p. 2: "The effects of blacklisting [a person] may be sufficiently serious to be the 'determination of a criminal charge', triggering the application of Article 6 [of the European Convention of Human Rights] in its entirety."

[291] This expression is taken from the ILC Articles on Responsibility of States for Internationally Wrongful Acts (Annex to UN General Assembly Res. 56/83 of 12 December 2001), Arts. 5, 6, 7 and 9.

[292] See for example See also Carol Harlow, *Access to Justice as a Human Right: The European Convention and the European Union*, in Philip Alston (ed.), *The European Union and Human Rights*, University Press: Oxford, 1999, 187-213.

[293] See for example Richard Clayton & Hugh Tomlinson, *The Law of Human Rights*, Oxford: Oxford University Press, 2000, at p. 550.

institutions exercising elements of governmental authority, including international organizations[294].

Notwithstanding the growing legal importance, for the United Nations, of human rights treaty law on the one hand and constitutional values and traditions common to UN Member States on the other hand and the extension of rules of customary international law and general principles of law about due process to international organizations, the principal source of human rights obligations of the United Nations is the UN Charter. All UN organs are bound to comply with the rules of the Charter as the constitution of the United Nations. Today, the Charter obliges the organs of the United Nations, when exercising the functions assigned to them, to respect human rights and fundamental freedoms of individuals to the greatest possible extent[295].

The human rights and fundamental freedoms which the organs of the United Nations are obliged to respect by virtue of the UN Charter include rights of due process, or "fair and clear procedures", which must be guaranteed whenever the Organization is taking action that adversely affects, or has the potential of adversely affecting, the rights and freedoms of individuals[296].

When imposing sanctions on individuals in accordance with Chapter VII of the UN Charter, the Security Council must strive for discharging its principal duty to maintain or restore international peace and security while, at the same time, respecting the human rights and fundamental freedoms of targeted individuals to the greatest possible extent[297]. The United

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[294] See for example Sarah Joseph et al., *The International Covenant on Civil and Political Rights*, 2nd ed., Oxford University Press, 2004, 394

[295] See August Reinisch, *Securing the Accountability of International Organizations*, in *Global Governance*, vol. 7 (2001), 131-149, at 137 *et seq.*, 141-143, where he is arguing that the UN is bound "transitively" by international human rights standards as a result and to the extent that its members are bound ("functional treaty succession by international organizations to the position of their member states").

[296] See Frédéric Mégret & Florian Hoffmann, *The UN as a Human Rights Violator? Some Reflections on the United Nations Changing Human Rights Responsibilities*, in Human Rights Quarterly, vol. 25 (2003), 314-342, at 314

[297] See Dan Sarooshi, *International Organizations and Their Exercise of Sovereign Powers*: Oxford University Press, Oxford, 2005, at 16: "A domestic public or administrative law principle is arguably only applicable to the exercise by an international organization of governmental power where this principle can be identified as applying to the particular power within the domestic public and administrative law systems of a number of member States, since only then can it be considered as a general principle of law and thus a formal source of law applicable to international organizations". These conditions appear to be met in the case of certain due process rights of individuals. For the applicability of general principles of law in the law of international organizations See also August Reinisch, *Developing Human Rights and Humanitarian Law Accountability of the Security Council for the Imposition of Economic Sanctions*, in American Journal of International Law, vol. 95 (2001),

Nations would contradict itself if, on the one hand, it constantly admonished its Member States to respect human rights and, on the other hand, it refused to respect the same rights when relevant to its own action. As another author wrote, "[i]t is self-evident that the Organization is obliged to pursue and try to realize its own purpose."[298]

There of course a duty of the Council to balance the general and particular interests which are at stake. Every measure having a negative impact on human rights and freedoms of a particular group or category of persons must be necessary and proportionate to the aim the measure is meant to achieve[299]. While the circumstances and modalities of particular sanctions regimes may require certain adjustments or exceptions, the rights of due process, or fair and clear procedures, to be guaranteed by the Security Council in the case of sanctions imposed on individuals and "entities" under Chapter VII of the UN Charter it is suggested that it should include the following elements[300]:

(a) the right of a person or entity against whom measures have been taken to be informed about those measures by the Council, as soon as this is possible without thwarting their purpose;
(b) the right of such a person or entity to be heard by the Council, or a subsidiary body, within a reasonable time;
(c) the right of such a person or entity of being advised and represented in his or her dealings with the Council;
(d) the right of such a person or entity to an effective remedy against an individual measure before an impartial institution or body previously established.

851-872, at 869: "When the United Nations–the major promoter of human rights in the international arena–takes enforcement action, it can be legitimately held to show respect for human rights in an exemplary fashion."

[298] See Zenon Stavrinides, *Human Rights Obligations under the United Nations Charter*, in International Journal of Human Rights, vol. 3 (1999), 38;. See also Mégret & Hoffmann, supra note 296, at 317

[299] If the UN rejected such standards as being of no importance or consequence for its own action vis-à-vis individuals, it violated the legal maxim of *Venire contra factum proprium (nemini licet / nulli conceditur / non valet)*: No one is allowed to act contrary to, or inconsistent with, one's own behaviour. See Detlef Liebs, *Lateinische Rechtsregeln und Rechtssprichwörter*, 3rd ed., Munich, 1983, 216. For the relationship between this rule and the concept of estoppel, see Robert Kolb, *La bonne foi en droit international public. Contribution à l'étude des principes généraux de droit*, Paris, 2000, 357

[300] See Dan Sarooshi, International Organizations and Their Exercise of Sovereign Powers, Oxford: Oxford University Press, 2005, at p. 16: "A domestic public or administrative law principle is arguably only applicable to the exercise by an international organization of governmental power where this principle can be identified as applying to the particular power within the domestic public and administrative law systems of a number of member States, since only then can it be considered as a general principle of law and thus a formal source of law applicable to international organizations". These conditions appear to be met in the case of certain due process rights of individuals.

The following chapters will discuss in detail the available international human rights systems currently available for the individual the concept of an international judicial review mechanism and the proposal for the International Court of Justice to be given the power and function of this role when considering cases involving human rights violations at the UN level for those subjected to targeted or smart sanctions.[301]It will be shown that at present there is no satisfactory system within the international systems of protection and that domestic and regional courts are currently unable to offer 'just satisfaction' [302].

[301] For the principle of proportionality as a limit to the Security Council's discretion under Chapter VII of the UN Charter, see Nicolas Angelet, *International Law Limits to the Security Council*, in Vera Gowland-Debbas (ed.), *United Nations Sanctions and International Law*: Kluwer Law International, The Hague, 2001, 71-82, at 72-74, where she comments that judicial review of Security Council resolutions is a responsibility which could only be entrusted to the International Court of Justice. There is an extensive literature addressing this issue. See Bardo Fassbender, *'Quis judicabit? The Security Council, Its Powers and Its Legal Control* (Review Essay), in European Journal of International Law, vol. 11 (2000), 219-232; John Dugard, *Judicial Review of Sanctions*, in *United Nations Sanctions and International Law*, The Hague: KluwerLaw, 83-91.

[302] These existing sanctions regimes which target individual persons and other entities affect amongst other things, the right to property, which is protected by regional human rights treaties and today possibly also by customary international law, the freedom of movement and the freedom of association. Sanctions may also affect the right to respect for family and private life and the right to seek and to enjoy in other countries asylum from persecution. Further, the right to reputation is affected which is a (civil) right in the meaning of Art. 14, para. 1, ICCPR and Art. 6, para. 1, of the European Convention of Human Rights will be discussed throughout this study.

CHAPTER 5
INDIVIDUAL ACCESS TO THE INTERNATIONAL REMEDY SYSTEM

1 Preliminary Remarks

This chapter outlines the current functions and powers of the United Nations bodies in the field of human rights, including the availability of individual to access those bodies. It also analyses the existing international mechanisms or procedures available to individuals, including the limitations or weaknesses of these procedures and explains why there is a need for a new separate form of judicial review within the United Nations discussed later in this study. This is necessary to support the argument that a new mechanism is required that allows the individual in limited cases to be heard at the international level by a tribunal capable to give just satisfaction for violations of internationally accepted human rights norms.

Various communications procedures have been developed within the framework of the United Nations in the field of human rights. The analysis in this chapter will be centred on the procedures concerning individual communications within both Charter and treaty-based bodies, that is, the Economic and Social Council with its subsidiary bodies and Committees (including the Human Rights Council which replaced the Human Rights Commission in 2006), working in accordance with the UN Charter, resolutions and treaty provisions.

2 Applicable Human Rights Measures.

Before considering the current international human rights organisations and their role and remit, it is first necessary to narrow and highlight those international rights which the individual or entity may have had violated as a result of UNSC targeted resolutions. It will be necessary to formally identify what rights have been infringed and where those rights originate from in terms of international human rights protection.

These rights can be found in two documents, The Universal Declaration on Human Rights (UDHR) and International Covenant on Civil and Political Rights (ICCPR) both of which set out in clear terms the international standards of basic human rights protection that are applicable to this study, that is, those rights which apply to those who have had asset freezing and travel bans applied to them, specifically they are as follows:

2.1 Rights Under the Universal Declaration of Human Rights

Article 8. Everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law.

Article 10. Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him.

Article 12. No one shall be subjected to arbitrary interference with his privacy, family, home or correspondence, nor to attacks upon his honour and reputation. Everyone has the right to the protection of the law against such interference or attacks.

Article 13.(1) Everyone has the right to freedom of movement and residence within the borders of each state.(2) Everyone has the right to leave any country, including his own, and to return to his country.

Article 17.

(1) Everyone has the right to own property alone as well as in association with others.

(2) No one shall be arbitrarily deprived of his property.

2.2 Rights under the International Covenant on Civil and Political Rights:

Art 14.1 All persons shall be equal before the courts and tribunals. 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.

Art 17.1. No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation.

Art 26. All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, .colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

2.3 Status of these Rights

Although the rights outlined above were initially contained within the UDHR and the ICCPR treaty documents, they are now considered together with the International Covenant on Economic Social and Cultural Right to form an International 'bill of rights' that has over time become considered customary law, that is, it applicable to all states whether signatory or not. As one of the principles of the UN charter is respect for and promotion of human rights, it seems a fair assumption that from the Charter itself, these rights would be applicable to the UN itself.

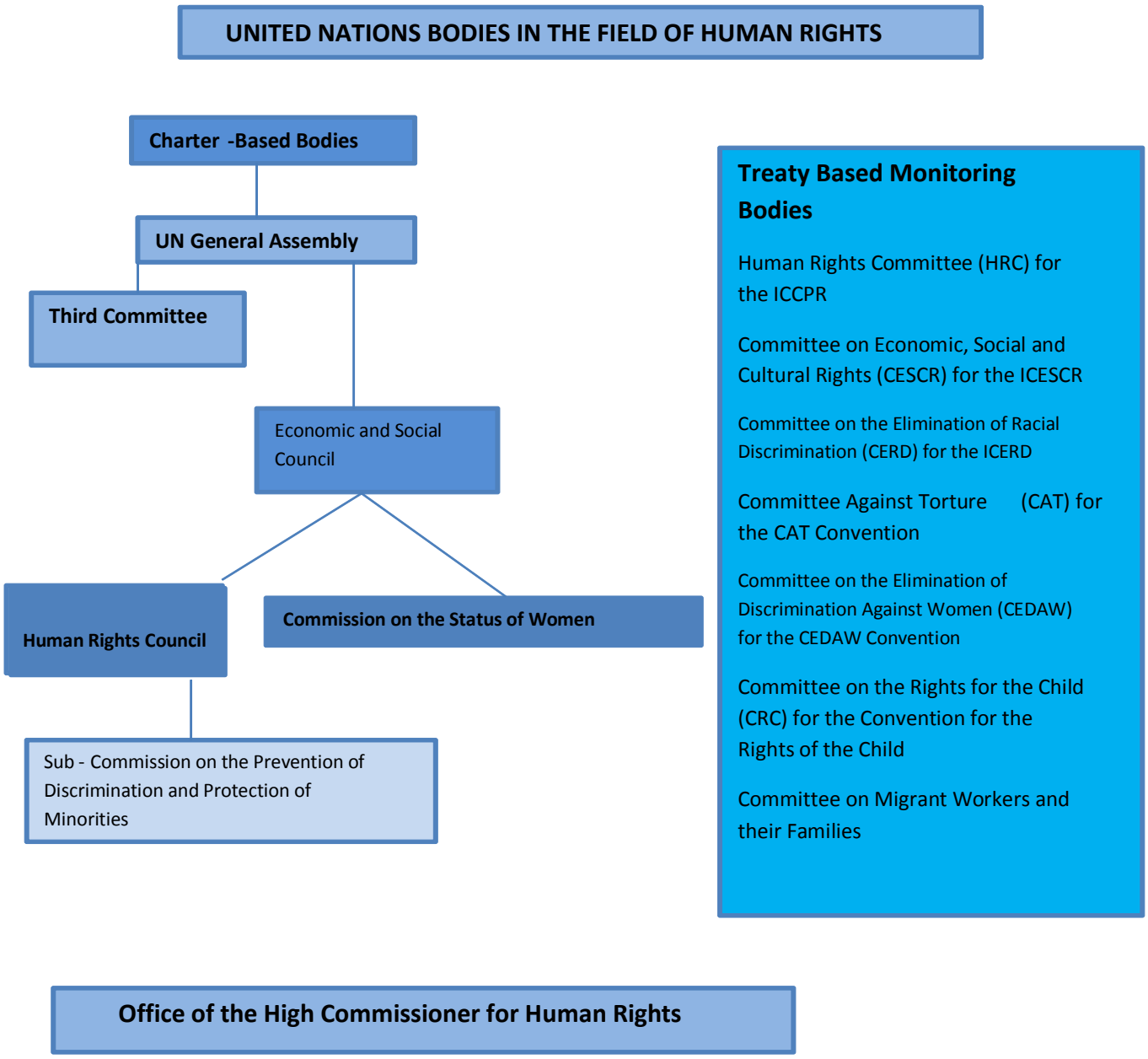
3 Overview of the United Nations Human Rights System and Treaty Based Bodies

3.1 Preliminary Remarks

A number of mechanisms[303] that grant individuals access to means of legal redress at the international level have been developed within the framework of the United Nations[304]. Anyone, be it a single individual or a group of people, may bring human rights problems to the attention of the United Nations; thousands of people around the world have done this in the past, and continue to do so. What kinds of communications on human rights can the United Nations receive? How are they dealt with and what are the procedures for handling them? How are the outcomes monitored? These are the issues that will be discussed in this chapter. To begin here is a pictorial representation of the UN's different bodies currently involved in Human Rights. A more complex diagram is to be found at Appendix 1.

[303] Despite their long existence, it was not until the last decade that these mechanisms become popular amongst individuals in any countries; partly because of the information system within the UN itself, and largely because many countries were not willing to become parties to the treaties. For example, many Arabic countries have neither signed nor ratified the treaty and others such as China have signed but not ratified it.

[304] The term United Nations used here refers to the UN itself, as by definition, the UN also includes a far wider family of other specialised agencies, e.g. ILO, Unesco, WHO.



As can be seen within the United Nations Human Rights system, there are two distinct types of bodies that can deal with communications concerning human rights problems. The first are those known as the Charter-based bodies or organs, also referred to as Charter Bodies. The second known as the Treaty-Based Bodies, also referred to as treaty-monitoring bodies or simply treaty bodies. Charter bodies function in accordance with the provisions of the United Nations Charter, which applies to all Member States. Treaty bodies, on the other hand, function according to the provisions contained within the particular treaty that establishes

them. Generally speaking, in International Law these treaties only bind the States that are parties to the treaties[305].

Individuals seeking redress for alleged abuse of their rights have limited access to the international system under four UN treaties[306]: the International Covenant on Civil and Political Rights (ICCPR) with its first Optional Protocol[307], the International Convention on the Elimination of all Forms of Racial Discrimination (ICERD),[308] the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT)[309], and the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW)310 with its Optional Protocol[311].

Under these treaties (sometimes referred to as covenants), any individual can bring a petition, complaint or communication[312] about alleged human rights violations to the respective Committees which function on the basis of the treaty provisions. These treaties are multilateral and under international law are legally binding on the signatory States[313]. According to the provisions of these treaties, any individual who is a subject of the State Party can challenge acts it allegedly commits in violation of the rights set forth in the treaties. This may be done by filing a petition with the respective Committee, however whilst the procedure may be clear there is a lack of any precedent on whether these treaties may be used against the UN itself as an international organisation. In other words none of the treaties provide a system of reviewing the actions of the United Nations Security Council as the UN is not as an entity a signatory to the treaty.

[305]See, I. Brownlie, *Principles of Public International Law*, Oxford Clarendon Press: Oxford, 1998, 10-64 for a detailed discussion on the principles surrounding international law and in particular treaty provisions.
[306] There are currently six major treaty based bodies that provide for Committees to monitor the implementation of human rights at the international level, the other two are: International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families, International Covenant on Economic, Social and Political Rights (ICESCR) and the Convention on the Rights of the Child (CRC). Although under optional Protocol Three of the CRC which came into force in February 2012, a child can now make an individual complaint to the Commission for the rights of the child (CRC), this provision is unlikely to have much effect on those subject to targeted sanctions and will not be pursued in this thesis as amongst other issues it is still not clear just what effect it will have. The other treaties do not make any provisions in their procedures to allow complaints by individuals.
[307] GA Res. 2200A (XXI), International Covenant on Civil and Political Rights', 16 December 1966, UN Doc. A/6316 (1966), *entered into force* 23 March 1976.
[308] General Assembly Resolution 2106A (XX) (1965).
[309] General Assembly Resolution 39/46 (1984).
[310] General Assembly Resolution 34/180 (1979).
[311] General Assembly Resolution A/54/4 (1999).
[312] All of the four treaties use the term "communication" and this seems to be the 'official' phrase or term accepted throughout. However, in many writings the terms "petition" and "complaint" are also used, and it is rightly so considering the very nature of the communication, which is a petition or complaint.
[313] See I. Brownlie, *(ibid n305)* 234.

4 Functions and Powers of Charter-based Bodies

By contrast Charter-based bodies do not receive or consider individual communications as viable and therefore will only be mentioned briefly.

4.1 General Assembly and the Third Committee[314]

As one of the six principal organs of the United Nations, the General Assembly is its main representative body. It contains representatives from all Member States. The General Assembly refers most human rights matters to its Third Committee, which deals with social, humanitarian and cultural matters.[315] The role of the General Assembly, prescribed in Articles 10 and 13 of the United Nations Charter, ranges from standard setting[316,] implementation and supervision of international standards[317], to providing advisory services, and hosting or participating in philosophical debates on human rights.

Amongst its functions those that are relevant to this study include[318]:

- to discuss any question relating to international peace and security and except where a dispute or solution is being discussed by the Security Council, to make recommendations on it;
- to discuss and, with the same exception as above, make recommendations on any question within the scope of the Charter or affecting the powers and functions of any organ of the United Nations;
- to initiate studies and make recommendations to promote: international political co-operation, the development and codification of international law, the realisation of human rights and fundamental freedoms for all;

[314] More detail on this including the historical analysis of the General Assembly can be read in Antonio Cassese and John Quinn's essays "The General Assembly: Historical Perspective 1945-1989" and "The General Assembly into 1990s" in Philip Alston (Ed.). *The United Nations and Human Rights*. Clarendon Paperbacks: Oxford, 1996, 23-106.
[315] S. Pritchard, N. Sharp, et al. Petitioning the CERD; individual complaints under the Racial Discrimination Convention (Human Rights Booklet No. 2). Australian Human Rights Centre, Faculty of Law, UNSW, Sydney, 1998, 6.
[316] Mainly in adoption of resolutions but also in making recommendations, *see* John Quinn in Philip Alston (ed.), *Ibid* (n 314) 65.
[317] In relation to treaty implementation the GA receives reports from the HRC, the CESCR, the CAT and the CEDAW, see OHCHR website, http://www2.ohchr.org/english/bodies/treaty/comments.htm, accessed 3 November 2012
[318] Full details of functions of UN GA can be found at the following UN website, http://www.un.org/en/ga/about/background.shtml, accessed 4 Jan 2013.

- to elect jointly with the Security Council the judges of the International Court of Justice, and on the recommendations of the Security Council, to appoint the Secretary-General.[319]

4.2 Economic and Social Council

The powers and functions of the Economic and Social Council (the ECOSOC) are detailed in Chapter X of the Charter. Like the General Assembly, the ECOSOC is a principal organ of the UN. As regards human rights in particular, according to the UN Charter, the ECOSOC may, amongst other things, "… make recommendations for the purpose of promoting respect for, and observance of, human rights and fundamental freedoms …" [Article 62 (2)]. In the field of human rights the ECOSOC has also initiated studies and prepared draft conventions for submission to the General Assembly.[320]

The founders of the United Nations foresaw an important role for the Council and gave it considerable powers in the UN Charter, *inter alia*:

- to furnish information to the Security Council and assist it upon request.[321]
- Pursuant to Article 68 of the UN Charter, ECOSOC has established a number of functional commissions[322]including a Commission (now Council) on Human Rights. In practice, the ECOSOC assigns most of its work on questions of human rights to the Council.[323]

However the Council itself does not hear or deal with individual complaints on human rights issues which it delegates to its Human Rights Council.

5 Commission on Human Rights 1947-2006

The UN Human Rights Council (UNHRC), is the primary human rights agency of the ESCOSC however it is necessary discuss briefly its predecessor the Commission on Human

[319]Article 4 Statute of the International Court of justice: http://www.icj-cij.og/documents/?p1=4&p2=2&p3=0, accessed 9 November 2011.
[320] Pritchard, Sharp & Rodrigues, Petitioning the CERD, *ibid* (n315) 7.
[321] Declan O'Donovan (1996) "The Economic and Social Council" in Philip Alston (ed), *ibid* (n 314) 107.
[322] As at the time of writing, there are *nine* functional commissions: Statistical Commission, Commission on Population and Development, Commission on Human Rights, Commission on the Status of Women, Commission on Narcotic Drugs, Commission on Crime Prevention Criminal Justice, Commission for Social Development, Commission on Science and Technology for Development and Commission on Sustainable Development. *See* Economic and Social Council, un.org/documents/ ecosoc.htm, accessed 4 June 2011.
[323] *Ibid* (n 308).

Rights (CHR), to examine if they could assist the individual wishing to seek satisfaction against UNSC targeted sanctions. Many of the procedures adopted by the current Council are the policies and procedures of the previous Commission and are therefore relevant to discuss.

When the Commission was created in 1947; it met annually for six weeks during February and March and consisted of 53 Member States. Brownlie suggests that it initially played a minimal role in the handling of human rights violations[324], however from 1967 following ESOSOC resolution 1235 (XL11) it began to make a thorough study of and report on situations revealing a consistent pattern of human rights violations. It was later considered by some as the single most important United Nations body dealing with international human rights.[325]

The commission assisted ECOSOC in coordinating human rights activities within the United Nations system. It undertook studies, made recommendations and prepared draft international instruments. It undertook tasks assigned to it by the General Assembly and ECOSOC, including the investigation of allegations concerning human rights violations. Since the 1960s, with the powers vested in it, the commission developed procedures in dealing with communications regarding violations of human rights[326].

Through the appointment of special rapporteurs, special representatives and independent experts, and through the establishment of working groups, the commission established rules and procedures for dealing with human rights situations in particular countries. It also dealt with specific types of human rights violations which affected a large number of people in a large number of countries.[327] It used three types of procedure: country procedures, thematic procedures and "1503" procedures.[328] Together, these procedures are known as the Charter-based human rights procedures.

The country procedures, also referred to as country mechanisms or mandates, were the mandates or procedures with which the Commission examined, monitored, and publicly reported on human rights situations in specific countries or territories. The thematic

[324] I. Brownlie, & G. Goodwin-Gill, (Eds), Brownlie's *Documents on Human Rights*, 6th Ed: (Oxford ,2010)13.
[325] The CHR is the main subsidiary body of the ECOSOC in the field of human rights. Mary Robinson, the UN High Commissioner for Human Rights, describes the CHR as having been "the central architect of the work of the United Nations in the field of human rights" http://www.unhchr.ch/html/menu2/2/chr.htm, accessed 6 June 2011.
[326] Regarding this role and function See Philip Alston *ibid* (n 314) 120-125,
[327] For an analysis of how this procedure operated in *See;* Philip Alston *ibid* (n 314) 126 cf. Pritchard, Sharp & Rodrigues' Petitioning the CERD, *ibid* (n 315) 7.
[328] Summary on the development of the procedures, *see* Philip Alston, *ibid* (n 314) 126 -210.

procedures were the procedures by which the commission examined, monitored, and publicly reported on major incidences of human rights violations worldwide.[329]

Country and thematic mechanisms were extra-conventional, in that they differed from treaty-based bodies as they had no formal complaints procedure. The activities of the country and thematic mechanisms are based on communications which have been received from various sources (the victims or their relatives, local information or NGOs, etc.) and which contain allegations of human rights violations. Such communications may be submitted in various forms (e.g. letters, faxes, cables, emails, etc.) and may concern individual cases as well as details of situations of widespread or systematic alleged violations of human rights. Collectively, these procedures or mechanisms were known as the Special Procedure of the Committee.[330]

The replacement of the Commission into the Council came about as a result of increasing criticism of the capability of the Commission to perform its tasks both professionally and credibly. The then UN Security General Kofi Annan said, "States have sought membership of the Commission not to strengthen human rights but to protect themselves against criticism or to criticise others for political gain. As a result a credibility deficit has developed which casts a shadow on the reputation of the United Nations system as a whole.[331]

These comments along with increasing concerns on the part of member states helped pave the way in 2006 for the replacement of the Commission by a new mechanism, the Human Rights Council (UNHRC).

5.1 United Nations Human Rights Council (UNHRC)

In Resolution 60/251332 which the General Assembly of the United Nations adopted on 15 March 2006, it identified the new Council Human Rights Council mandate which replaced the former Commission as 'promoting universal respect for the protection of all human rights and fundamental freedoms for all, without distinction of any kind and in a fair and equal

[329] *See*, Commission on Human Rights, http://www.unhchr.ch/html/menu2/2/chr.htm, *ibid (*n 315) accessed 6 June 2011.
[330] Also referred to as 'communications' under extra-conventional mechanisms, http://www.unhchr.ch/html/-menu2/8/ex_conv.htm, accessed 20 May 2010.
[331] In Larger Freedom: Towards Development, Security and Human Rights for All, reports of the Secretary-General, A/59/2005/ (21 March 2005) para 182.
[332] UN GA/Res/60/251

manner'[333]. It sets out a number of guiding principles such as universality, impartiality and non-selectivity[334]. The Council should address the situation of violations of human rights, including gross and systematic violations and make recommendations about these.[335]Through a dialogue of co-operation the Council should contribute to the prevention of human rights violations and respond promptly to human rights emergencies.[336]The new Council is still an intergovernmental organisation which now consists of 47 States as opposed to the Commissions'53. It was hoped that the Council would take on the same status of the other councils to reflect the importance of its work and the high regard the UN allegedly placed on human rights, however to date this has not yet fully occurred but is still a possibility. The Council is required to meet more regularly than its predecessor for at least ten weeks over a year in at least three different sessions; the Council may also hold further sessions at the request of one third of its members[337]. Under the new system when election is sought, States are called upon to take into account the human rights record of a potential candidate and the voluntary pledge they make regarding improving human rights protection when considering their application.[338]

However, consideration must be given as to whether this change of name is merely cosmetic or if will it bring real change and if so, why? One reason given for a more effective organisation is the inclusion of a new mechanism known as the 'Universal Periodic Review' (UPR). All Member States of the United Nations, including all elected Council members will now submit to a periodic review of their own human rights performance to be conducted by the council over a four year period.[339]This UPR is designed to 'complement not duplicate the work of the treaty bodies' although it is difficult, as Brownlie suggested, to see how this will be possible. This may be difficult as the basis for the review encompasses the UN charter and the major UN human rights documents as well as the examination of the pledges of states who submit themselves as for membership of the Council.[340]This four year cycle is supposed to ensure that States cannot avoid attention but at the same time the methodology adopted is designed to be more co-operative than confrontational, although a member State found to responsible for a gross violation could be suspended from the General Assembly.

[333] UN GA/Res/60/251, para 8
[334] Ibid para 4
[335] Ibid para 3
[336] Ibid para 5(f)
[337] Ibid para 10
[338] Ibid para 8
[339] Ibid para 5(e), 9
[340] I. Brownlie & G Goodwin-Gill (Eds), Brownlie's Documents on Human Rights 6th Ed (Oxford 2010) 14.

The Council is empowered to work with a variety of stakeholders including regional organisations, national human rights institutions and civil society.[341]The Council was given express powers to take over all the functions of the previous Commission, inter alia it is to 'review, assume and where necessary improve all mandates functions and responsibilities of the Commission'.[342]The processes of the Council still remain in large part confidential but the change of emphasis is to focus on situations rather than individual violations.[343]The former Sub-Committee on the Promotion and Protection of Human Rights has been replaced with an Advisory Committee, intended to work at the Council's discretion and be its 'think tank'. It comprises of 18 expert members elected by secret ballot based on geographical location.[344]Unlike its predecessor the Advisory Committee cannot adopt resolutions or decisions.

5.2 Critical Appraisal on the UNHRC

The Secretary General has characterised the UPR as a mechanism which has 'great potential to promote and protect human rights in the darkest corners of the world.'[345]Country review began in 2008 and by the end of 2009, 80 States had been reviewed under the procedure, however there has been no examination of the UN's own Security Council resolutions in respect to human rights compliance regardless of whether or not there could be mandate to do so. The Council continues to 'review the mandates of the Commission' so there may in the future be an opportunity for the examination of terrorism sanctions against the individual, but it is still far too early to say. The Council has reviewed it work in 2011 and reported to the General Assembly. In evaluating its report the General Assembly concluded that in its five year history the Council had developed considerably, but that it should avoid politicisation and continue to take the lead in addressing urgent human rights situations around the world.[346]It of course has the major flaw of not allowing individual petition or representation with no powers to offer an effective remedy to individual cases[347].

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[341] UN GA/Res/60/251, para 5(h)
[342] UN GA/Res/60/251, para 6
[343] UN GA/Res/60/251, para 85-109
[344] UN GA/Res/60/251, para 65-84
[345]Secretary General's video message to the opening of the fourth Council session, 12 March 2007, http://www.un.org/webcast/unhrc/archive.asp?go=004, accessed 10 March 2013.
[346] Sixty-sixth General Assembly Plenary, GA/11167, November 2011.
[347] For a discussion on the merits of this change see Peter N. Prove, *Re-commissioning the Commission of Human Rights*: UN reform and the UN human rights architecture, www.lutheranworld.org/What_We_Do/OIAHR/Issues_Events/UN_Reform-Human_Rights.pdf, accessed 17 May 2011.

Freedman argues that the Commission failed to universally protect and promote human rights, particularly by either overlooking, or being prevented from addressing, many grave human rights situations. The Commissioner has, moreover, not overcome the Commission's selectivity and bias in addressing human rights. She cites as the leading example, Israel which occupies a vastly disproportionate amount of the Council's time and resources, as occurred at the Commission. Human rights violations by Israel in the Occupied Palestinian Territories are not disputed. However, the disproportionate focus on Israel within Council proceedings and mechanisms has been deliberately calculated to deflect the spotlight from similar, and often graver, human rights violations in other regions. Both the Secretary-General, notwithstanding his encouraging rhetoric and the High Commissioner for Human Rights were unable to convince Council members to avoid such selectivity thereby giving proportionate attention to other human rights situations[348].

The founding principles also include co-operation, inclusiveness and dialogue, which aim to overcome the Commission's culture of naming, shaming and blaming. However, as has been demonstrated regarding the US, that culture is being repeated at the Council. Emphasis on co-operation has undermined the body's proceedings and mechanisms to the extent that states have refused to cooperate with the body or have used this principle to insist on weakened actions by the Council when seeking to protect or promote human rights. The Council has provided a forum for dialogue, but often that dialogue and information-sharing has been impeded by groups and blocs intent on naming, shaming and blaming rather than seeking constructive dialogue[349].

5.3 Office of the High Commissioner for Human Rights

The UN Office of the High Commissioner for Human Rights, formerly known as the Centre for Human Rights, is part of the United Nations Secretariat. The Office plays an important part in implementing the human rights programmes developed by policy organs and in servicing Charter-based and Treaty-based human rights bodies.[350] One of its main functions is to provide and disseminate information and documents relating to international human rights, and to channel communications to the appropriate bodies. The Office is based in Geneva and has a branch in the United Nations headquarters in New York. It has no power or

[348] R. Freedman, *The United Nations Human Rights Council*: A critique and early assessment, Routledge: London, 2012, 473.
[349] *Ibid* 494.
[350] Pritchard, Sharp & Rodrigues, Petitioning the CERD, *ibid* (n 315) 10.

mandate in its function to hear individual claims of human rights abuse or offer any remedy. It serves more as an administrative academic type of organisation.

6 Communications Procedures and Individual Access through International Human Rights Instruments

It should be noted that the procedures that discussed above brought before the Charter bodies do not concern individual complaints or petitions as such, the bodies have no ability to hand down a judgement or act in any form of quasi-judicial manner, rather these procedures concern human rights situations that affect a large number of people in countries over a protracted period of time.[351]Individuals or, in most cases, groups of people who claim to be the victims of alleged human rights abuses[352]may, however, participate in the examination procedures as witnesses with a consultative status.

As for individual complaint mechanisms under specific human rights treaties, there are currently four United Nations committees appointed to receive and consider individual communications concerning human rights: The Human Rights Committee (HRC) under the ICCPR, the Committee on the Elimination of Racial Discrimination (CERD), the Committee Against Torture (CAT) and the Committee on the Elimination of all Forms of Discrimination Against Women (CEDAW).

7 Treaty-based Communications Procedures

Treaty-based communications procedures are procedures for dealing with human rights complaints which have been brought before the treaty-based bodies. These bodies will then consider and decide what action should be taken on the communications. There are two types of communications: inter-state communications and individual communications. Whilst this paper will only concern itself with the systems available for the individual in the international plane it should perhaps be noted that despite three systems currently being

[351] See, *United Nations Fact Sheet No. 7* on Communications Procedures, http://www.unhchr.ch/html/menu6/2/fs7.htm, accessed 11 April 2010.

[352] The role of the NGOs is of fundamental significance. More on this, *see* Declan O'Donovan in Philip Alston (ed.), ibid (n 314) 110. To date there are 1600 NGOs having consultative status with the ECOSOC, *see* http://www.un.org/documents/ecosoc.htm, accessed 18 July 2010.

available for an interstate complaints procedure with regard to human rights violations no state had lodged a complaint as of 2007.[353]

Treaty-based bodies, also referred to as treaty bodies, are established to defend the provisions laid down in the treaty, and to monitor and supervise their implementation. This means that the rules and procedures of the treaty apply only to those States which are parties to the treaty and not to all UN member States. The treaty bodies concerned are the Human Rights Committee (the HRC) formed under the ICCPR, the Committee on the Elimination of Racial Discrimination (the CERD), the Committee Against Torture (the CAT) and the Committee on the Elimination of Discrimination Against Women (the CEDAW). None of these systems offers any form of redress to the individual nor do they have the judicial expertise to offer such a solution.

7.1 Procedure brought before The Human Rights Committee (HRC).

The HRC works in accordance with the provisions set out in the International Covenant on Civil and Political Rights (ICCPR) and its first Optional Protocol.[354] The ICCPR and its first Optional Protocol were adopted by the General Assembly in its resolutions in 1966 and entered into force on 23 March 1976.[355]

The ICCPR, along with its first Optional Protocol, is regarded as the most important international instrument for the protection of human rights.[356] This is for two reasons. Firstly, it not only sets down most, if not all, of the basic civil and political rights proclaimed in the Universal Declaration of Human Rights (part I, articles 6 to 27), but more importantly it puts those rights into a legally binding form. It should be noted however that the States that are parties to the Covenant are not automatically parties to the Optional Protocol. An act of ratification or declaration from a State is required before it becomes a Party to the Protocol. Secondly, it was the Optional Protocol which, for the first time, opened the door for

[353] H. J. Steiner & P. Alston, *International Human Rights in Context, Political, Morals* (3rd ed) OUP, Oxford 2007.
[354] The Second Optional Protocol to the ICCPR is aimed at the Abolition of the death Penalty.
[355] The first optional protocol preamble is as follows; The States Parties to the present Protocol,
Considering that in order further to achieve the purposes of the International Covenant on Civil and Political Rights (hereinafter referred to as the Covenant) and the implementation of its provisions it would be appropriate to enable the Human Rights Committee set up in part IV of the Covenant (hereinafter referred to as the Committee) to receive and consider, as provided in the present Protocol, communications from individuals claiming to be victims of violations of any of the rights set forth in the Covenant.
[356] Torkel Opsahl in Philip Alston (Ed.), *ibid* (n 314) 367.

individuals to access remedies at the international level. By 20 March 2013, although there were 114 parties to the Covenant only 35 were signatories to the Optional Protocol.[357]

Pursuant to the Covenant, the Human Rights Committee was created in September 1976 in accordance with the provisions contained in part IV (Articles 28 to 45) of the ICCPR to monitor the implementation of the Covenant. This part of the ICCPR sets out the establishment, composition, status, function and procedure of the Committee. Its two main functions are to consider reports from, and complaints against, States parties. The former is obligatory while the latter is optional.[358]

Although the HRC is not an organ of the United Nations it does utilise the services of the Office of the United Nations High Commissioner for Human Rights and submits its annual reports to the General Assembly. The HRC has five main functions: to receive and consider periodic reports from the States parties, to make general comments, to examine inter-state communications and to consider individual communications[359].

In accordance with the implications of the ICCPR, the HRC could be considered as a *quasi*-court of law for the parties in cases of alleged violations of the rights set forth in the Covenant.[360]

Thus, under this procedure, individuals are granted a *locus standi*, the right to be heard in court or other proceeding. Communications or complaints against States parties exist in two forms: inter-state communications and individual communications[361].

[357]See UN Treaty Collection ICCPR; http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-5&chapter=4&lang=en, accessed 7 May 2010.

[358] Obligatory according to Article 40 of the ICCPR; optional because it depends on the communications received. The wording of the Optional Protocol reads "…individuals …**may** submit a written communication …for consideration."

[359] Walter Kälin and Jörg Künzli. *The Law of International Human Rights Protection.* Oxford University Press; (Oxford 2009) 192.

[360] Article 45 of the ICCPR: The Committee operates like a court in the manner it considers evidence and arguments and subsequently makes 'decision' on the communications. Moreover, in practice the functions of the Committee combine judicial, administrative, supervisory and conciliatory elements.

[361] The procedure for handling inter-state communications is provided for in Article 41 of the ICCPR. States Parties can submit communications to the HRC alleging that another State party has not fulfilled its obligations under the treaty. At the time of writing, there have not been any communications submitted under this procedure.

The competence of the Committee to receive and consider individual communications is provided for in the first Optional Protocol to the Covenant (hereinafter referred to as the Protocol). The Protocol, which entered into force on the same date as the Covenant, sets out the conditions of admissibility of individual communications as well as their examination procedures. The second Protocol deals with the elimination or abolition of the death penalty within the States parties[362].

Article 1 of the Protocol stipulates that States parties must recognise the competence or ability of the HRC to receive and consider communications from individuals alleging that the State party violates the provisions of the ICCPR. Thus, the HRC cannot receive nor consider petitions or communications which originate from citizens of States that are not parties to the Protocol. This then would severely limit its general use or applicability to individuals involved in cases of targeted sanctions.

7.2 Critical Appraisal and Limitations of the HRC Procedure

It must be noted that whilst the HRC hands down judgements, it is not a true court; it is not made up of judges in the judicial sense and it cannot issue a judgments against a non-signatory state, indeed those states not signatories to the additional protocols allowing individual petitions are not involved in the process at all. The views it does expresses on the merits of individual communications have no legal force and are not binding on the State party involved even if a signatory. This is the most significant limitation of this procedure. The State party concerned is not obliged to take any notice of the steps or measures contained in the views, and the Committee has no means of enforcing them. Despite recognition and vindication of the Committee's efforts in dealing with communications, in the final analysis these have been futile, in effect, in many cases.[363]

7.3 Summary

Although the Committee plays an important role in hearing and reporting on alleged human rights violations under the ICCPR, the fact that only those states that have signed the optional protocol allows an individual to bring to the committee attention alleged individual abuse in

[362] ICCPR Second Optional Protocol to the International Covenant on Civil and Political Rights, aiming at the abolition of the death penalty. Adopted and proclaimed by General Assembly resolution 44/128 of 15 December 1989.

[363] Among others, a case concerning human rights violations in Uruguay where the Committee's views simply fell onto deaf ears. *See*, Torkel Opshal in Philip Alston's (Ed.), The United Nations and Human Rights, *Ibid* (n 314) 434-443.

the first place, that coupled with the fact that the Committee hands down a judgment without the power to make an offending state or organisation change its practice makes it less effective for the purposes of this study.

8 Other Treaty-based Communication Procedures

Other treaties have entered into force that are legally binding on States parties providing they are signatories to them; namely The International Convention on the Elimination of All Forms of Racial Discrimination (ICERD) which came into force on 21 December 1965 and took effect on 4 January 1969, the International Covenant on Economic, Social and Cultural Rights (ICESCR), which came into effect on 3 January 1976, The Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) entered into force on 3 September 1981, The Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT Convention) entered into force on 26 June 1987 and the Convention on the Rights of the Child (CRC), which came into force on 2 September 1990. Whilst these international treaties deal with human rights issues, none are relevant in the present study of individual or target sanctions and are not discussed further.

9 Conclusion

This chapter has demonstrated that the current procedures available to the individual under international law who wishes to bring a claim regarding a human rights issue are sadly lacking in any real enforcement mechanism with no ability to give effective just satisfaction that would provide a real legally binding remedy that could be pursued by an individual who wished to seek redress for inclusion on a sanctions list instigated by the UN.

The treaty bodies were not designed with that remit in mind. They do not possess the necessary quality and expertise of a court and have little experience in handing down judgements. Their membership is not made up from the judiciary but from a mixture of academics and specialists in their respective areas of competence.

Treaty bodies to date have no authority to examine the competence of the UN itself and in order to enable any such body to do so would require a new treaty signed by all members of the UN, even then should this be possible it would leave the treaty body likely to be in conflict with the UN through article 103 of the UN treaty discussed later.

The next chapter will begin to look at the proposal of an international judicial review or appeal mechanism capable of offering such a proposal within the bounds of international law. To begin with the concept of judicial review or appeal and human rights will be discussed and outlined as neither are by no means a universally accepted precept.

CHAPTER 6
JUDICIAL REVIEW AND HUMAN RIGHTS

1 Preliminary Remarks

As this study focusses on the lack of an effective judicial remedy currently available at the international level for those subjected to targeted sanctions by the United Nations it is necessary to examine at the outset the elements required for a judicial review to occur, this will be achieved from examination of various jurisdictions and deciding what constitutes a judicial review or appeal for the purposes of this thesis. Likewise there must be the same discussion surrounding what constitutes 'human rights' as this is itself a much contested issue. The starting point for this thesis is the Universal Declaration of Human Rights which has been accepted by most states and is the basis of most modern human rights documents. This last element will be considering some of the ideals and ideologies which underpin contemporary concepts of human rights throughout the world. The discussion in this chapter will be concluded with a brief explanation of what constitutes a violation of human rights. The subject of international judicial review, as a possible solution for the current problem, will be examined in detail later; this chapter will continue to use a comparative view as discussed in the methodology section of this thesis in order to obtain a wider assessment of the purpose of judicial review.

2 Judicial Review

Clive Lewis QC a barrister practising English Law, writing in the context of English common law, defined judicial review as:

> "…the process by which the courts exercise a supervisory jurisdiction [or control] over the activities of public authorities in the field of public law".[364]

This control is exercised primarily through the application for judicial review of regulations and policies made by those public authorities by individuals and entities who feel that the public authority has acted *ultra vires*. Lewis further emphasizes that judicial review jurisdiction only operates in the field of public law; and:

[364] Clive Lewis, Judicial Remedies in Public Law. (2nd Ed), London: Sweet & Maxwell, 2000, 7.

> [The] procedure is generally regarded as public law remedy. More accurately, the application for judicial review is a specialized procedure by which an applicant can seek one or more of the existing prerogative remedies which can now only be claimed by way of an application for judicial review and, in appropriate circumstances, declarations and injunctions and damages.[365]

Supperstone and Goudie, also writing in the context of English law, assert that "judicial review is the process by which the High Court exercises its supervisory jurisdiction over the proceedings and decisions of inferior courts, tribunals and other bodies or persons who carry out quasi-judicial functions or who are charged with the performance of public acts and duties."[366] In this connection, it is important to distinguish between application for judicial review and appeal, bearing in mind the suggestion of Ian McLeod that "appeal is a means of challenging a [court] decision, while [judicial] review is a means of challenging the way in which the decision was made."[367] Whilst this may be the case in UK law, it is not the case in EU law. However, it is important to distinguish between judicial review and judicial appeal, here it is explained as:

> One major practical consequence of the distinction is that in the case of an appeal the appellate body is not only being asked to say whether the decision was right or wrong, but can also generally substitute its own decision. Whereas in the context of [judicial] review, the supervisory body is not called upon to say whether it agrees with the merits of the decision, and therefore, even if it upholds the challenge, it cannot substitute its own decision, compel it to be re-made in a lawful fashion, and make an order prohibiting future illegality.[368]

In the case Chief Constable of the North Wales Police v Evans, Lord Brightman expresses himself in similar vein:

> Judicial review, as the words imply, is not an appeal from a [court] decision, but a review of the manner in which the decision was made. [It] is concerned, not with the decision, but with the decision-making process. Unless that restriction on the power of

[365] Ibid n 364, *19*
[366] Michael Supperstone, & James Goudie, (Eds.). *Judicial Review*, (Butterworths: London 1992) 24.
[367] Ian McLeod, *Judicial Review*. (Barry Rose: Chichester, 1993) 1.
[368] Ibid n 364, 28

> the court is observed, the court will, in my view, under the guise of preventing the abuse of power, be itself guilty of usurping power.[369]

A United States-oriented definition of judicial review is put forward by Tate and Jackson in the book they edited, entitled "Comparative Judicial Review and Public Policy". This book states that:

> … Judicial review refers to the ability of a court to determine the acceptability of a given law or other official action on grounds of compatibility with constitutional forms.[370]

In relation to McLeod's term "fashion", the word "forms" refers to procedural matters and the substance or matter of the law. From this perspective, judicial review can be categorized into two major types, namely procedural and substantive judicial review. In the procedural review, the object of examination or review is the "fashion", the way or the procedure by which a decision or law was issued. Thus, it concerns itself with whether or not all the necessary formalities have been met. That is why this type of review is also called formal judicial review. The procedure by which the constitutionality and legality of the substance or the subject matter of the decision or law are tested is called substantive or material judicial review.[371]

Neal Tate goes even further when he divides judicial review into five different types:

a. Constitutional and Administrative Review
b. Direct and Indirect Review
c. A Priori / A Posteriori and Abstract / Concrete Review
d. Coerciveness of Review.[372]

In the aforementioned book, co-editor Neal Tate provides comprehensive explanations of these types of review, which can be summarised as follows:

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[369] Ibid (n 366) 24.
[370] Donald Jackson, & Neal Tate, (Eds.),, *Comparative Judicial Review and Public Policy*. Greenwood Press: (Westport 1992) 4.
[371] A Bradley & K Ewing, Constitutional & Administrative law 15th Ed Pearson, (London, 2011) 67.
[372] Jackson & Tate (Eds.). (n 370*)* 4-8.

a. Constitutional review occurs when the courts are assigned to examine and to declare whether state laws, legislation and actions of government (including legislative and judicial agencies) are constitutional or unconstitutional. Administrative review occurs when the courts are assigned to examine and to declare whether the actions of government agencies (other than the courts) are legally appropriate or not.

b. Direct review is basically the same as constitutional review, while indirect review occurs where, in the process of interpretation of laws; a court considers whether or not the issuing body or legislature actually has the legislative power it claims.

c. A priori / a posteriori review is an examination procedure exercised by the courts before (a priori) or after (a posteriori) laws or actions take effect. The former is identical to abstract, the latter to concrete.

d. Coerciveness of review was introduced by William Kitchin in 1990. This has to do with the effectiveness of the procedure. At one extreme, the ability of courts to declare official laws void on grounds of unconstitutionality is very limited (like in Indonesia); at the other extreme, the power of courts is unlimited (coercive). It is therefore important to determine in which instance the power of courts exercising judicial review may be coercive and those in which it may be advisory[373].

For the purpose of the discussion in this thesis, which is mainly considering the actions of the UN Security Council, the assertion of Brewer-Carias' that judicial review is "[the] power of court to decide upon the constitutionality of legislative acts; in other words, the judicial control of the constitutionality of [all] legislation"[374]is particularly helpful.

Further detailed discussion of either procedural judicial review or the divisions mentioned above is outside the parameters of this study. This is because whilst most of the measures mentioned are primarily concerned with municipal law, this thesis will contend that they can be equally applied to both the State internally and externally and to international organisations in particular the United Nations but further discussion of the mechanics of

[373] Jackson and Tate, (*n 370*) 8.
[374] Allan Brewer-Carias, *Judicial Review in Comparative Law* , Cambridge University Press (Cambridge, 1989) 4-8.

judicial review is academic. At present there is no legal concept of judicial review for actions of the Security Council! Consequently, the focus of this thesis is grounded in establishing that there should be a system in place to allow for such action.

It should be noted for sake of completeness that not all decisions or laws that are disliked by citizens or groups of citizens, are reviewable. Three main factors are used to decide whether aggrieved persons can challenge decisions: firstly, whether or not the particular body or agency that made the decision is the appropriate body to be subject to a review procedure, secondly, assuming that the body is appropriate and subject to review, whether or not it is possible to review the particular decision or law that is subject to complaint and thirdly, whether or not the person who is submitting application for review has *locus standi* to do so. Moreover, the procedural relevance for the applicant of answers to the above questions must also be considered. Must the applicant proceed in a particular way depending on whether or not review is available? What consequences are there for the applicant's case, if, in challenging the decision in question, he or she uses a procedure deemed to be inappropriate by the court? Due to limited space, and in order to maintain a focussed discussion, these issues will not be dealt with in this thesis except in relation to the United Nations Security Council.[375]

In summary, judicial review is the procedure whereby the 'court' is able, in certain cases, with or without application, to review the legality (and constitutionality or in this case compliance with its own Charter) of legislation or decisions affecting an individual or entity made by a wide variety of bodies, ranging from internal, such as government or state institutions, ministers and officials exercising prerogative or statutory powers, and other powerful self-regulating bodies, to external, such as those rules now made by international organisations such as the United Nations.

This thesis will not consider every act or role of the United Nations but only those acts made by the Security Council that have taken on a quasi-legal significance; such as naming individuals and entities for inclusion on 'smart' or targeted' sanctions lists. The judicial

[375] For details on this subject matter, see, among others, Grahame Aldous & John Alder, *Application for judicial Review: Law and Practice of the Crown Office*, (2nd ed)., Buttersworth: London, 1998; Sue Arrowsmith, *Government Procurement and Judicial Review*, Carswell: Toronto, 1988; Stanley A. de Smith, Harry Woolf, A.P. LeSeur & Jeffrey Jowell (Eds.) *Judicial Review of Administrative Action*. (5thed)., Sweet & Maxwell London 1998; and C.T. Emery & B. Smythe *Judicial Review: legal limits of official power*. Sweet & Maxwell: London, 1988.

review aspect will consider whether the Security Council acted *ultra vires* of its own powers in taking on such a role and where pertinent, to mention within the context of this study, the compliance with human rights norms established under the UN Charter and the United Nations Universal Declaration of Human Rights.

2.1 The Notion of Judicial Review

From an historical viewpoint, the notion of judicial review emerged as a companion of the idea of the *Rechstaat* (Rule of Law), which dates back to the late nineteenth century in Europe.[376] Since then, this concept has been developed and reached its evolutionary apex shortly after World War II. From then on, despite differences in interpretation, the concept seemed to be suitable for every country in the world.

A closer examination of history helps to trace the notion of judicial review back to its origin. It was the Magna Carta, decreed by King John of England in June, 1215, which was regarded as the birth of the Rule of Law.[377] The Great Charter, as it is popularly referred to, guaranteed that citizens would be protected against arbitrary decisions and sentences - these were, up to that time, made at the Crown's discretion and considered part of its prerogative. With this Charter, the King recognised the authority of the law over his own power to govern (although retaining some of his prerogatives), and placed himself on the same footing as his subjects before the law. The Magna Carta thus established the principles of supremacy of the law and equality before the law: two main "pillars of the Rule of Law", as Dicey termed it[378]. Later on in history, the principle of the Rule of Law became an effective means of controlling the performance of governments, whose power was thus limited by the duty to guarantee the rights and freedoms of individuals and at the same time regulated by the functions and duties of the government.

In the eighteenth century, the French commentator Montesquieu introduced the doctrine of the separation of powers (Trias Politica), which requires that the three main State functions (legislative, executive and judicial) should each be exercised by different agencies. Although

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[376] See, for instance, R. Gneist, *Der Rechsstaat und die Verwaltungsgerichte in Deutschland.* 2nd ed., Darmstadt 1958: reprint and Informationen zur politischen Bildung, der Rechsstaat. published by Bundeszentralle fuer politischen Bildung Bonn (1991), particularly at 3-6 and 13-15.

[377] Rene Dassault, & Louis Borgeat, *Administrative Law: A Treatise.* Vol. 4, (2nd ed), Carswell, Student Edition, (Toronto 1990) 25-26.

[378] A.V. Dicey's "Introduction to the Study of the Law of Constitution", edited by E.C.S. Wade, 10th ed., as quoted by Dassault and Borgeat, *Id.*

the strict separation of powers has never actually occurred, the basic principles of this doctrine emphasize that every exercise of power must happen through the proper channels and must be in accordance with the law.

Basically, the legislative bodies make the laws, the executive agencies implement and perform the duty and competence prescribed by those laws, and the judicial agencies (courts) supervise or monitor the implementation of those laws and, where necessary, force the other agencies to abide by the laws if there is a violation or inconsistency.

Notwithstanding the values it upholds, the concept of the Rule of Law will remain a buried relic unless, as van Dijk asserts:

> …procedures are made available by which it is possible to control the observance by the government of the legal rules it has itself laid down. Such control of governmental action not only serves to protect the individual against the government; it serves the public interest in the maintenance of the legal order. Moreover, this control is in the interest of the government itself. The awareness that the government too is bound by the law and is subject to supervision under certain guarantees, in combination with the fact that for most legal communities this supervision will show that the government generally acts legally, strengthens confidence in the governmental apparatus and thus enhances the efficiency of the administration. [379]

One of the above-mentioned procedures is unarguably the judicial review. In accordance with van Dijk's assertion, the notion of Rule of Law is part of, or rather, derived from the principle that no one may exercise power unless that power has been granted to them by law. This premise can also be used in formulating the notion of judicial review of government acts; that is, no government can exercise power unless that power has been granted by law. Furthermore, the legality of that exercise of power must constantly be subject to a review procedure prescribed by the law.

2.2 The Purpose of Judicial Review

[379] P Van Dijk, *Judicial Review of Governmental Action and the Requirements of an Interest to Sue*: Sijthoff & Noordhoff, The Hague, 1980, 2.

In relation to their function as law enforcers, and in the context of English public law, Lewis summarises that the courts will review an exercise of power by the government and other public bodies in order to ensure that they:

a. have not made an error of law;
b. have considered all relevant factors, and not taken into account any irrelevant factors;
c. have acted for a purpose expressly or implicitly authorised by statute;
d. have not acted in a way that is so unreasonable that no reasonable public body would act in that way;
e. have observed statutory procedural requirements and the common law principles of natural justice or procedural fairness.[380]

Although these review criteria were only meant to be applicable in judicial practices based on the common law, they are, in fact, also suitable for most, if not all, national court systems and practices. The words "common law", for example, can be replaced with "constitutional law" in the European-continental system to make the term more generic.

While the aim of judicial review may vary somewhat in emphasis from country to country, nevertheless, the general purpose of all judicial proceedings in the courts is to ensure that the law is enforced and upheld as the law itself requires. Judicial review is no different; with the only exception being, within the confines of the definition, that the purpose of judicial review is to test, to question, or to challenge the lawfulness of acts, decisions or laws of the government and other public bodies. This right of the citizen to challenge the laws passed by their democratically elected representatives is of course a dichotomy within a democratic society but this acts as a check and balance not against the democratic process but by the excess of the Executive who may not always have a democratic legitimacy to pass legislation.

In Japan, for example, the principal purpose of judicial review is the protection of individual rights,[381] whereas in the United States and Canada, which represent the American-style of judicial review, the main purpose is to "measure legislation against the requirements of a

[380] Clive Lewis, (*Ibid* n364) 107.
[381] Jackson & Tate, (*Ibid*. n 370) 29.

written constitution"[382]. In the United Kingdom and other countries whose legal systems have common law foundations, the purpose of judicial review is primarily, although not only, to "exercise a supervisory jurisdiction over public bodies to ensure that they observe the substantive principles of public law."[383]

In this study it will be suggested that although there is no separation of powers at the level of the UN, it is the authors' contention that the International Court of Justice as an organ of the UN itself should be empowered through a change of its statute to enable it take on such a role in ensuring that the acts of the organisation remain legal and compliant with human rights standards they themselves have set.

3 Major Concepts of Human Rights

3.1 Preliminary Remarks

The term "major concepts" in relation to human rights means the more widely discussed concepts in the literature examined in this study, but does not in any way imply that the "major concepts" are more genuine or more valuable than the "minor" ones.[384] It is not appropriate nor indeed feasible to discuss all human rights concepts in this study. It is also accepted that there are difficulties both in the definition and interpretation of international human rights instruments. Generally speaking however it has been argued by some that there are four major systems[385] of human rights currently in operation throughout in the world: European, American, African and Asian[386]. All four will be dealt with briefly as concepts in the following sections. The discussion will commence with an overview of the Universal Declaration of Human Rights, which in this respect can be regarded as a fundamental doctrine and part of a 'bill of international human rights' which in turn will also be discussed by reference to the International Covenant on Civil and Political Rights (ICCPR)[387] and the

[382] (*Ibid* n 370)30.
[383]Clive Lewis, (*Ibid*. n 364) 3.
[384] Some authors suggest that there are several new emerging human rights concepts or systems in several regions such as in Arabian region (Cairo Declaration on Human Rights, 1990) and Asian Region (Bangkok Declaration,1993). For these, *see* among others, Henry J. Steiner & Philip Alston. 2000. *International Human Rights in Context: Law, Politics and Morals.* Clarendon Press: Oxford, 780.
[385] Most authors use the term "concept", but some others "system". Steiner & Alston, (Supra n384) 779-786, uses the term "system". In this work both terms are regarded as the same and used interchangeably.
[386] According to Steiner & Alston, one of the new emerging concepts is the Asian system; albeit still in the form of a proposal compared to that of the European, Inter-American and African systems. See, Steiner & Alston, (Supra n384)780.
[387] For a historic background and discussion on the history and development ICCPR see: Christian Tomushat at the UN Audio visual library http://untreaty.un.org/cod/avl/ha/iccpr/iccpr.html, Accessed 3 Jan 2012.

International Covenant on Economic Social and Cultural Rights[388]. These together these are more often referred to as an international bill of rights they will be referred to in greater detail later within the thesis.

It can be argued that the most important question relating to the universality of human rights is the following: whether they are universal or whether they ought to be universal. The answer to this question is far more than a simple 'yes' or 'no'. It involves some relevant issues such as moral and cultural values, tradition, religion, state and legal systems as well as social, political, economic, and even historical backgrounds. Addressing this issue, Lindholt argues:

> The importance of distinguishing between the two lies within the fact that we cannot legitimately deduce from "is" to "ought", since this represents a confusion of two distinct scientific methodologies. This means that just because there seems to be some degree of universal consensus as to basic human needs formulated as rights and freedoms, we cannot extend this to serve as the only legitimation for claiming that human rights, as they develop and express themselves at different times or under different circumstances, must therefore conform to a narrowly defined universal code of human rights. As to the contrary situation, deducing from the normative to the empirical also carries some dubious consequences. An illustration hereof would be to reject certain types or distinctions of rights because they do not conform to a normative definition of a universal human rights conception.[389]

3.2 Universal Declaration of Human Rights

In less than half a century, the Universal Declaration of Human Rights (the UDHR) has come to be regarded as possibly the single most important document created in the twentieth century and as the accepted world standard for human rights[390.] As the Second World War drew to an end, the representatives of the four major allied powers met in 1944 at Dumbarton Oaks in Georgetown, Washington DC, to discuss the future world order. Two world wars had been fought in less than 30 years and atrocities had been inflicted mainly on members of the Jewish race in Europe and on prisoners of war in detention in Asia and Europe. Within this

[388] For full details of ICESCR http://www.un-documents.net/icescr.htm, Accessed 3 Jan 2012.
[389] Lone Lindholt, *Questioning the Universality of Human Rights, The African Charter on Human and People's Rights*. Aldershot: Ashgate/Dartmouth, 1997, 23.
[390] Markus Schmidt. Eds D Moeckli, S Shah and S Sivakumaran, International Human Rights Law, Oxford Uuniversity Press: (Oxford, 2010) 391.

context, the leaders felt it was imperative that the nations and peoples of the world live together more peaceably resolve conflict ideally without recourse to armed conflict, and instigated plans for establishing what was to become the United Nations[391.]

In late 1945, leaders of the world's nations met in San Francisco to form the United Nations. Inspired by the great South African pre-apartheid leader Field-Marshall Smuts, they included in the preamble to the Charter of the UN, an important reference to human rights.

> We the peoples of the United Nations [are] determined -
> .. to reaffirm faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women and of nations large and small.

This reference to human rights was followed up by six references throughout the UN Charter's operative provisions to human rights and fundamental freedoms[392]. In addition, largely as a result of pressure brought to bear on the political leaders by some[42] United States non-government organisations, Article 68 was included. It required the Economic and Social Council to set up commissions in the human rights and economic and social fields. The outcome was the establishment of a Commission on Human Rights. Thus the Commission is one of the very few bodies to draw its authority directly from the Charter of the United Nations.

In April 1946, Mrs Eleanor Roosevelt, widow of President Franklin Roosevelt of the United States was appointed to chair an interim group of 9 members. By June, the interim body had suggested that the new Commission should make its first task the development, as soon as possible, of an international bill of human rights. Later in the year, the new Commission of Human Rights of 18 members, again chaired by Mrs Eleanor Roosevelt, was appointed, and included China's P.C.Chang, Frenchmen Rene Cassin and Dr Charles Malik of Lebanon. The Commission met for the first time in January 1947 and considered several critical issues. Its decisions have greatly influenced the human rights development since then, including action at both the regional and national level. It concluded that it should work to develop first a declaration rather than a treaty. This was to allow the document to be produced with unanimous agreement or at least without dissention. The declaration was intended to have more moral and political gravitas than a recommendation, but less binding in international

[391] T. Weiss & S. Daws, The Oxford Handbook on the United Nations, Oxford University Press (Oxford, 2008) 527.
[392] See UN Charter http://www.un.org/en/documents/charter/, Accessed 10 Feb 2010.

law than a treaty. Perhaps most important of all, it decided that the declaration should contain both civil and political and also economic and social rights[393].

The Commission's view was that the declaration should be a relatively short, inspirational and energising document accessible to ordinary people. It should be the foundation and central document for the remainder of an international bill of human rights. It thus avoided the more difficult problems that had to be addressed when the binding treaty came up for consideration just what role the state should have in enforcing the rights in its territory and whether the mode of enforcing civil and political rights should be different from that of economic and social rights[394]. All these topics whilst both interesting and noteworthy, will not be explored further in this study.

It was fortunate that the Commission made the decision to separate the formally legally binding covenant from the initial declaration. Although the declaration was endorsed in December 1948, the two covenants (the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights) that emerged to define the obligations of each state were not ready for ratification (formal approval by the governments of the world) until 1966, some 18 years later[395].

The acceptance of the declaration was not without its difficulties. Many individuals and groups helped to drive the declaration through including Eleanor Roosevelt and her advisers who came mainly from the US Department of State. Those who provided drafts to the Committee for consideration which included the international lawyer Professor Hersch Lauterpacht of Cambridge University and British author H G Wells. There was also a draft based on preparatory work for an American Declaration of the Rights and Duties of Man. Finally, the secretariat, led by Professor J P Humphrey executed the onerous task of collating all this material for the Commission to consider.

When the Commission finally took its vote on 18 June 1948, twelve of its fifteen members voted in favour. The Soviet Union, Byelorussia, the Ukraine and Yugoslavia (the Soviet bloc technically had only two members) abstained. On the evening of 10 December 1948, the

[393] T Weiss & S. Daws, ibid n 391, 528.
[394] Ibid n 391, 529.
[395] D. Moeckli, S. Shah and S. Sivakumaran, *International Human Rights Law*, Oxford University Press (Oxford, 2010) 404.

General Assembly endorsed the text of the UDHR without amendment, only two days before it rose until the next year. There were no dissenting votes, but the six communist countries, then members of the UN, and also Saudi Arabia and South Africa, abstained.

3.3 Aspirational or Instrumental

The Commission then turned to formulating the declaration. It decided to name it the Universal Declaration of Human Rights (UDHR) which was to set a standard of rights for all people everywhere regardless of race gender greed religion and political persuasion. In the words of the first preamble to the UDHR, it was to inculcate:

> recognition of the inherent dignity and .. equal and inalienable rights of all members of the human family [... and through that recognition provide] the foundation of freedom, justice and peace in the world.

Article 1 reflects the inspirational nature of the project. It was included only after much controversy about whether it was superfluous; merely stating the obvious, or whether it should be included in the preamble rather than the main text. It proclaims in ringing terms that:

> All human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood.

The reason for including it in the main text is to state firmly the basis of all human rights, the rationality of human persons and their obligation to deal fairly with everyone else, regardless of race, sex, wealth and so on. Article 7 follows up this theme by saying that all are to be equal before the law and have a right to protection against any form of discrimination.

Articles 3 and 27 are probably the core of the substantive provisions in the Declaration. They give every human being the rights to life, to liberty, to security of person (Art 3) and to an adequate standard of living (Art 27). The first three are core civil and political rights, the last an economic and social right. The right to an adequate standard of living is interesting in that it specifies as part of it the right to health and well-being not only of a person but of his or her family, and also the right to necessary food, clothing, housing and medical care, and the right to social security (also covered in Art 22).

Overarching all the particular rights are Articles 28 and 29. (There are 30 Articles in the Declaration, of which 17 could be regarded as relating to civil and political rights and 8 to economic and social rights). Articles 28 and 29 have not generated much discussion, and have not been given legally binding force in the two Covenants. But they have momentous significance. Article 28 emphasises the responsibility of the whole international community for seeking and putting into place arrangements of both a civil and political and an economic and social kind that allow for the full realisation of human rights. It would be easy to ask questions about current arrangements or plans that hardly seem to do this, such as those relating to trade and investment arrangements and perhaps some of those planning to eradicate international crimes such as genocide and war crimes. Article 30 is also of high importance, because it underlines the responsibility all people have to their community. Notice that the Article does not talk about the state.

3.4 The changing status of the UDHR

With the advent of the Cold War and the consequent deceleration of many constructive developments, the Universal Declaration has still managed to emerge successfully from the complex and politically hazardous processes of the United Nations to become its human rights flagship. The Declaration had not managed during this time to achieve full recognition from the communist and certain Middle Eastern countries, but at least they had not voted against it. It can be argued that as a human rights document it has achieved world recognition as the basis on which to build effective human rights protection. Whilst it does have many critics those who argue that many states still routinely violate basic human rights norms, it has led to changes and the introduction and recognition at the regional and national level of human rights protection that is enshrined binding legislation.

UDHR has almost certainly now becomes a part of international customary law. The view is steadily growing among international lawyers that state practice is an important source of international law as it includes not only acts such as observing rules about navigation at sea but also acts such as voting for resolutions at the United Nations and other international gatherings. The very large and increasing number of ratifications of the two human rights Covenants, and the fact that the rights stated in the UDHR are commonly recognised as well founded in moral and good practice terms, means that there are now virtually unchallengeable grounds for asserting that the UDHR rights have become part of international customary

law[396]. That means that, unlike treaties, which only bind a country once it has accepted the treaty obligations, all countries in the world are bound, whatever their particular view may be. A country cannot repudiate international customary law, as it may do with a treaty obligation. This is the position that this author takes throughout this study when interpreting actions of the UNSC in its dealings over sanctions against the individual[397.]

Of equal importance, the UDHR has become almost an extension of the UN Charter[398]. Although, the Charter has only a few articles that refer to human rights and fundamental freedoms, it is now usual to refer to the UDHR as setting out the content of those rights and freedoms. So it has become a part of the fabric of the UN itself, and is often referred to in resolutions of the UN General Assembly, and in its debates, for example in relation to the Declaration on the Granting of Independence to Colonial Countries and Peoples of 1960. At the human rights conference in Teheran in 1978, to mark the 30th anniversary of the UDHR, the representatives of 84 nations unanimously declared that the UDHR states a common understanding of the inalienable rights of all people and constitutes an obligation for the members of the international community.

3.5 Concluding remarks on the UDHR

More than sixty years on from what Eleanor Roosevelt described as a possible global Magna Carta, the UDHR has become the starting point and backbone for modern human rights protection. Whilst it will be difficult in this study to have a consensus on human rights interpretation, the UDHR can be likened to what Walzer describes as 'Thick and Thin'. Here the idea is that although we may not all agree on every aspect of Human Rights protection and that they may have different interpretations it can be argued that even at the thinnest point there is a similar agreement that rights do exist[399].

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[396] F. Martin, S. Schnably, R. Wilson, J. Simon, M. Tushnet, International Human Rights and Humanitarian Law, *Treaties, Cases & Analysis*, Cambridge University Press (Cambridge 2006) 215.
[397] I. Brownlie, Principles of International Law, 4th Ed, Oxford University Press (Oxford, 1990) 5-7.
[398] Ibid n395, 35.
[399] M. Walzer, in his book: *Thick and Thin: Moral Argument at Home and Abroad*, University of Notre Dame Press: Notre Dame, 1992 Walzer focuses on two different but interrelated kinds of moral argument: maximalist and minimalist, thick and thin, local and universal. According to Walzer the first, thick type of moral argument is culturally connected, referentially entangled, detailed, and specific; the second, or thin type, is abstract, ad hoc, detached, and general. Thick arguments play the larger role in determining our views about domestic justice and in shaping our criticism of local arrangements. Thin arguments shape our views about justice in foreign places and in international society

Notwithstanding the initial difficulties and resistance, the Declaration has probably achieved a stature in the world that even the most optimistic of its founders in 1948 would not have expected. First, it has become accepted (often rather reluctantly, it is true) as an influential statement of standards, even by countries that are doubtful about the human rights enterprise. When countries such as Burma, Argentina, China and the former Yugoslavia feel bound to defend their alleged breaches of the UDHR, then it can be said to have achieved an important political and moral status and has been suggested it is now reached the level of *Jus Cogens*[400.]

Nevertheless, even though we cannot come to an agreement as to whether all or even some human rights are universal or not, due to the complexities and the variety of perceptions pertaining to this matter, one thing is certain: the basic principles set forth in the Universal Declaration of Human rights (UDHR) have been agreed by the membership of the United Nations and is deemed as the fundamental corner stone in human rights protection. (Together with the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic and Social Rights (ICESR).

The opening statement of the Declaration distinctly and appropriately acknowledges that:

> …[the] recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world.[401]

Universal peace and the respect of human rights are urgent issues. Man can peacefully enjoy life only if the human rights of every individual are recognized and what is more, respected. Progress is only possible if peace prevails.

3.6 European Concept of Human Rights

The formation of a regional system of human rights operating across the European States was not unusual in its content and in fact preceded the formation of the Council of Europe in 1949. This European concept of human rights culminated in the European Convention on Human Rights and Fundamental Freedoms, which was signed on 4 November 1950 and entered into force on 3 September 1953. What is remarkable about this system of human rights are the protection mechanisms that have evolved and the ability and rights of the

[400] F. Martin, S. Schnably, R. Wilson, J. Simon, M. Tushnet, *(ibid* n 396)33.
[401] First sentence of the *Preamble* of the Universal Declaration of Human Rights.

individual to take their grievance and be heard before the European Court of Human Rights (ECtHR) at Strasbourg, which has the power to provide just satisfaction. By 1995 all thirty states then party to the convention had accepted the right of the individual to petition and more importantly the jurisdiction of the Court[402]. It is this development that has led to the myriad of case law and academic comment of the Convention's jurisprudence. There are currently 14 protocols which have been agreed upon as supplementary documents to the original text. The Convention is considered the most advanced and developed framework and structure for the international protection of human rights in the world. In relation to the promotion of respect for international human rights standards, the Convention is of particular importance for several reasons:

- It was the first comprehensive treaty in the world in this field

- It established the first international complaints procedure and the first international court for the determination of human rights matters

- It remains the most judicially developed of all human rights systems

- It has generated a more extensive jurisprudence than any other part of the international system.[403]

Yet, despite the reputation that the Convention has gained for covering a wide range of human rights, the European Convention on Human Rights and Fundamental Freedoms and its protocols still only deal with certain rights within this spectrum. Alpha Connelly observes:

> … the Preamble to the Convention explicitly states that the signatory governments are enforcing only certain rights proclaimed by the United Nations General Assembly in the 1948 Universal Declaration of Human Rights. The rights guaranteed by the Convention are mainly civil and political rights: rights such as the right to life, to freedom from torture and from inhuman and degrading treatment or punishment, to personal liberty, to fair trial, to respect for private and family life, to freedom of religion, freedom of expression, freedom of assembly and

[402] M. Janis, R. Kay, A. Bradley, *European Human Rights*:*Texts and Materials*, 3rd Ed, Oxford University Press, (Oxford, 2008) 21.
[403] Steiner & Alston, (*ibid* n 384) 786.

> freedom of association. The right to vote, a right essential to representative democracy, is guaranteed not in the original text but in [article 3 of the First Protocol]. Economic and social rights, such as the right to work and the right to social welfare, are the subject of separate treaty, the 1961 European Social Charter" [which entered into force on January 26, 1965].[404]

Van Dijk suggests that Human rights in the European perspective are considered as "rights of the individual and obligations to society."[405] In 1981, Gerard Wiarda, who was the then president of the European Human Rights Court, wrote an essay on the *Ringeisen*[406] case in which the Court tried to give its own interpretation of the expression "determination of civil rights and obligations" in Article 6 (1) of the convention. He argued that:

> … the Court must have given a much broader scope than what was intended when the provision was drafted. Indeed, in reality, the terms "civil rights and obligations" is an equivalent of "private or individual rights and obligations.[407]

One might, of course, argue that there was no necessity for the Court to give an abstract definition of "civil rights and obligations", but, in fact, the notion of the guarantee of individual rights has been a prevailing feature of the concept of human rights in Europe.

The underlying importance of human rights in Europe within this study is the rights of an individual to challenge perceived breaches against public authorities and the state. Something that is not yet possible within the international stage against the UNSC.

3.7 European Court of Justice

It is perhaps judicious to remind ourselves of the discussion in Chapter three regarding the European Union Court of Justice (EUCJ), as part of the regional protection of human rights within the European Union. The role of this court has been discussed in particular in relation

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[404] Alpha Connelly, *Ireland and the European Convention on Human Rights: An Overview*, in Liz Heffernan, *Human Rights: A European Perspective*, The Round Hall Press:Dublin 1994, 35.
[405] Van Dijk, *Protecting Human Rights: The European Dimension*. Koeln (Carl Heymans Verlag KG, 1987) 133. He commented on the wording of the article which leads to that conclusion, especially when one considers the text in French, which has more clarity, "*contestations sur ses droits et obligations de caractere civil*".
[406] Ringeisen v Austria 2614/65, [1971] ECHR 2, (1971) 1 EHRR 455, [1968] ECHR 7, [1972] ECHR 2
[407] *Ibid* 134.

to the case of Kadi in which the Court has become directly embroiled for nearly ten years in conflict with the United Nations Security Council regarding the imposition of sanctions[408].

The main function of the European Union Court of Justice which was established under the treaty of Rome[409] is to interpret European Law (EU law) in order to make sure it is applied fairly throughout the EU. It also settles legal disputes regarding the interpretation of EU law between EU governments and EU institutions. The EU Court is empowered under treaty to issue advisory opinions to the national Courts of member States on the interpretation and application of EU law within those states. Individuals, companies or organisations may also in certain circumstances bring cases directly before the EU Court for breaches of their EU rights. As far as human rights are concerned, human dignity, freedom, democracy, equality, the rule of law and respect for human rights are the values on which the European Union is supposedly founded. These principles have been embedded in the Treaties of the European Union, they have been reinforced by the Charter of Fundamental Rights[410]. Countries seeking to join the EU must respect human rights, and so must countries which have concluded trade and other agreements with it. The EU is not yet but is moving towards becoming a signatory of the ECHR which it is hoped will give rise to human rights harmonisation throughout Europe.

3.8 Inter-American Concept of Human Rights

The Inter-American Human Rights System is a gradual development from fundamental principles for a peaceful co-existence among the American states. The principles include regional solidarity, collective security, non-intervention, democracy and human rights. These primary and collectively accepted norms were given legal status at the ninth Inter-American Conference held in Bogota in May 1948, when the American states adopted a Charter establishing the Organization on American States (OAS). At the same time, the Bogota Conference also adopted the American Declaration of the Rights and Duties of Man.[411]

[408] See discussion on Kadi and others in Chapter 4.
[409] Full details of operation and composition of the Court: http://europa.eu/about-eu/institutions-bodies/court-justice/index_en.htm, Accessed 4 Jan 2012.
[410] For full details, http://www.europarl.europa.eu/charter/default_en.htm, accessed 4 Jan 2013.
[411] About the debate on the legally binding quality of the Declaration's provisions relating to human rights, *see* W. van Thomas and A. Thomas. 1963. *The Organisation of American States.* (Dallas: Southern Methodist University Press) 223.

Thus, the Americans already had a commitment to human rights in the form of a declaration seven months before the United Nations had adopted the Universal Declaration of Human Rights, and two and a half years before the European Convention on Human Rights and Fundamental Freedoms was adopted.

Nevertheless, the establishment of a regional treaty whereby the principles set forth in the Declaration would have a legally binding power only came much later.[412] That treaty is the American Convention on Human Rights, which was adopted in 1969 and entered into force in 1978. Prior to the adoption of the Convention, the Inter-American Commission on Human Rights was established in 1959. The Commission became an organ of the OAS only after the amendment of the Charter by the Protocol of Buenos Aires 1967. The principal function of this Commission is "to promote the observance and protection of human rights, and to serve as a consultative organ of the OAS in this matter."[413]

On the basis of the rights which are protected and the freedoms which are guaranteed in the American Declaration on the Rights and Duties of Man, and the Convention on Human Rights, one might hastily conclude that the Inter-American concept of human rights has an individualistic focus, just like the European one. Article 1 of the Convention, for example, requires the States "to ensure to all persons subject to their jurisdiction the free and full exercise" of the rights and freedoms recognised therein[414].

The American Convention on Human Rights contains twenty-six rights and freedoms, twenty-one of which are included in the United Nations Covenant on Civil and Political Rights. They are: the right to life, the right to liberty and security, the right to a fair trial, the right to free election, the right to an effective remedy if one's rights are violated, the right to recognition as a person before the law, the right to compensation for miscarriage of justice, the right to a name, the right of the child, the right to a nationality, the right to equality before

[412] The reason for this is that in the face of massive and widespread human rights violations in many *coup d'etat* attempts in Latin American countries, the progress towards an established human rights system in the region proceeded slowly. J.S. Davidson observes the phenomenon in his books *Inter-American Human Rights System*, published by Dartmouth, 1997, particularly at pp. 1-99 and 259-260, and, more generally in *Human Rights*, published by Open University Press, 1993.

[413] Chapter XVI, *Article 111* of the Charter. This broad mandate was further amplified by the Commission Statute and Rules of Procedure according to which, as the work progressed, the Commission became an organ of the American Convention on Human Rights.

[414] R. Smith, *Texts and Materials on International Human Right*, Routledge Cavendish: Oxford, 2007, 132.

the law, freedom from torture and inhuman treatment, freedom from slavery and servitude, freedom from retroactivity of the criminal law, freedom of conscience and religion, freedom of thought and expression, freedom of assembly, freedom of association, freedom to marry and found a family, and freedom of movement. Meanwhile, there are five rights and freedoms included in the Convention which are not part of the United Nations Covenant: the right to property, freedom from exile, prohibition of the collective expulsion of aliens, the right of reply, the right of asylum.[415]

However, taking this view is not entirely true, especially in conjunction with the provision contained in Article XXXVIII of the Declaration, which provides that "the rights of man are limited by the rights of others, by the security of all, and by the just demands of the general welfare and advancement of democracy."

It should be noted that although the United States of America has not accepted the jurisdiction of the Inter-American Court to hear complaints of alleged violations of human rights, the Commission does have jurisdiction to investigate and report on any such violations as the USA is a member of the organisation[416].

In conclusion, the American concept of human rights can be pictured as a freeway of rights where civic duties function as road signs that remind individuals of the speed limits while exercising their rights[417].

3.9 African Concept of Human Rights

The African system could be describe as the newest, least developed and effective system of human rights protection.[418] This is not surprising when one considers the problems faced by the African Commission on Human and People's Rights, which is the sole active organisation in the whole African human rights system. The African Commission is a relatively inexperienced organisation, with few powers, and for the most part it has been hesitant in

[415] For further comparison of the rights protected in the Inter-American system, the European Convention on Human Rights and in the U.N. Covenant on Civil and Political Rights, *see* N.R. Sharma., *Human Rights in the World*, Pointer Publishers: Jaipur,1999,especially at pp. 35-117.
[416] See for example, Mary and Carrie Dann v United States of America, report No: 75/02 (2002) in which the petitioners claimed that various rights under the American Declaration on the Rights and Duties of Man had been infringed.
[417] R. Smith (*ibid* n414) 133.
[418] Steiner & Alston, *supra n384*, 920.

exercising or creatively interpreting its existing powers, or developing further powers. Moreover, the basic structure and tasks undertaken by the Commission have not shown innovation in terms of inter-governmental human rights institutions.

Human rights in the African perspective are by and large a communal matter. Contrary to the European perspective, which distinguishes individuals, the African view on human rights emphasizes communality. Lone Lindholt articulates this African perspective as follows:

> …the focus is the group and on obligations rather than on the rights of the individual, contained in the statement 'in African culture it is the community (consisting of unitary, or extended, families) that has priority'. Indeed, we may not even find many examples of forms of traditional governments fulfilling the requirements of European democratic ideals, which again rest on the equality, autonomy and ability of representation of each member of the community.[419]

Yet this does mean that in traditional Africa there has never been a universally recognised conception of rights. Some human rights recognised by most "civilised" societies have long been part of the African culture, such as: the right to membership, freedom of thought, speech, belief and association, and the right to enjoy property. In contrast to European human rights, which stemmed from a 'Grundnorm' or constitutional basis, these rights and freedoms were originally derived from natural law and the dignity of man. In Lindholt's own terms, the legitimacy of these rights comes from:

> … a set of social values ingrained as a set of basic principles espoused by at least a substantial majority of a given society. ….Africa maintained a set of rights and duties for its peoples which were substantially in tune with the concept of "natural law" and the "dignity of man.[420]

The Charter establishing the Organisation of Africa Unity (OAU) came into force in 1986. It imposed no explicit obligation on member states for the protection of human rights. The OAU founding Charter only required states parties to have due regard for human rights as set out in the Universal Declaration of Human Rights in their international relations. In spite of

[419]Lone Lindholt, *Questioning the Universality of Human Rights, The African Charter on Human and People's Rights*. Aldershot: Ashgate/Dartmouth, 1997, 18, More details on the cultural perspective of the African human rights conception, *see for example;* Ahmed Abdullah, Frances An-Na'im & M. Deng (Eds.), *Human Rights in Africa, Cross-Cultural Perspectives*, The Brookings Institution: Washington, 1990, 12

[420] *Ibid* 19.

the absence of a clear human rights mandate, the OAU took bold steps to address a number of human rights issues such as decolonisation, racial discrimination, environmental protection, and refugee problems. The continental organisation however ignored the massive human rights abuses wantonly perpetrated by some despotic African leaders against their own citizens. This was due largely to the OAU's preference for socio-economic development, territorial integrity and state sovereignty over human rights protection, as well as firm reliance on the principle of non-interference in the internal affairs of member states.

The African Commission on Human Rights and Peoples Rights was established in 1987, one year following the entry into force of the African Charter.

The role of the African Commission is defined as to 'promote the protection of human rights through studies and research, cooperation with other human rights bodies and dissemination of information'.

It interprets the Charter's provisions, considers complaints for violation of the Chapter's provisions and drafts state's reports on the implementation of the Charter's provisions. It adopts resolutions and guiding principles that are subsequently used in the interpretation of the Charter and the reasoning of its decisions.

Complaints can be submitted by the victims of a human right violation as well as a third party (e.g. NGO).
When a violation of a human right is found, the Commission's communication may contain recommendations to the respondent state including an award of compensation (although it does not specify the amount). Under its own rules and provisions, the Commission is empowered to issue provisional measures.

The African Commission has been and still remains the main human rights body of the African Continent. However, the individual complaint procedure is not used as frequently as one would expect, something that surely does not explain the delay in reaching a decision upon a given complain. Also, there is no follow up mechanism for its recommendations. The Commission's work is assisted by Special Rapporteurs, such as the Special Rapporteur on the Freedom of Expression and Access to Information, and the Special Rapporteur on Human Rights Defenders. The Special Rapporteurs publish press releases, send letters to the

governments, receive information about violations of the Charter's provisions, engage with NGOs, undertake on–site visits and produce their own reports that include recommendations.

3.10 The African Court of Human Rights

The Protocol on the African Court on Human Rights and People's Rights, adopted in 1998, entered into force in 2004, however less than half the member states of the AU have ratified the Protocol. The African Court of Human Rights is due to be replaced by the African Court of Justice when the Protocol on the Statute of the African Court of Justice (adopted in 2008) enters into force.

Under Article 5 of Protocol, the African Commission is entitled to submit cases to the Court. Only one case has so far been examined by Court and that was found inadmissible due to lack of jurisdiction.

Under the provisions of the Protocol, the Court can:

1. make an appropriate order to remedy the human rights violation (including payment),[421] deliver advisory opinions,[422]
2. adopt provisional measures in circumstances of extreme gravity and urgency when irreparable harm to persons would otherwise ensue.[423]
3. The Council of Ministers (now the Executive Council of the African Union) shall monitor the execution of the Court's judgments.[424]

3.11 Asian Concept of Human Rights

The modern concept of human rights is relatively new to Asia. It has been introduced and developed over less than four decades,[425] but the Asian concept of human rights has yet to be fully formulated. James Tang observed that a region-wide system of human rights protection does not exist in the Asian region[426.] Steiner and Alston note that "although Chapter VIII of

[421] Art 27(1)
[422] Article 4(1)
[423] Article 27(2)
[424] Article 29(2)
[425] T.S. Batra, *Human Rights, A Critique*. (New Delhi: B.V. Gupta, 1979) 41.
[426] James Tang, (Ed.), *Human Rights and International Relations in the Asia Pacific.* (London, New York: Pimter 1995) 3. The Asian Charter of Human Rights is not considered as the 'official' concept of human rights; it is mainly the position or view taken by a large number of human rights NGOs, community organisations, concerned persons and groups. As a matter of fact, there are several documents relating to basic principles of human rights adopted within several Asian countries, e.g. Kuala Lumpur Declaration on Human

the United Nations Charter makes provision for regional arrangements in relation to peace and security, it is silent as to human rights cooperation at that level."[427]

More recently, regional concepts and systems of human rights have begun to emerge as a reaction to the active encouragement of the United Nations through a resolution adopted by General Assembly[428].

Dating back to the ancient world, mainly in East Asian region, one strong influence upon the concept of human rights is seen by some commentators as closely related to Confucianism. W. Theodore de Barry makes the following comments about the core values of Confucianism:

From this [public and private tension] it may seem again that the Confucian ideal was a balance of public and private, not an assertion of one over the other. In fact, from the Confucian point of view the state's responsibility for the public interest was to encourage legitimate private initiative. How to define what was legitimate remained an issue, and the state, historically, was not slow to assert its own authority in this respect (any more than it is today), but Confucians were just as ready to challenge any such claim on the part of the state bureaucracy (guan), asserting instead that the public interest (gong) consists in serving the legitimate desires and material needs of the people. A balance of public and private (gongsi yiti), not the person or individual subordinated to the collectivity or state, remained the Confucian ideal.[429]

A human right in Confucianism is therefore none other than a balance of public interest on one side and individual desire for freedom on the other. A true human right can only be appreciated in the light of the continuing tension that results from efforts to achieve a balance between the two.

Rights, Larrakia Declaration, Bangalore Declaration, Declaration of ASEAN Accord. All these documents can be accessed in a collection compiled by F. de Varennes in *Asia-Pacific Human Rights Documents and Resources*, Vol. 1, published by Martinus Nijhoff, 1998.

[427] Steiner, Alston, supra n 384, 210

[428] An appeal was made by the United Nations through *General Assembly Resolution 32/127* to States in areas where regional arrangements in the field of human rights do not yet exist "to consider agreements with a view to the establishment within their respective regions of suitable machinery for the promotion of human rights."

[429] Theodore de Barry, *Asian Values and Human Rights.* Cambridge; Harvard University Press, 1998, p29; cf., James C. Hsiung (Ed.), *Human Rights in East Asia*, a Cultural Perspective. Paragon House Publisher:(New York, 1985) 1-30.

Using another style of speech, but with essentially the same meaning, Michael Freeman observes that "there was no explicit concept of human rights in East Asian culture before the reception of Western political ideas at the end of the nineteenth century", and asserts that: Confucianism laid the foundations of ethics in certain social relations and the mutual obligations that were inherent in them.[430]

With regard to the infiltration of Western ideas into Asian values, Freeman further suggests that:

> …the embrace of Western ideas and of rights into Asian values was mainly caused by the dissatisfaction of the indigenous with the old order and the fact that Western ideas of rights and democracy have helped Asian protesters to articulate their goals and principles. [431]

Yet, as time has passed and changes have occurred, such an embrace has not been without objections. Objections to the application of Western ideas of human rights are based on the argument that such ideas and values are alien to Asian traditions. These objections gained considerable currency in the East when governments of Asian countries were so "unfairly" stamped as human rights violators by the West, while at the same time Western countries practiced imperialism and colonialism.

The Asian response to this criticism was straightforward. The Asians argued that despite its social and technological achievements, there was no justification for the West to preach morality to Asia, let alone push Asia into implementing 'westernized' human rights. The difference here lies within the basic concept of human rights held by East and West respectively: the West sees them as the equal civil and political rights of every individual, whereas Asia views them more in the context of economic and social development for the nation as a collective entity.

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[430] Michael Freeman, *Human Rights: Asia and the West* in James Tang (Ed.), *Human Rights and the International Relations in the Asia Pacific,* ,Pinter, London 1995, 25-38
[431] Ibid, n 430, *28*

This polarisation of perception also leads to the other common Asian argument against criticism from the West:[432] that stability, and therefore authoritarianism and respect for traditional cultural values, are necessary to facilitate development, including that of economic and social rights.

For example, summarizing the debate with respect to Western and Asian human rights perspectives, Yash Gai asserts:

> … it is generally assumed that there is one Asian view or concept of human rights, and that it is opposed to the tradition of individual human rights that first developed in the West.… The gist of this position is that human rights as propounded in the West are based on individualism and therefore have no relevance to Asia in societies which are based on the primacy of the community.[433]

Onuma Yasuaki, commenting on the "universal" versus "relative" perceptions of human rights, argues that such controversy goes beyond the realm of human rights and behind it one can see fundamental problems, namely:

a) contradictions between the globalisation of economic and information activities and the national state system;
b) contradictions between the emergence of non-Western powers in Asia and the persistence of West-centric power structures of information and culture in international society, and
c) contradictions between a sincere quest for a more humane and less violent world and a deep resentment against the colonial past and present inequality among nations and international society.[434]

However, there is clear evidence that there is no link between economic growth and the negation of human rights. Some authoritarian governments may have succeeded in their

[432] Ibid, n *430*, 16.
[433] Gai, Yash, "Human Rights and the Governance: The Asia Debate", in *Asia-Pacific Journal on Human Rights and the Law*, Vol. 1,issue 1, 2000. The Hague: Kluwer Law International, 16-17. For additional readings, *see also* John Girling (Ed.), *Human Rights in the Asia-Pacific Region* Canberra: Dept. of International Relations, Research schools of Pacific Studies, Australian National University, 1991
[434] Yasuaki, Onuma, *In Quest of Intercivilizational Human Rights: "Universal vs. Relative*", in Asia-Pacific Journal on Human Rights and the Law 1: 53-88, 2000, 53

economic development, but many such regimes have failed to achieve stability or economic growth.

In 1993, a common understanding of human rights was reached when Asian governments came together in Thailand's capital, Bangkok, for the preparation of the United Nations sponsored World Conference on Human Rights, to be held in Vienna. The Asian governments that were present in Bangkok adopted a declaration at the conference in Vienna. The document, then known as the Bangkok Declaration, recognises the universality of human rights with a special note that those rights have to be interpreted in the context of religious, historical, cultural and regional particularities.

The argument that human rights are "none of Asia's business" is no longer valid, since the adopted common position expressed in the Bangkok Declaration partly, if not largely, reflects the universally recognised principles of human rights. This, to some degree, opens the avenue for the establishment of an international mechanism for promotion and protection of human rights in national government policies, in partial conformity with the United Nations' encouragement and appeal to all States. As one human rights activist says, "Human rights do not belong to the West, they are ours too"[435].

4 Human Rights Violations

Every person wishes to live in peace and harmony with their neighbours[436]. This idea extends from home to society, state and the whole world. However such an ethical venture must be protected. Any violation in a particular instance may be a threat for all human rights. Hence, it is the responsibility of the individual, family, society and the world to protect and preserve harmony by ensuring that human rights are not violated. In order to guarantee this, a State must make the effort to produce legislation that necessarily contains legal assurances for the preservation of human rights. A violation of such a right will only lead to a hostile society.

When does a violation of human rights take place? Any action against the enjoyment of human rights becomes a breach of human rights, regardless of the origin of this action, be it

[435] Quoted from the opening note made by *Dr. F. de Varennes* in the Asia-Pacific Journal on Human Rights and the Law, Vol. 1, Issue 1, 2000.
[436] This view is reflected in virtually all major religious writing from the Bible to the Koran.

from an individual, a family, a society, a state or government, or the international community and its organisations.

From what Lalit Parmar has catalogued about situations in which human rights may be considered violated, any of the following actions or conditions are considered violations of human rights:

- Fear of exercising human rights; the fear to defend one's own human rights and those of others;
- Obstruction to human rights; any acts that prevent someone from enjoying his/her human rights;
- Breach of human rights; denying someone's rights to benefit from his/her rights;
- Molestation of those who attempt to exercise their human rights; any molesting or annoying acts that intimidate people so that they are deprived of enjoying their rights;
- Attack on human rights; some people do not wish to allow other people to enjoy their rights.
- Any clear, direct or indirect, attack on the rights of others[437].

Violations of human rights constitute the slippery slope that can lead to the situation that occurred in Nazi Germany. Examination of more recent atrocities such as in the Baltic and Africa have shown that large scale genocide and crimes against humanity often start with minor breaches of an individual's human rights.

5 Summary

The term Rule of Law (*Rechtsstaat*,) shares the fate of many other political and legal definitions. That is it is a term widely used in the political and legal discourse, although it is understood in various ways. It is, however, fortunate that many debates will cease when the existence of the Rule of Law is in danger; namely, when there is a threat or potential hindrance, be it coming from socio-political, economic, legal or any other forces. Walzers' suggests that moral reasoning is at its best when done at the ``thick'' level, in which the many components of individual and communal decision-making, history, and particularity can be

[437] Parmar, Lalit, Human Rights. (1st ed)., Anmol Publications Pty: (New Delhi,Ltd 1998) 76-80.

dissected, analysed, and accounted for. But it is the ``thin'' level of moral discourse (where generally recognizable slogans and terms predominate) that most often is the meeting point for intra-cultural and cross-cultural discussion and debate. So for example according to him, the thin good of ending communism or providing aid to the needy is something that large numbers of people can agree on, but the thick good of making decisions about how to achieve such goals is more difficult.

In a *Rechtsstaat*, the government and by implication those institutions on the international plane are also bound by the law, and all its acts are ideally subject to review for their lawfulness and conformity with human rights standards. Such review procedures are necessary in the interests of both the individual citizen and the government itself. Realising that everyone is acting according to the law creates a climate of confidence, and so progress is possible in the struggle for social welfare.

Judicial review is a court procedure whereby the legality and constitutionality of a government act can be challenged, and if they are found unlawful, the court has the competence to repeal the act or decision and, where possible, impose another that is lawful and in accordance with the law.

In order to assess whether a government or an international organisation has breached a human right standard, a common understanding as to what human rights really are has to be achieved. It may be argued that the basic principles set forth in the Universal Declaration of Human Rights should be the international standards suitable for every civilised society, since there is no direct disagreement only abstention from those fundamental values of human dignity and rights as set out in its pages. It is accepted that interpretation of these rights is another matter, however for the purposes of this thesis it is the line drawn in the sand.

Any act that breaches, denies, attacks or ignores human rights is seen as a violation of human rights. Recognition and respect of these rights are the preconditions for peace and the social, economic and political welfare among all members of the human family. Any interference with the exercise and enjoyment of these rights has a significant effect on the dignity and lives of all human beings no matter what level they are derived from. The UN as the instigator of modern human rights through its conventions and founding principles should not

be exempt from criticism and review of decisions it makes within the Security Council when they affect an individual's rights.

CHAPTER 7
THE ROLE OF THE INTERNATIONAL COURT OF JUSTICE IN REALATION TO OTHER POLITICAL ORGANS OF THE UNITED NATIONS

1 Introduction

In Chapter 5, the international bodies and procedures currently available for dealing with the individual human rights issues have been examined and explained in detail. They have shown that there is no body presently available with a judicial capability and understanding that could easily fulfil the role of dealing with those subjected to UNSC targeted sanctions. Most of the current bodies have the role of investigative and reporting with little or no formal judicial experience makeup or jurisprudence. They are not court and none hand down judgements that are in anyway similar to a judicial review/appeal. These bodies have been developed to deal in specific areas of human rights and with a State's failure to comply with those international human rights norms at State level.

This then leads us to the next organisation to consider in dealing specifically with providing a judicial review/appeal body and international procedure for those subject to UNSC targeted sanctions.

The International Court of Justice, like the Security Council and General Assembly, is a principal organ of the United Nations[438] and it is indeed referred to as 'the principal judicial organ' of the UN[439]. What has emerged from the jurisprudence of the Court since its inception is that there is an absence of hierarchy between the Security Council and the Court[440] and neither organ is in any way subordinate to the other. The Court has therefore

[438] Art.4 of the UN Charter.

[439] It is interesting that the ICJ should have been referred to in the Charter as the "*principal* judicial organ" because it is in fact the *only* judicial organ created by the Charter. This expression has. however, taken on a real meaning since 1945 because other judicial organs have now been created within the UN system. The General Assembly has set up an Administrative Tribunal to handle staff matters and "appeals" from that Tribunal used to go to the ICJ. Also, the Security Council has more recently set up two other judicial bodies within the UN system: the International Criminal Tribunal for the Former Yugoslavia and the International Criminal Tribunal for Rwanda. See SC Res.808 and 827 for the former and 955 for the latter.

[440] See Franck. "The 'Powers of Appreciation': Who Is the Ultimate Guardian of UN Legality?" (1992) 86 A.J.I.L. 519; Reisman. "The Constitutional Crisis in the United Nations" (1993) 87 A.J.I.L. 83: R. St J. Macdonald. "Changing Relations between the International Court of Justice and the Security Council of the United Nations" (1993) 31 Can. Y.I.L. 3; Watson. "Constitutionalism, Judicial Review, and the World Court" (1993) 34 Harv.I.L.J. 1; Gowlland-Debbas, "The Relationship between the International Court of Justice and the Security Council in the Light of the *Lockerbie Case* " (1994) 88 A.J.I.L. 643; Bedjaoui, *The New World Order*

held that it is not debarred from exercising its functions by the fact that the matter before it is at the same time being considered by the Security Council[441]. In the *Nicaragua* case the Court noted that[442] while in Article 12 of the Charter there is provision for a clear demarcation of functions between General Assembly and the Security Council… there is no similar provision anywhere in the Charter with respect to the Security Council and the Court. The Council has functions of a political nature assigned to it, whereas the Court exercises purely judicial functions. Both organs can perform their separate but complementary functions with respect to the same events.

Until the *Lockerbie* case,[443] however, all the cases involving the parallel functioning of the Court and the Security Council have been cases where it was the same party that presented

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and the Security Council--Testing the Legality of its Acts (1994): Brownlie, "The Decisions of Political Organs of the United Nations and the Rule of Law", in *Essays in Honour of Wang Tieya* (1994), p.91: 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" (1995) 26 N.Y.I.L. 33; Alvarez, "Judging the Security Council" (1996) 90 A.J.I.L. 1.

[441] See *United Stales Diplomatic and Consular Staff in Tehran* I.C.J. Rep. 1980.3.21-22: also *Military and Paramilitary Activities in and Against Nicaragua* (Jurisdiction) I.C J. Rep. 1984, 392, 435.

[442] *Nicaragua, ibid.*

[443] The first case was *Questions of Interpretation and Application of the 1971 Montreal Convention Arising from the Aerial Incident at Lockerbie* (*Libya* v. *US: Libya* v. *UK*). Provisional Measures. I.C.J. Rep. 1992, 3, 114. That case arose out of US and UK demands that Libya surrender for trial two Libyan nationals accused (by the US and UK) of carrying out the bombing of Pan Am Flight 103. In Jan. 1992 the Security Council adopted Res.731 urging Libya "to provide a full and effective response" to the requests of the UK and US. In Mar. 1992 Libya filed applications in the ICJ. against the UK and US. Libya asked for a judgment declaring that the UK and US were in breach of their obligations under the Montreal Convention and that it was complying with its obligations under that Convention. Libya also filed an application, under Art.41 of the ICJ Statute, requesting the indication of provisional measures which would prevent the US and UK from taking any measures that would coerce Libya to surrender the two men to any jurisdiction outside Libya or that would otherwise prejudice the rights claimed by Libya. After the close of oral arguments in the ICJ but before judgment was delivered, the Security Council adopted, under Chap.VII of the Charter. Res.748 which imposed mandatory sanctions on Libya in the event that Libya failed to comply, by a certain date, with the demand to surrender the two men. Libya's requests for provisional measures were dismissed by the ICJ. It considered that, by Art.25 of the Charter. UN members are obliged to accept and carry out the decisions of the Security Council: that obligation *prima facie* extended to Res.748 and by Art.103 of the Charter prevailed over any obligation under the Montreal Convention. The rights claimed by Libya were therefore inappropriate for protection at the provisional measures phase.The second case is *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (*Bosnia & Herzegovina* v. *Yugoslavia (Serbia & Montenegro)*). Requests for Provisional Measures I.C.J. Rep. 1993, 3 and 325. In its second request for provisional measures. Bosnia asked the ICJ to declare that SC Res.713 imposing an arms embargo upon the whole of the territory of the former Yugoslavia must not be construed as imposing an arms embargo on the Bosnian government as this would be contrary to the right of self-defence enshrined in Art.51 of the Charter and would also stop the Bosnian government from preventing the commission of genocide as required by Art.1 of the Genocide Convention. The ICJ held that this request was outside the scope of Art.41 of the Statute as it was not aimed at a declaration by the ICJ indicating steps that the respondent ought to take for the preservation of the applicant's rights but. rather, at "a declaration of what those rights are which would clarify the legal situation for the entire international community in particular the members of the United Nations Security Council" (p.345). This aspect of Bosnia's case (the part seeking a lifting of the arms embargo) has become moot as a result of the signing of the General Framework Agreement for Peace in Bosnia and Herzegovina (the Dayton Accords) and as a result of SC Res.1021(1995) which lifts the arms embargo. The point was therefore not pursued at the jurisdictional phase of the case in Apr. 1996. See the ICJ's judgment on jurisdiction and admissibility delivered on 11 July 1996.

the matter to the two organs and both organs were being used to achieve more or less the same ends. The potential for conflict between the organs was therefore low.[444] In these cases it was therefore easy for the Court to state that both organs could perform their "separate but *complementary* functions". In more recent cases, however, the States instituting action in each organ have not intended the functions of the Court and the Council to be complementary. In these cases opposing sides have sought to use the two organs for contradictory or conflicting purposes and one side has sought to have one organ negate the actions of the other. The situation was well articulated by Judge Bedjaoui in *Lockerbie* when he said[445]:

> if the concomitant exercise of the concurrent but not exclusive powers has thus far not given rise to serious problems, the present case, by contrast, presents the Court not only with the grave question of the possible influence of the decisions of a principal organ on the consideration of the same question by another principal organ, but also, more fundamentally, with the question of the possible inconsistency between the decisions of the two organs and how to deal with so delicate a situation.

The question that has now arisen, particularly in *Lockerbie,* is whether one principal organ the Court may nullify the decision of another, the Security Council. It relates to the role the Court may play when there is a decision by the Council that is stated to have been taken to maintain or restore international peace and security[446].

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[444] In *Diplomatic and Consular Staff, supra* n.12. it was the US that brought the matter before both the Council and the ICJ and both organs reached similar decisions, viz. requesting Iran to release the hostages. See also SC Res.457 of 4 Dec. and 461 of 31 Dec. 1979. Again, in the *Nicaragua* case it was Nicaragua that brought the matter both before the ICJ and to the attention of the Council and though the ICJ upheld its claims against the US. Nicaragua failed to secure a specific condemnation of the US by the Council. Again this was not a case of conflicting decisions: there was a decision by the ICJ to the effect that the US was responsible for the illegal use of force against Nicaragua and no decision by the Council as to whether or not the US bore such responsibility. See 1986 I.C.J. Rep. 14 and 76 I.L.R. 349. See also SC Res.530 and 562 of 19 May 1983 and 10 May 1985 respectively both of which reaffirmed the right of Nicaragua to be free of outside interference and expressed support for the Contadora peace process. Res.562 in particular called upon *all States* "to refrain from carrying out. supporting or promoting political, economic or military actions of any kind against *any State in the region* which might impede the peace objectives of the Contadora Group". Neither Res. particularly implicated the US or any other State. Two draft resolutions tabled by Nicaragua in 1986 and calling for full compliance with the ICJ's decision failed to be adopted because of negative votes (vetoes) by the US.

[445] I.C.J. Rep. 1992.3, 33.

[446] The question of the limitations of the powers of the Security Council and of the possibility of judicial review (though not by the ICJ) also arose in the first case before the International Criminal Tribunal for the Former Yugoslavia. In the *Du%24sko Tadić* case (Case No.IT-94-1-I-T). the defendant contested the validity of the Security Council action in setting up the Tribunal. He asserted that the resolutions of the Council were invalid and that in consequence the Tribunal had no jurisdiction to try him. One of the Tribunal's Trial Chambers, in a Decision of 10 Aug. 1995. rejected this motion of the defence and held that it contained non-justiciable issues. Nonetheless, the Trial Chamber expressed its view on the appropriateness of the Security Council action in

2 The Substantive Limits to the Powers of the Security Council Contained in the Purposes and Principles of the Charter

The UN Charter and its negotiating history support the contention that the powers of the Security Council are not unlimited. That this is so was well understood at the 1945 Conference on International Organisation which drew up the Charter. At this conference many delegations expressed concern at the wide powers of the Council and proposed amendments which would limit the freedom of the Council and make clear how far the Council could go in the exercise of its powers.[447] None of these amendments was adopted, however, because it was accepted that the text of the Charter (as proposed by the sponsoring powers at Dumbarton Oaks) already encompassed the limitations sought to be included. As the report of the Rapporteur of Committee III/3 (Enforcement Arrangements) of the Conference put it:[448]

> A number of amendments … were directed at limiting the great freedom which in the Dumbarton Oaks proposal, is left to the Council in determining what action if any to take.

Some of these amendments were designed to make more precise the Council's obligations to act in accordance with the purposes and principles of the Organisation and the provisions of the Charter. The Committee considered that, since such specifications were already stated in Chapter VI defining the powers of the Council, it was unnecessary to make special mention of them in the present Chapter.

The main limitation on the powers of the Security Council was therefore understood to be the duty to act in accordance with the purposes and principles of the Charter. This obligation is expressly contained in Article 24(2) of the Charter and the purposes and principles are those stated in Articles 1 and 2. That this is a substantive limitation of the powers of the Security Council has been recognised in a number of individual opinions of judges of the International

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setting up the Tribunal and took the view that that action was appropriate. However, on appeal, the Appeals Chamber of the Tribunal decided (by 4 votes to 1) that the Tribunal was competent to pronounce on the plea challenging the establishment of the Tribunal. The Appeals Chamber came to this conclusion on the basis that a challenge to the validity of the establishment of the Tribunal was a challenge to the jurisdiction of the Tribunal. It then held that in accordance with the principle of *Kompetenz-Kompetenz* it had the competence to decide on its own jurisdiction (and thus on the legality of the establishment of the Tribunal). After examining the matter, the Appeals Chamber held that the Security Council had acted within its powers in setting up the Tribunal (see Case No.IT-94-1-AR72, decision of 2 Oct. 1995) (1996) 35 I.L.M. 32.

[447] See e.g. the amendments proposed individually by Australia, the Netherlands. Chile and Mexico, 12 U.N.C.I.O. Docs. 603 and also those of Norway. 11 U.N.C.I.O. Docs. 378. Greece, 3 U.N.C.I.O. Docs. 531 and Iran. 3 U.N.C.I.O. Docs., 554.

[448] Doc.881 III/3 146.12 U.N.C.I.O. Docs., 504-5 (10 June 1945).

Court. Judge Weeramantry, in his dissenting opinion in *Lockerbie*, after posing the question whether there are norms or principles circumscribing the boundary within which the responsibilities of the Security Council are to be discharged, remarked:[449]

> Article 24 itself offers us an immediate signpost to such a circumscribing boundary when it provides in Article 24(2) that the Security Council in discharging its duties under Article 24(1), "*shall* act in accordance with the Purposes and Principles of the United Nations". The duty is imperative and the limits are categorically stated.

Also, Judge *ad hoc* Lauterpacht in his separate opinion in the *Bosnia Genocide Convention* case expressed the same thought when he remarked: "Nor should one overlook the significance of the provision in Article 24(2) of the Charter that, in discharging its duties to maintain international peace and security, the Security Council shall act in accordance with the Purposes and Principles of the United Nations."[450]

This limitation on the powers of the Council has on occasion been deployed by States in Security Council meetings. For example, when the Security Council, in 1951, was dealing with the question concerning the passage of ships through the Suez Canal, the representative of Egypt made the following remarks:[451]

> Although we do not want to pretend that the functions and powers of the Security Council are limited to those specific powers mentioned in paragraph 2 of Article 24 of the Charter, yet we affirm that those powers and duties are limited and should be strictly regulated and governed by the fundamental principles and purposes laid down in Chapter 1 of the Charter. Paragraph 2 of Article 24, on the "functions and powers" of the Security Council reminds us that "In discharging these duties the Security Council shall act in accordance with the Purposes and Principles of the United Nations". Those Purposes and Principles of the United Nations are laid down in Chapter I of the Charter; Article 1, paragraph 1, demands that the adjustment or settlement of international disputes should be "in conformity with the principles of justice and international law".

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[449] I.C.J. Rep. 1992, 3, 61:94 I.L.R. 478, 544.
[450] I.C.J. Rep. 1993, 325, 440, para.101; 95 I.L.R. 1, 158. See also Judge Bedjaoui, writing in a non-judicial capacity, *op. cit. supra* n.2. particularly at pp.14 and 31.
[451] SC Official Records (1951), 553rd meeting, pp.22-25. Quoted by Mr Stavropoulos, representative of the UN Secretary General, at the oral hearings of the *Namibia Advisory Opinion* before the ICJ. See Pleadings, Oral Arguments, Documents--*The Namibia Advisory Opinion*, Vol.2, p.48. Also reproduced by Bedjaoui. *idem*, pp.285-286.

However, the purposes of the United Nations are very broad goals which the organisation is set up to achieve and the principles to be observed in achieving those goals are for the most part directed at the conduct of member States and not the organisation. Nevertheless, there are specific limitations in the provisions of Articles 1 and 2 of the Charter which circumscribe the powers of the Organisation generally and thus of the Security Council. It is to these specific limitations which are now considered.

2.1 General Principles of International Law

The first possible limit on the powers of the Council under these provisions is a duty on the part of the Council not to violate general international law unless the Charter specifically allows it to do so. As the Egyptian representative quoted above pointed out, Article 1(1) of the Charter provides, as one of the purposes of the United Nations is that international disputes or situations which might lead to a breach of the peace are to be settled or adjusted "in conformity with the principles of justice and international law". The contention, then, is that in exercising its responsibilities the Security Council is bound to act in accordance with international law and may not disregard or derogate from it unless the Charter specifically allows it to do so.[452] As Judge Bedjaoui has pointed out:[453]

It appears less acceptable than ever that sovereign States should have created an international organisation equipped with broad powers of control and sanction vis-a-vis themselves but *itself* exempted from the duty to respect both the Charter which gave birth to it and international law.

The view that the Security Council is bound to respect general international law has been stated by a number of judges of the Court in separate and dissenting opinions. In *Lockerbie* Judge Weeramantry stated: "The history of the United Nations Charter thus corroborates the view that a clear limitation on the plenitude of the Security Council's powers is that those powers must be exercised in accordance with the well-established principles of international

[452] See the statement made by the Representative of Ecuador. Mr Ayala Lasso, in the Security Council prior to the adoption of Res.687(1991) which provides, *inter alia,* for the demarcation of the Iraq-Kuwait border. He said: "While Chapter VII of the Charter authorizes the use of all necessary means to implement the resolutions of the Council, it cannot confer on the Council more powers than those set forth in the Charter itself. A position of the Council in this matter, which is an extremely sensitive one. must fall unequivocally within the bounds of international law and of the United Nations Charter if it is not to become a fresh source of conflict": SC meeting of 3 Apr. 1991. UN Doc.S/PV.2981. Reproduced by Bedjaoui, *idem,* p.347.
[453] See Bedjaoui. *idem,* p.7.

law."[454] In the same case Judge Bedjaoui asked: "is not the essential point of concern to us here the fact that the Council is bound to respect 'the principles of international law', an expression that holds more precise meaning for international lawyers?"[455]

According to Dapo[456], it is not correct to contend that the Security Council is not at all restrained by principles of international law when it is taking collective measures to enforce the peace or to suppress aggression and by inference against individual's organisations or entities. First of all it is not clear that the delegates to the San Francisco Conference sought to limit the application of principles of international law only to peaceful adjustment of disputes by the Security Council. In the Committee on the Structure and Procedure of the Security Council, Norway proposed an amendment which would have required that "no solution should be imposed upon a State of a nature to impair its confidence in its future security or welfare".[457] The UK delegate argued that this was unnecessary in view of the reference to justice and international law in the principles of the Charter which bind the Security Council.

The Norwegian delegate replied that there was no problem connected with pacific settlement of disputes but only with coercive action in applying sanctions. This shows that he also took the view that the phrase "justice and international law" in the principles of the Charter referred only to pacific settlement of disputes as this was all that was covered by the Chinese proposal which led to its inclusion in the Charter. It seems that he therefore wanted to insert limits to the enforcement powers of the Council. The US delegate then took the floor to support the opinion that the Norwegian amendment was unnecessary. He referred to the purposes and principles of the Charter, specifically mentioning the phrases "regard for principles of justice and international law", "respect for the principle of equal rights and self-determination" and "promotion and encouragement of respect for human rights and for fundamental freedoms for all without respect to race, language, religion, or sex". In his opinion these "constituted the highest rules of conduct. Furthermore, the Charter had to be considered in its entirety and if the Security Council violated its principles and purposes it would be acting *ultra vires.* "

To the extent that the United Nations is a subject of international law it follows that its organs

[454] I.C.J. Rep. 1992, 3, 65; 94 I.L.R. 478, 548.
[455] *Idem*, p.46: 94 I.L.R. 478, 529. See also Judge Fitzmaurice in the *Namibia Advisory Opinion* I.C.J. Rep. 1971, 6, 294.

[456] Akande Dapo.The International Court of Justice and the Security Council: is there room for judicial control of decisions of the political organs of the United Nations? I.C.L.Q. 1997, 46(2), 309-343
[457] Doc.555. III/1/27. 11 U.N.C.I.O. Docs., 378 (24 May 1945).

are thereby subjected to international law. Where the Charter gives the Council a right to derogate from international law it is clear that that right exists. Where no express permission is given the right does not exist. For example, the Security Council is empowered to use force in the maintenance of international peace but this does not relieve it of its duty in using such force to respect international humanitarian law in armed conflict (*the jus in bello*). As one writer has pointed out, in transferring the power to wage war or conduct military operations the member States "could not attribute to the Organization a power which they themselves did not and do not possess". The reason for this is because the United Nations and its member States are equally subject to international law and therefore have obligations under it.

2.2 Human Rights Obligations

Dapo also suggests that there is a limitation on the powers of the Security Council in respect to international human rights norms and that there is a duty on its part to observe generally accepted standards of human rights behaviour when it is acting in its role of quasi-judicial/legislative law maker interpreter. Since the end of the Second World War there has been an increasing awareness of the need to protect the rights of the individual and this was one of the reasons for setting up the United Nations. One of the purposes of the United Nations, which as we have seen limit the powers of the Security Council, is that expressed in Article 1(4) of the Charter, which provides for international co-operation "in promoting and encouraging respect for human rights". Likewise, Article 55 of the Charter declares that "the United Nations shall promote … universal respect for, and observance of human rights and fundamental freedoms …" The ICJ has on two occasions declared that conduct by a State which violated the fundamental rights of individuals is contrary to the principles of the Charter and it has thus confirmed that this is a substantive obligation flowing from the Charter.[458] Indeed it would be anachronistic if the Security Council, an organ of the United Nations, was itself empowered to violate human rights when the whole tenor of the Charter is to promote the protection of human rights by and in States. Judge *ad hoc* Lauterpacht in the *Bosnia* case recognised that human rights obligations do constitute a limitation on the power

[458] See *Diplomatic and Consular Staff, supra* n.15. at p.42 where the ICJ said: "Wrongfully to deprive human beings of their freedom and to subject them to physical constraints 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." Also in *Namibia Advisory Opinion* I.C.J. Rep. 1971.6.57 the ICJ stated that "denial [by South Africa] of fundamental human rights is a flagrant violation of the purposes and principles of the Charter".

of the Security Council.[459]

There is, of course, the question as to which fundamental human rights the Council is bound to respect. Gill has suggested that "the Council will *at a minimum* be bound by the rules of human rights contained in the International Bill of Rights from which no derogation is permitted in time of emergency or armed conflict."[460] One may also suggest that human rights norms which have entered into the corpus of general international law are binding on the Security Council and also that by Articles 1(4) and 55(c) of the Charter, human rights obligations (such as the various human rights treaties) adopted within the United Nations system are binding on the Organisation even if they are not yet accepted by all member States.

In the exercise of its powers to impose economic and diplomatic sanctions under Article 41 both the Security Council itself and its members have often shown a reluctance to act in such a way that the basic human rights of the peoples of the territories concerned will be violated.[461] For example, it is recognised that the Council cannot pursue a policy of starvation.[462] Also, in the establishment of the International Criminal Tribunal for the Former

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[459] I.C.J. Rep. 1993.325.440 at paras.101 and 102. See also 95 I.L.R. at 158.

[460] Article 4 of the International Covenant on Civil and Political Rights sets out provisions in respect of which no derogation may be made even "in time of public emergency which threatens the life of the nation."

[461] See Gowlland-Debbas, "Security Council Enforcement Action and Issues of State Responsibility" (1994) 43 I.C.L.Q. 55, 91. See also Gowlland-Debbas. *Collective Responses to Illegal Acts in International Law. United Nations Action in the Question of Southern Rhodesia* (1990). pp.437-441 and 459-460. See also the decision of the European Court of Justice (particularly the Opinion of Advocate General Jacobs) in *Bosphorus Hava Yollari Turizm ve Ticaret AS* v. *Minister for Transport, Energy and Communications, Ireland* (C-84/95), [1996] 3 C.M.L.R. 257 holding that a European Community Regulation (Council Reg.990/93) implementing S.C.Res. 820 did not violate the plaintiffs fundamental rights.Note that medical supplies and foodstuffs required for humanitarian purposes are always excluded from UN sanctions regimes. See in respect of Rhodesia. Res.253(1968) paras.3(d) & 4; Iraq--Res.661(1990) paras.3(c) & 4. Res.666(1990) & Res.687(1991) para.20; the Federal Republic of Yugoslavia (Serbia & Montenegro) and the parts of Bosnia and Croatia under the control of Serb forces--Res.757(1992) paras.4(c) & 5, Res.820(1993) para.12; Haiti--Res.917(1994) para.7(a).Nevertheless, certain parts of Res.820(1993) & 992(1995) raise the question as to whether the Council may have authorised the violation of the right to a fair hearing provided for in Article 14 of the International Covenant on Civil and Political Rights. Paragraphs 16 and 4 of those resolutions (respectively) provide that no vessels suspected of *having violated* or being in violation of the relevant Security Councils imposing sanctions on the Federal Republic of Yugoslavia (Serbia & Montenegro) or on the Serbian controlled parts of Bosnia-Herzegovina is to be allowed passage through installations, including river locks or canals within the territory of Member States (in particular through the locks of Iron Gates I system on the left hand bank of the Danube in Romanian territory--Res.992). If this is intended to deny access to vessels suspected of having been involved in *previous* violations of the sanctions regime, as opposed to those suspected to be presently attempting to violate the relevant resolutions (and this is a reasonable interpretation of those resolutions as other provisions of those resolutions deal with the right of States to take measures to avoid infringement of the resolutions), it is arguable that those concerned have a right to have their rights and obligations judicially determined and cannot simply be denied all rights of access on the basis of suspicion.

[462] See Provost. "Starvation as a Weapon: Legal Implications of the UN Food Blockade Against Iraq and Kuwait" (1992) 30 Col.J.Trans.L. 577 who argues that starvation is prohibited by rules of international

Yugoslavia, the Security Council was careful to ensure that the basic rights of accused persons are respected. The Secretary General regarded the point as so basic that in his report to the Security Council prior to the establishment of the Tribunal he said:[463]

> It is axiomatic that the International Tribunal must fully respect internationally recognized standards regarding the rights of the accused at all stages of its proceedings. In the view of the Secretary General such internationally recognized standards are, in particular, contained in Article 14 of the International Covenant on Civil and Political Rights.

The Statute setting up the Tribunal ensures respect for human rights norms in a number of ways. In the first place, Article 21(1) and (4) ensure that there is absolute respect for the principle of "equality of arms", i.e. the prosecution and the defence are put on the same footing and given equal opportunities. Second, the accused is entitled to be present at his trial as provided for in Article 14(3)(d) of the International Covenant on Civil and Political Rights (ICCPR).[464] Third, the Statute follows the Second Optional Protocol to the ICCPR and it denies the Tribunal the power to impose the death penalty. Fourth, Article 25 of the Statute of the Tribunal guarantees to the accused a right of appeal, as stipulated in Article 14(5) of the ICCPR.[465] It would indeed be surprising if the Council has the power to set up a criminal tribunal (as it asserts that it has, and an assertion that the Tribunal has upheld it does have)[466] but has no obligation to set up one that guarantees the rights of persons brought before it.[467]

It would therefore seem there is a body of evidence to support the notion that the UN Security Council should act in accordance with internationally recognised human right norms as contained within the international 'Bill of Rights'.

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humanitarian law, in particular by Arts.54 and 70 of Protocol I to the Geneva Conventions. According to him these provisions have attained the status of customary international law.

[463] See the Report of the Secretary General Pursuant to Paragraph 2 of Security Council Resolution 808 (1993). UN Doc.S/25704, para.106, p.27. Repr. (1993) 32 I.L.M. 1159.

[464] See Art.21 (4)d of the Statute of the Tribunal.

[465] See paras.22-26 of the First Annual Report of the Tribunal to the General Assembly and the Security Council (29 Aug. 1994), UN Docs.A/49/432 and S/1994/1007. Also reproduced in (1994) Hag.Y.I.L. 187, 197.

[466] See the decision of the Appeals Chamber of the Tribunal in *Tadić* (IT-94-1-AR72) (1996) 35 I.L.M. 32.

[467] One of the arguments put forward by the defendant in *Tadić* before the Tribunal, *ibid,* was that the establishment of the Tribunal was contrary to the general principle that a person is entitled to be tried by a tribunal or court "established by law"--See Art.14(1) of the ICCPR. The Appeals Chamber held that the interpretation of that principle that requires a tribunal to be established by a legislature has no application in an international law setting. However, the Appeals Chamber held that other possible interpretations of the principle are that a tribunal must be established by a body with power to take binding decisions or that the tribunal must be established in accordance with the rule of law. The Chamber held that the establishment of the Tribunal satisfied these last two interpretations and therefore held that the Tribunal had been "established by law". See *idem,* paras.41-48; (1996) 35 I.L.M. 32.46.

3 Responsibility of the United Nations for an Internationally Wrongful Act

In July 2011, the International Law Commission (ILC) recommended that the Articles for Responsibility of International Organisations (ARIO) for be adopted by the General Assembly of the UN[468] regarding the responsibility of international organisations for their for wrongful acts[469]. It outlines the principle that for every internationally wrongful act of an international organization there entails international responsibility for that organization. This act or omission must be attributable to the organisation and must constitute a breach of that organisations obligation under international law. As the articles refers to international law this is relevant in the present study as it would presumably include a breach of international human rights norms, as outlined in the international bill of rights. (These are further discussed in detail chapter 6).

In particular article 7 makes it clear that if a state or any of its organs, place their function at the disposal of an international organisation, then it is the international organisation that must take responsibility for that function. This infers for example that where states give information to the UN through its security services, or government agencies that leads to inclusion of an individual or entity on a UN sanctions lists such as that maintained under resolution 1267, then the responsibility for who appears on these lists and their culpability for the subsequent sanctions imposed by the UN through their resolutions still lies firmly with the UNSC[470].

3.1 Implications for UN under ARIO

[468] See *Official Records of the General Assembly, Sixty-sixth session, Supplement No. 10* (A/66/10), paras. 87 and 88.

[469] Article 2 of ARIO gives an explanation for the use of terms, which it states for the purposes of the present draft articles means, (a) "international organization" means an organization established by a treaty or other instrument governed by international law and possessing its own international legal personality. International organizations may include as members, in addition to States, other entities; (b) "rules of the organization" means, in particular, the constituent instruments, decisions, resolutions and other acts of the international organization adopted in accordance with those instruments, and established practice of the organization; (c) "organ of an international organization" means any person or entity which has that status in accordance with the rules of the organization; (d) "agent of an international organization" means an official or other person or entity, other than an organ, who is charged by the organization with carrying out, or helping to carry out, one of its functions, and thus through whom the organization acts.

[470] ARIO, Article 7, deals with the 'Conduct of organs of a State or organs or agents of an international organization placed at the disposal of another international organization'. It states that where the conduct of an organ of a State or an organ or agent of an international organization that is placed at the disposal of another international organization shall be considered under international law an act of the latter organization if the organization exercises effective control over that conduct.

Whilst ARIO is primarily intended to deal with the relationship between states and international organisations, such as the UN, it may have some implications for individuals and entities who wish to appeal the decision to place them on sanctions lists, particularly under the 1373 resolutions where it is a state nomination. Under ARIO the responsibility would still lie with where the UNSC for example under resolution 1373 have provided the names of individuals and entities themselves then under article 7 or ARIO there is a responsibility there is little an individual could do to instigate their state to take counter measure such as noncompliance in order to comply with international law.

Where a state lists an individual under UN resolutions such as 1373, then the UN could be held responsible under ARIO and therefore subject to counter measures from the individual's state. This could decide not to comply with resolution as it would not be binding (therefore bypassing article 103 of the UN charter (see discussion in chapter 7)…as it would be in breach of that states international obligations under the international bill of rights.

Given that under ARIO the UN is responsible for its own actions and that states acting on behalf of their citizens could hold the UNSC accountable for breaches of human rights then it seems to make eminent sense to have an organisation available under the auspices of the ICJ to examine and determine such matters in compliance with international law. As "the legal framework governing the responsibility of international organisations is sufficiently clear […], inadequacies in the legal enforcement and compliance with human rights produce both a 'liberty deficit' and an 'accountability deficit'[471].

3.2 Concluding Remarks

Throughout this study other international organisations or bodies that deal with the individual and human rights issues have been examined and found wanting for a number of fundamental reason of lacking the necessary international law credentials or the authority and competence under international law to deal effectively with the Security Council.

It has been shown previously that the Security Council are consistently failing to follow the rule of law it is required to do under its own charter. Given such a failing to face its obligations under international law, it is clear that some further action is required sufficient to

[471] Guglielmo Verdirame.The UN and Human Rights: Who Guards the Guardians? 2013, Cambridge Studies in Comparative Law CUP, p2

make them accountable and assessable to the individual seeking redress for violations of their rights. With no other organisation currently readily available with the necessary expertise, jurisprudence and credibility at the international level to provide the necessary just satisfaction for those affected then this author contends this should logically fall to the ICJ to fulfil this role.

CHAPTER 8
THE CASE FOR INTERNATIONAL JUDICIAL REVIEW OF THE UNITED NATIONS SECURITY COUNCIL IN RELATION TO BREACHES OF HUMAN RIGHTS

1 Preliminary Remarks

From the previous discussion, it appears that those individuals alleging human rights abuses on the basis of internationally recognised and accepted standards who live and reside in States which would normally offer adequate legal remedies for defending their human rights, have little chance to obtain fair redress under the existing international channels for any violation of their rights when subjected to sanctions imposed by the UNSC. This is the case whether the violation is caused by the UNSC directly or indirectly through the implementation into national laws in order to comply with UN Security Council Resolutions[472]. As has previously been discussed States are unwilling to ignore these resolutions regardless of any human rights implications as under Articles 41 and 103 of the UN Charter the UNSC resolutions are clearly stated lacking ambiguity and directing member states to act in a specific way against those listed such as travel bans and asset freezing binding on member states regardless of any other international or national commitment[473].

It should be conceded, that various international procedures currently available for dealing with human rights communications has only achieved limited success in providing individuals with some form of recourse and a chance to defend their human rights. However, as previously discussed these procedures carry with them significant constraints and limitations. Accordingly, these conditions greatly limit the chances for the individual to obtain the just satisfaction in the form of redress or compensation that they desperately need.

An international judicial review and appeal system that would therefore allow those subjected to the relevant UN sanctions and subsequent acts of State/Government to truly benefit. This should be employed at an international level because the circumstances under which the UN is placed, particularly with article 103 of the charter (discussed in Chapter 3) make any such

[472] B.G. Ramcharan, *The Concept and Present Status of the International Protection of Human Rights*: Martinus Nijhoff Publishers: Dordrecht Boston, 1989 267.
[473] Behrami v France ; Saramati v France, Germany and Norway (2007) 45 EHRR SE 85 , para 149

procedure operating under the domestic legal system virtually useless if a state is to comply with its international law obligations.

It is the author's contention and basis of this study that only one organisation is both legally qualified has the necessary jurisprudence gravitas and establishment to be capable of carrying out this function, the International Court of Justice[474]. This thesis is primarily aimed at finding a judicial solution for human rights violations of those subjected to UN sanctions and whilst it could be argued that this process could in fact be applied in a wider context, it will not form part of this study, however it is possible that any such procedure could eventually work equally well for those individuals who find themselves unable to obtain just satisfaction at the national and regional level for a violation of the human rights under international treaty provisions, but as stated this is beyond the ambit of this discussion which will concentrate only on this issues involving acts of the Security Council to impose restrictions on individuals and entities through implementation of their targeted sanctions regime which at this time has no system to allow for a sufficient judicial review or appeal.

The purpose of this chapter is therefore twofold. Firstly, it argues that another mechanism is needed at the international level as a complement to procedures which have been in place for a long time but have proved ineffective as instruments offering individual protection from the United Nations. Secondly, it analyses the advantages of the proposed procedure in comparison to the others that have already been implemented internationally. As part of the discussion, it is therefore necessary to examine the powers and competence of the International Criminal Court (ICC) under the Rome Statute as well as various other international practices (e.g. good offices, etc.) to examine any analogous procedures or systems that might be better suited.

2 Why is International Judicial Review Needed?

Some form of judicial review/appeal procedure is considered necessary in a modern world as the systems currently in place within the international legal system are insufficient to deal with the present problem regarding targeted or smart sanctions as a result of UNSC Resolutions. The reason for this is that because all the existing international procedures,

[474] For full information on the Courts, including its membership, operation, statute and procedures see: http://www.icj-cij.org/homepage/, accessed 3 Jan 2011. For a discussion on the functioning of the Court see for example S. Rosenne., *Intervention in the International Court of Justice*: Martinus Nijhoff Publishers, Netherlands 1993; *The Law and Practice of the International Court 1920-1996*: Martinus Nijhoff Publishers 1997

particularly those aimed at defending the human rights of individuals, are designed to give a voice against the abuses of States and generally, have not considered having authority to challenge the new phenomenon of human rights abuses by (or as a direct result of legislation enacted by the States to give effect to UN Resolutions) the UN. This legislation cannot fulfil the expectations of individual victims. In the first instance, the problem lies within the procedure itself.

Under Charter-based procedures, for instance, individual complaints are not generally considered. These procedures were designed to deal specifically with a given country's human rights situation as a whole but as a consequence do not allow an individual the right to petition the UN itself as an international organisation. Under treaty-based procedures, although dealing with individual petitions, the views or conclusions usually do not bring about the desired result. It could even be argued that the quality of the decisions which currently result from the procedures that are available makes the entire mechanism futile as no state or regional organisation has been able to overall the decision of the Security Council[475].

Strengthening the position of the Committees to assist in permitting recommendations which are legally binding on the Security Council is one possibility. However, given the reluctance in the current situation of the Security Council to devolve power to an effective ombudsmen (see discussion in chapter 3 and 4) this may be worth considering but is highly doubtful to be effective. Historically even the moderate powers the Committees do possess, has taken a long time for the Committees to obtain recognition from States. How much longer would it take for the States to recognise the authority bestowed on the Committees without the constant need for further Security Council resolutions to uphold and bind their decisions upon the member states.

Moreover, even if an amendment to the treaty provisions endowed the treaty-based bodies with the same authority as a court, in most cases they still currently require additional official recognition, because the provisions are optional. The waiting time can be very long or even indefinite. From the victim's perspective, this is intolerable. Again, in this respect, the political will of the States plays a decisive role. Such political will can well be uncertain and unpredictable. With international judicial review, the door is at least partially opened: as a Member of the United Nations, a State is *ipso facto* a party to the Statute of the International

[475] See for example the discussion regarding cases of Kadi/Nada in Chapter 4.

Court of Justice, even though as it currently stands, not all member States recognise the competence of the ICJ to hear a case and issue judgments on matters involving that State.[476]

There would additionally be a risk of inconsistency if some other international body was considered in order to deal with issues regarding the implementation and execution of Security Council Resolutions in respect of targeted sanctions. For example, Judge Gilbert Guillaume, the International Court of Justice's former President, has recommended caution about the risk of inconsistency and conflicting judgments because of overlapping jurisdiction due to what he calls the "proliferation of international judicial bodies". In his address to the members of the General Assembly's Sixth (Legal) Committee, he asserted that the proliferation of judicial bodies was a response to the need to subject expanding inter-State relations and cross-frontier transactions to the rule of law.[477]
He went on to caution:

> Among the unfortunate consequences from that proliferation though, were the risk of overlapping jurisdictions, which could lead to 'forum shopping', the rendering of conflicting judgments and inconsistency in case law. While international law certainly has to adapt itself, it must nonetheless preserve the unity and provide the players on the international stage with a secure framework.[478]

This would suggest that it would be better to attempt to any strengthen judicial review/appeal not by creating a whole new mechanism, which might conflict or contradict others in place, but instead expand the mandate of an established institution already in situ, with the necessary credentials such as possessed by the International Court of Justice.

All these aforementioned procedures tend to have as part of their main objective to provide a broad platform from which individuals may exercise their right to defend themselves against violations of human rights but of course, only after their rights have been violated.

Speaking specifically regarding human rights violations, Professor Martin Scheinin, former Special Rapporteur on Human Rights and previous Director of the Finland-based Abo

[476] Article 93(1) of the Statute of the International Court of Justice.
[477] UN General Assembly Press Release, GA/L/3157, available at: http://srch1.un.org:80/plweb-cgi/, Judge Guillaume's remark was actually made to comment on the establishment of the ICC, but its implication may well go beyond that', accessed 1 November 2010.
[478] Ibid n 477, at p 2

Akademi University Institute for Human Rights suggests that some form of international tribunal is certainly a prospect. In relation to the establishment of the International Criminal Court (ICC), seen by him as a parallel for the possible establishment of an international human rights court, Scheinin argues:

> The entry into force of the Rome Statute in July 2002 and the subsequent period when the ICC will become operative will provide momentum for international discussion on the need of a World Human Rights Court. If individuals are made, on the level of international law, subject to penal procedures and penal sanctions for violations of certain human rights, through the International Criminal Court with final and binding jurisdiction, why should the primary subject of international law, namely states, not be made subject to the jurisdiction of a human rights court with the power to issue binding decisions?[479]

The pivotal reason for Professor Scheinin suggesting this conclusion is that in recent years, much attention has been given to the problems and potentials of the system of international supervision of human rights law; although this has primarily taken place only in academic and non-academic analysis on how to improve the functioning of the so- called treaty bodies established under six major human rights treaties elaborated within the United Nations framework[480].

Pointing out a recent development that occurred within the ICC, Scheinin sees that this could;

> Serve as strong support for the parallel processes of giving individuals also rights directly on the international level and of making states accountable for their acts or omissions that lead to the violations of human rights.[481]

He argues that a future "World Human Rights Court" would have to be endowed with all necessary power to fully exercise its jurisdiction as another world court (alongside the International Court of Justice), such as the power of judicial review of the UN itself, state parties' acts covering legislative and administrative products as well as judicial decisions. A

[479]Martin Scheinin., *Towards a World Human Rights Court*: Institute for Human Rights, Abo Akademi University: Finland, 2003, p 3
[480] Ibid 4
[481] Ibid 6

tentative blueprint of this world human rights court could be based on the following characteristics:

1) No new substantive human rights norms need to be elaborated. The substantive norms of human rights are to be found in the 1948 Universal Declaration of Human Rights and subsequent human rights treaties and the evolving institutionalized practices of interpretation based on those treaties;

2) In order to ratify the Statute of the World Human Rights Court, States need not renounce the human rights treaties they have already ratified. However, States will be free to withdraw from existing optional complaint procedures if they recognize the binding jurisdiction of the Court in relation to the same set of substantive human rights norms;

3) The process of amending existing multilateral human rights treaties need not be resorted to;

4) The World Human Rights court will be optional in nature. Any State may subject itself to the binding jurisdiction of the Court, in relation to the substantive norms provided by one or more of existing human rights treaties. This will result in somewhat cumbersome variable geometry in the work of the Court, as the applicable law will differ from case to case. By converting the principle of independence and indivisibility of all human rights into a legal one, the resulting hardship can be kept within tolerable borders;

5) Entities other than States, including the UN itself or multinational corporations or organisations, may by unilateral declaration recognize the binding jurisdiction of the Court. Such declaration must specify a) a set of human rights norms contained in the existing human rights treaties to which the entity considers itself bound, and b) what internal remedies of the entity, or generally available external remedies, need to be exhausted before a complaint may be submitted to the Court;

6) The same approach might be feasible even in respect of States themselves: that they would have the right to specify what regional or international procedures constitute such remedies that must be exhausted before engaging the Court. The admissibility question related to "the same matter" could be resolved in a similar fashion, by allowing the State in question to determine whether previous consideration by a regional human rights body precludes a subsequent complaint to the new Court;

7) The Court will have the competence to issue binding decisions on interim measures of protection and binding decisions on effective remedies in cases of human rights violations. The Court will have an effective follow-up mechanism to ensure the implementation of its judgments;

8) So far, no blueprint exists to address the question of whether the jurisdiction of the Court will be limited to complaints by individual victims of human rights violations, or whether a case can be initiated by other actors (States, non-governmental organisations, etc.), and whether this will require that the Court will deal not only with (individual) human rights violations but also with "unsatisfactory application", e.g. to take positive measures.[482]

One interesting point in Scheinin's idea is the possibility of giving such a court a more extensive jurisdiction not only to deal with individual complaints but also with an "unsatisfactory application", such as to take positive measures. The competence of such a court to deal with an unsatisfactory application in taking a positive measure may well be regarded as involving the review of a State's acts or legislation and their conformity with human rights standards or even that of the United Nations itself which currently lacks any real judicial oversight into its own abuses of human rights.

It would therefore be useful if there existed at international level a judicial review and appeals procedure which scrutinised the consistency and the actions of the UNSC resolutions in regard to international human rights compliance and which took the necessary measures if inconsistencies were found. In this context, the availability of an international judicial review of UN Security Council actions specifically in relation to its targeted sanctions resolutions that result in breaches of human rights may, in this context, prevent the violation of wider human rights abuses from taking place and provide individuals with an avenue through which they can secure the exercise of their rights before any violation occurs. The procedure may thus function as an early-warning system for the protection of human rights.

Nonetheless, even if a violation has taken place because a particular State has adhered to its national system of judicial review[483,] international judicial review can still be used to bring

[482] Ibid 8

[483] In countries such as Switzerland, a regulation will be reviewed through a referendum before it comes into effect. But in countries like Indonesia, a regulation enters into force first and if considered inconsistent, a petition may be filed with the court. On various systems of judicial review, *see*, among others, Brewer-

about an amendment in the legislation of this State. The proposed mechanism may thus have a dual function: prevention and reparation. This could also serve as a way to balance the power States have attached to article 103 of the UN Charter meaning that it could not be invoked it breached international human rights standards.

Judicial review at this level may also serve to advise States and governments that they have exceeded the expectations of the UNSC in their implementation of legislation in response to UNSC sanctions and that in doing do have exercised its own power over and above what the resolution required. This may act as deterrence to future violations under Security Council Resolutions. There is of course always a possibility that a government will misuse its power while conducting its administrative and legislative affairs either allegedly in response to the command of a UNSC resolution in this situations, the court should be able to examine the lawfulness and fairness of their actions which is made in response to the relevant UNSC resolution and advise accordingly.

In relation to the violation of principles for the promotion and protection of international human rights, a range of treaties have been adopted and ratified. But mere adoption and ratification of treaties do not themselves decrease the incidence of violations of rights, for it is up to the State parties to work out how they are going to implement these treaties. Many of the treaties are not implemented in practice. With the UNSC taking over a quasi-judicial/[484]executive role of implementing targeted sanctions of individuals at the international level the UN charter itself has become an obstacle to human rights compliance. A major impediment to satisfactory implementation of these standards does undoubtedly lie within national laws themselves. So, in order to secure the conformity of these national laws with international standards of human rights, an international judicial review procedure must be available in the first instance to set the example and lead the way as well as showing that no one is above the rule of law.

To what standard should the UNSC be held accountable in this context? It is suggested that it is both logical and equitable to expect the United Nations supreme decision making body to uphold to its own standards of human rights in what is generally referred to as the 'International Bill of Rights', which purposes of this study consists of the Universal

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Carais, *Judicial Review in Comparative Law*, Chapter 5.

[484] See discussion in chapter two regarding changing role of the UNSC in relation to individual sanction lists.

Declaration of Human Rights, the International Covenant on Civil and Political Rights together with its two Optional Protocols, and the International Covenant on Economic, Social and Cultural Rights.

The two covenants are already legally binding on States parties. The principles contained in the Universal Declaration of Human Rights are not an international treaty or part of the UN Charter however they are now considered almost universally as part of customary international law[485]. Its provisions either constitute a general principle of international human rights law or express basic humanitarian views[486]. More important is its status as an authoritative guide, produced by the General Assembly, for the interpretation of the United Nations Charter. In this capacity, the Declaration has considerable indirect legal effect and is regarded by the General Assembly and by some prominent jurists as a part of the "law of the United Nations".[487]Moreover, in the Proclamation, it is stated that the Declaration is;

> a common standard of achievement for all peoples and all nations, to the end that every individual and every organ of society, keeping this Declaration in mind, shall strive by teaching and education to promote respect for these rights and freedoms and by progressive measures, national and international, to secure their universal and

[485] For a full discussion on the sources, types and hierarchy of international law and how state behaviour can lead to the adoption of certain practices as 'customary international law' see Ian Brownlie, and G, Goodwin-Gill.,(Eds)., *Brownlie's Documents on Human Rights,* (6th Ed): Oxford University Press, Oxford ,2010, Cha 1-2, I. Brownlie, *Principles of Public International Law*, Oxford University Press, Oxford 1998, Chap 1-3

[486] *See* Article 38(1)(c) of the Statute of the International Court of Justice

[487] Ian Brownlie (Ed.)., *Basic Documents in International Law.* (4th Ed): Clarendon Press, Oxford, 2005, 255 and on jus cogens, *see*, Juergen Broehmer. *State Immunity and the Violation of Human Rights*: Kluwer Law International, The Hague, 1997, particularly at pp 145-147, excerpt of which: "… [t]he concept of jus cogens is based on the notion that the international legal order contains norms which cannot be subject to contracting out, respectively which cannot be derogated by any subsequent nor unless that norm is also attributed jus cogens character. In effect this postulates a set of norms higher in hierarchy than general norms of international law and insofar similar to public policy norms of municipal legal orders … In the broader context of human rights the law of genocide, the principles of racial non-discrimination, the rules prohibiting slavery and piracy and the rules concerning crimes against humanity are the least controversial jus cogens norms. However, the *jus cogens* catalogue of norms also includes "the murder or causing the disappearance of individuals", "torture or other cruel, inhuman or degrading treatment or punishment". That follows from the definition of *jus cogens* norms as rules which cannot be derogated from and which must be recognized "by the international community of States as a whole" (art. 53 Vienna Convention on Law of the Treaty). "The international community as a whole" cannot be understood in the sense of each and every state: *jus cogens* norms do not rely on state's consent for it to be bound … it is at least not evident that there is any significant opposition within the international community against the very existence of these fundamental rules."

effective recognition and observance, both among the peoples of Member States themselves and among the peoples of territories under their jurisdiction.[488]

Most of the human rights principles and standards laid down in the Declaration are then elaborated in the Covenants, which even go so far as to propose mechanisms for defending human rights. Unfortunately, as explained above, these mechanisms may only be invoked by individuals who are placed under the jurisdiction of the States which are parties to both treaties. What is needed now is a mechanism that applies to the United Nations to give individuals a right of representation and protection at the very highest level.

Several other references to the principles underlying these developments and to the practical modalities of their international implementation can be found in the United Nations Charter, particularly in Articles 1(3), 55(c), 56, 62(2), 68 and 76(c).

There is all the more reason to do away with any hesitations about the use of international standards of human rights as a basis for judicial review because these standards also involve other aspects of social interaction, such as culture and ethics with human rights touching both. Whilst interpretation of these rights is often vexatious for any court of tribunal tasked with their interpretation, it is matter of degree. For example whilst there is strong debate on the right to life, which includes discussion on abortion and capital punishment, there is no denying from either an ethical or cultural context that there is a right to life argument, it is only the extent of that right which is debated. In other words no cultural or moral value judgment would deny at least the basic principles and standards set forth in the Universal Declaration of Human Rights? Since human rights are the natural birth rights of every human being, universally.[489] The respective relationships of culture and ethics with human rights might be likened to *lex generalis* for the former and to *lex specialis* for the latter. It has generally fallen to the role of a court to interpret and apply the law and in this instance that is exactly what is proposed.

Thus, the promotion, observance, protection and defence of human rights is an international concern and not simply the business of certain states, regions or groups of people unless the

[488] GA Doc. A/811, The Universal Declaration of Human Rights, adopted by the General Assembly of the UN on 10 December 1948.
[489] Diana Ayton-Shenker, United Nations Background Note "The Challenge of Human Rights and Cultural Diversity", Published by the United Nations Department of Public Information DPI/1627/HR--March 1995, available at:< http://www.un.org/rights/dpi1627e.htm,> accessed 4 Jan 2013.

international peace and security that all are striving for is a mere facade. That is why a specific procedure needs to be established whereby the possible violation of any right as a result of wrongdoing or abusive legislation on the part of the United Nations may be prevented.

What about any other international machinery, such as the International Criminal Court? Besides, what are the contributions of other international practices similar to judicial review such as mediation and good offices, conciliation, arbitration, etc.? How far can these mechanisms go in providing redress for human rights violations at an international level? A systematic examination of these is provided in the following two sections.

3 The Power and Competence of the International Criminal Court (ICC)

Two years before entering the new millennium, the international community under the auspices of the United Nations[490] successfully drafted and adopted the Rome Statute of the International Criminal Court.[491] The idea was supported without question by the General Assembly, who emphasised even further "… the need to make necessary arrangements for the commencement of the International Criminal Court in order to ensure its effective operation."[492]

The Statute contains 12 parts and 128 articles. According to Article 126, the Rome Statute will come into force on the first day of the month after the 60th day following the date of the deposit of the 60th instrument of ratification, acceptance, approval or accession. To date, of the 140 countries that have signed the Statute, more than 60 have already ratified the Statute rendering its provisions in force[493].

[490] That is, the Preparatory Commission for the Establishment of the International Criminal Court which was established by Resolution F of the Final Act (A/CONF. 183/10) of the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of the International Criminal Court. On the work of the Preparatory Commission, see, among others, UN Press Release L/2968 of 8 December 2000; on the reading of the Rules of Procedure and Evidence and the Elements of Crimes, see, summary of proceedings PCNICC/1999/L.5/Rev.1, Add. 1 and Add. 2.

491 On 27 July 1998 the UN Diplomatic Conference adopted the draft Statute (A/CONF. 183/9). Complete text of the Statute is taken from: http://www.un.org/law/icc/statute/99_corr/cstatute.htm, accessed 21 March 2011.

[492] A/Res/55/155.

[493] David Howell "*Yes to the World Criminal Court, but with America on Board*" in International Herald Tribune, 6 March 2001. For the number of states that have ratified the Statute, see, <http://www.un.org/icc> accessed 24 February 2012.

The International Criminal Court (the ICC) is to be an independent and permanent judicial body with jurisdiction over "most serious crimes of concern to the international community as a whole" if they were committed by individuals. Nevertheless, in the Preamble of the Statute it is emphasised that the ICC "shall [only] be complementary to national criminal jurisdiction."[494]

The Court was seen as the offspring of two *ad hoc* tribunals which prosecuted war crimes in former Yugoslavia and in Rwanda, as well as of hybrid national/international courts which were being established in Sierra Leone, Cambodia and East Timor.[495] But the very beginning of the ICC can be traced back to the second decade of the 1900s.

The first proposals leading to the creation of a permanent and independent international criminal court were introduced just after the First World War, when the Permanent Court for International Justice was established. In the interval between the First and the Second World War, interest in the creation of this kind of court somehow subsided. The idea was revived after the Second World War, when the Nuremberg and Tokyo international military tribunals were created.[496]

The ICC functions as an organ of the United Nations. The relationship of the ICC with the United Nations shall be determined by an agreement to be approved by the Assembly of States parties to this Statute and thereafter concluded by the President of the ICC on its behalf (Article 2) and the seat of the Court shall be at The Hague in the Netherlands (Article 3).

According to Article 4, the ICC shall have international legal personality and other legal capacity as may be necessary for the exercise of its functions and the fulfilment of its purposes (par. 1). The ICC may exercise its functions and powers on the territory of any State party and, by special agreement, on the territory of another State too (par. 2).

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[494] *See*, sentence "Emphasizing…etc." of the Preamble and Article 1 of the Rome Statute.

[495] Michelle Sief "*World Needs a Crimes Court*" in Christian Science Monitor,15 March 2001 <http://www.globalpolicy.org/wldcourt/icc/2001/0315us.htm>accessed 16/04/2011.

[496] Bernhard Graefrath, "Universal Criminal Jurisdiction and an International Criminal Court" in *European Journal of International Law*, Vol. 1, No. 1 < http://www.ejil.org/journal/Vol1/No1/art4-01.html> accessed 10 April 2011. For more details on the history of the proposals, *see* M.C. Bassiouni, A Draft International Criminal Code and Draft Statute for an International Criminal Tribunal, 2nd revised and updated edition, Dordrecht, Martinus Nijhoff: Boston, 1987, 1 ff., International Criminal Law, 2nd edition, Vols. 1-3, Ardsley, Transnational Publishers: New York, also B.B. Ferencz, An International Criminal Court - A Step toward World Peace: a document, history and analysis. Oceana Publications: Dobbs Ferry,New York, 1980.

Part 2 of the Statute concerns the jurisdiction of the Court, the admissibility of a case and other relevant legal principles. Article 5(1) stipulates the types of crimes covered by the Court's jurisdiction. It specifies that these crimes must be of concern to the international community as a whole, such as: (a) the crime of genocide, (b) crimes against humanity, (c) war crimes and (d) the crime of aggression.

Genocide occurs when any of the following acts is committed with intent to destroy in whole or in part a national, ethnic, racial or religious group[497]:

- killing members of the group;
- causing serious bodily or mental harm to members of the group;
- deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
- imposing measures intended to prevent births within the group;
- forcibly transferring children of the group to another group.[498]

A crime against humanity takes place when any of the following acts is committed as part of a widespread or systematic attack directed against any civilian population:

- murder;
- extermination;
- enslavement;
- deportation or forcible transfer of population;
- imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law;
- torture;
- rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilisation, or any other form of sexual violence of comparable gravity;
- persecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender, or other grounds that are universally

[497] See The Impact of the ICC on victims and affected communities, Uganda Victims Foundation, Feb. 15-17, 2010, which is based on a UVF/REDRESS workshop held in Lira, Uganda, See also The Impact of the Rome Statute System on Victims and Affected Communities, REDRESS/Victims' Rights Working Group, March 22, 2010.

[498] Article 6 of the Rome Statute.

recognised as impermissible under international law, in connection with any act within the jurisdiction of the Court;

- enforced disappearance of persons;
- the crime of apartheid; and
- other inhuman acts of similar character intentionally causing great suffering, or serious injury to body, physical and mental health.[499]

War crimes occur when an act or acts of violence are committed as part of a plan or policy or as part of a large-scale order for such crimes to be perpetrated (Article 8 par. 1). According to paragraph 2, war crimes include any of the following acts:

a) grave breaches of the Geneva Conventions of 12 August 1949, namely, any of the following acts against persons or property protected under the provisions of the Conventions[500]: Wilful killing, torture or inhuman treatment, including biological experiments, wilfully causing great suffering or serious injury to body or health, extensive destruction and appropriation of property not justified by military action and carried out

[499] Article 7 of the Rome Statute. Paragraph 2 of the article further defines the meanings of "attack directed against any civilian population" as a course of conduct involving the multiple commission of acts against any civilian population pursuant to or in furtherance of a State or organisational policy to commit such attack; "extermination" includes the intentional infliction of condition of life, *inter alia* the deprivation of access to food and medicine, calculated to bring about the destruction of part of a population; "enslavement" means the exercise of any or all of the powers attaching to the right of ownership over a person and includes the exercise of such power in the course of trafficking in persons, without grounds permitted under international law; "deportation or forcible transfer of population" means forced displacement of the persons concerned by expulsion or other coercive acts from the area in which they are lawfully present without grounds permitted under international law; "torture" means the intentional infliction of severe physical or mental pain or suffering upon a person in the custody or under the control of the accused (pain or suffering due to lawful sanction is excluded); "forced pregnancy" means the unlawful confinement of a woman forcibly made pregnant with the intent of affecting the ethnic composition of any population or carrying out other grave violations of international law (this does not affect national laws on pregnancy); "persecution" means the intentional and severe deprivation of fundamental rights contrary to international law by reason of the identity of the groups or collectivity; "crime of apartheid" means inhumane acts committed in the context of an institutionalised regime of systematic oppression and domination by one racial group over any other racial group or groups with intent of maintaining the regime; "enforced disappearance of persons" means the arrest, detention or abduction of persons by, or with the authorization, support or acquiescence of, a State or political organisation, followed by a refusal to acknowledge that deprivation of freedom or to give information on the fate or whereabouts of those persons, with the intention of removing them from the protection of the law for a prolonged period of time.

[500] Altogether there are four Conventions and two Additional Protocols: Convention for the Amelioration of the Condition of the Wounded and Sick Members of Armed Forces in the Field, Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, Convention Relative to the Treatment of Prisoners of War, Convention Relative to the Protection of Civilian Persons in Time of War, Additional Protocol relating to the Protection of Victims of International Armed Conflicts (Additional Protocol 1), and Additional Protocol relating to the Protection of Victims of Non-International Armed Conflicts (Additional Protocol 2). All four Conventions entered into force on 21 October 1950, while the Additional Protocol 1 entered into force on 7 December 1979 and Additional Protocol 2 on 7 December 1978.

unlawfully or wantonly, compelling a prisoner of war or other protected person to serve in forces of hostile power, wilfully depriving a prisoner of war or other protected person of the rights of fair and regular trial, unlawful deportation or transfer or unlawful confinement and taking of hostages;

b) other serious violations of the laws and customs applicable in international armed conflict within the established framework of international law, such as attacks against civilians, non-military targets including those belonging to humanitarian or peacekeeping missions, the use of biological and chemical weapons, etc.;

c) intentionally wounding retired soldiers who are *hors de combat.*[501]

As concerns the crime of aggression in particular, the Statute prescribes that the Court shall extend its jurisdiction to this type of crime once a provision has been adopted in accordance with Articles 121 and 123 which define the crime and set out the conditions under which the Court shall exercise jurisdiction with respect to this crime.[502]

3.1 Exercise of Jurisdiction

Article 13 rules that the Court may exercise its jurisdiction with respect to any sort of crime covered by the Statute if (a) a situation arises in which one or more of the alleged crimes is referred to the Prosecutor by a State party, (b) a situation arises in which one or more of the alleged crimes is referred to the Prosecutor by the United Nations Security Council pursuant to Chapter VII of the Charter, or (c) the Prosecutor has initiated an investigation *proprio motu* based on reliable information that one or more such crimes have indeed taken place.

To assist the Court in determining whether one or more such crimes have indeed taken place, a set of rules on the Elements of Crimes shall be adopted by a two-thirds majority of the Assembly of States Parties (Article 9 par. 1). In exercising its powers, the Court is also to uphold the general principles of criminal law, such as *ratione temporis* (Article 11), *nebis in idem* (Article 20), *nullum crimen sine lege* (Article 22), *nulla poena sine lege* (Article 23), non-retroactivity or *ratione personae* (Article 24), etc.

[501] Article 8 of the Statute of the ICJ.
[502] Paragraph 2, Article 5 of the Rome Statute. The article further requires that the provision concerning the crime of aggression shall not contravene the provisions or principles of the United Nations Charter.

The jurisdiction of the Court excludes any person who was under the age of 18 (Article 26) when the alleged crime occurred, but no exception is made with respect to the official rank of a person, even if he/she enjoys legal immunity under international as well as national laws (Article 27). As in a normal criminal trial, the Court must exempt a person from criminal responsibility if the person is mentally ill, incapable, or acting in self- defence, etc. A person's right to presumption of innocence is also to be respected and the burden of proof is laid upon the Prosecutor (Article 66).[503]

3.2 Analysis and Comparison

As noted above, the creation of the ICC is the next and perhaps the final outcome of the Nuremberg and Tokyo international military tribunals, two *ad hoc* international tribunals for former Yugoslavia and Rwanda and the current fledgling tribunals for Sierra Leone, Cambodia and East Timor for the effective enforcement of international humanitarian law.[504] The establishment of those tribunals was meant to provide a more effective means of enforcing international humanitarian law after the previous mechanisms seemed to fail.

The first means available for legally enforcing international humanitarianism was the traditional and rather controversial method of reprisals, whereby a soldier used an illegal means of warfare in response to violations of the laws of war by his enemy. The aim of this tactic is to make the enemy stop behaving illegally and to 'punish' him in order to deter him from committing further breaches. The second means was generally known as Protecting Power, a mechanism agreed upon by the parties to a conflict, to secure the supervision and implementation by the armed forces of their international humanitarian obligations. The third means was the existence of the Fact Finding Commission. The Commission was set up by the Secretary-General at the request of the Security Council in accordance with Resolution 780 (1992) to investigate violations of international humanitarian law in the former Yugoslavia. Based on the subsequent findings of this Commission, the Security Council decided to establish the International Criminal Tribunal for the Former Yugoslavia.[505]

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[503] Rules on the trial process and the enforcement of the rulings are summed up in part 6 Articles 62 – 85 and part 10 Articles 103 - 111 of the Statute.

[504] Bernhard Graefrath, "*Universal Criminal Jurisdiction and an International Criminal Court*" in European Journal of International Law, 1990,Vol. 1, No. 1, http://www.ejil.org/pdfs/1/1/1146.pdf, accessed 6 Feb 2013

[505]Daphna Shraga & Ralph Zacklin, *The International Criminal Tribunal for the Former Yugoslavia*, European Journal of International Law: 5 EJIL(1994) 360-380 <http://www.ejil.org/pdfs/5/1/1248.pdf> accessed 9 Jan 2013.

While the three previous methods concentrated on the States' duty to uphold their obligations under international humanitarian law, the ICC focuses its jurisdiction on individual responsibility. It should be acknowledged that, in one way, the creation of the ICC does represent a step forward in the effort to promote the observance of humanitarian law internationally. Yet, on the other hand, the mechanism is flawed as far as the effective enforcement of international humanitarian law is concerned, because the implementation of the prosecution and punishment of individuals ultimately hinges on, and depends on, the goodwill of States.[506]

Unlike the procedures which deal with individual communications under various treaties in which the Committees do not make legally binding decisions, the ICC does hand down judgments and has legal binding force on the parties concerned. This is as expected because the ICC is a judicial institution operating as a criminal court on the basis of general criminal law principles at international level. Thus, it does not work in the area of international human rights.

Petitions or complaints alleging violations of individual human rights are dealt with by the Committees established for that specific purpose, but they are not vested with the same degree of powers or competence as the ICC. In other words, some privileges enjoyed by the ICC, such as the power to hand down judgments, are not granted to the Committees. This makes the work of the Committees ineffective and in many cases futile for law enforcement purposes.

Indeed, the effective implementation of the decisions made by the ICC ultimately depends on the goodwill of States[507]. Still, from this point onward, it is no longer a question of the court's judicial competence, but rather a question of sanction and of moral values held by individual

[506] Ibid at 372

[507] For a discussion on the of the ICC effectiveness see for example; David Tolbert *Stocktaking: Peace and Justice,* (The Rome Statute Review Conference) Jun 2010 < http://ictj.org/publication/stocktaking-peace-and-justice-rome-statute-review-conference> accessed 16 Jan 2013. Neha Jain, A Separate Law for Peacekeepers: The Clash between the Security Council and the International Criminal Court The European Journal of International Law Vol. 16 no.2 EJIL 2005; EU Guiding Principles Concerning Agreements Between a State Party to the Rome Statute of the International Criminal Court and the United States Regarding the Conditions to Surrender of Persons to the Court < www.europa.int/comm/external_relations/human_rights/gac.htm>J. Crawford, P. Sands, and R. Wilde, Joint Opinion in the Matter of the Statute of the International Criminal Court and in the Matter of Bilateral Agreements Sought by the United States under Article 98(2) of the Statute (2003), at 22–23. I. Bantekas and S. Nash, International Criminal Law 4th ed Hart Publishing: London, 2010; M. Boot, Genocide, Crimes Against Humanity, War Crimes: Nullum Crimen Sine Lege and the Subject Matter Jurisdiction of the International Criminal Court (2002), at 554; R. Kerr, The International Criminal Tribunal for the Former Yugoslavia: An Exercise in Law, Politics, and Diplomacy (2004) 80–81.

States. The issue here is in which skilful way could an effective sanction be formulated so that a State would have no other choice but to implement it within its national jurisdiction, because it felt that this sanction served its own interests as well as those of the international community at large, even though it might have to observe it under constraint.[508] For no State would 'feel' happy to bow to international pressure and besides, there could be some financial or political consequences occurring. As the United Nations Secretary-General's seminal Rule of Law report says, "Peace and justice, if properly pursued, promote and sustain one another. The question can never be whether to pursue justice, but rather when and how[509]."

4 International Practices Similar to Judicial Review

Article 2(3) of the United Nations Charter states that all Member States;

> shall settle their international disputes by peaceful means in such a manner that international peace and security and justice are not endangered.

This article means that there is no general rule requiring states to settle their grievances, but that if they decide to do so, this must be done in a peaceful manner. The absence of a general obligation to settle disputes is reflected by the fact that the jurisdiction of the International Court of Justice (ICJ) is not compulsory. Thus, a state cannot be compelled to submit a dispute with another state to a third party such as the ICJ for settlement unless it has agreed upon it.[510]

Under international law, many procedures to settle disputes have been implemented; although, from a legal point of view, these are relatively obsolete. As a matter of fact, such procedures for the supervision and pacific settlement of disputes have been developed through old-fashioned processes in which the acts and omissions of the States could be reviewed for their conformity with international legal norms. Most of these procedures have

[508] More on the theory of sanction and punishment, *see*, Igor Primoratz (1989*). Justifying Legal Punishment*, New Jersey, London: Humanities International Press, particularly pp. 1-31. On the effectiveness of the United Nations sanctions, *see*, Willem J.M. van Genugten and Gerard A. de Groot (eds.) (1999), *United Nations Sanctions, Effectiveness and Effects especially in the Field of Human Rights - A Multi- disciplinary Approach,* Antwerpen: Intersentia.

[509]UN Doc. S/2004/616, para.21,The Rule of Law and Transitional Justice in Conflict and Post-conflict Societies, Report of the Secretary-General, Aug. 24, 2004,

[510] The only exception to this rule is the obligation of states under Art. 33 of the Charter, which requires a state to submit disputes which are likely to endanger international peace and security to third party for a peaceful settlement.

a non-judicial character.[511] Nevertheless, it is perhaps valuable to consider some of these procedures before possibly coming to the conclusion that an international judicial review is needed.

The said procedures vary greatly among themselves and can be any of the following:

- consultation between States parties;
- settlement of disputes through mediation and good offices;
- inquiry and conciliation (under the direction of one or more other States, a commission or an organ of an international organisation);
- specific settlement of disputes of non-judicial supervision;
- pacific settlement of disputes within the framework of international organisations or regional machinery.

In general, most of these procedures concern the settlement of disputes of a specific nature; such as in diplomacy, problems relating to the international economy and trade cooperation, and other related matters such as disputes about territorial borders.[512]

4.1 Negotiation

As in the national legal system, the most common method of settling a dispute is through negotiation which appears to be the best option because it is simple and it does not involve a third party.[513] However, the procedure can only operate if the disputants have agreed to adopt this method of settlement, which would then in turn affect the binding power of the settlement. If the parties concerned so decide jointly, the outcome of the procedure can become legally binding and then it may be set in the form of a treaty. Otherwise, the outcome can be recorded in an exchange of notes or diplomatic memoranda, which have no legal effect.[514] The agreement between the People's Republic of China and the United Kingdom over the future of Hong Kong is an example of how this second option can work.

4.2 Good Offices and Mediation

[511] P van Dijk, *Judicial Review of Governmental Action*, Ibid (n405)363.
[512] See, for instance, M. Dixon, *Textbook on International Law* (Blackstone Press Limited: London 1989) 222-245: Malcolm Shaw *International Law* (4th Ed, Cambridge University Press, London, 1997)717-774 and Ian Brownlie, *Principles of Public International Law* (5th Ed, Clarendon Press: Oxford, 1998) 703-706.
[513] Malcolm M. Shaw, International Law, *Ibid* n512, 546.
[514] M. Dixon, ibid (n 512) 223

Unlike negotiation, the use of the procedures of good offices and mediation involves the service of a third party. This third party may be an individual or individuals, a State or a group of States, or else one or more international organisations.[515]The main role of this third party is to persuade and encourage the contending parties to sit at the negotiating table to settle their differences. The person offering good offices must be a neutral and trustworthy party who is external to the negotiation, such as when the late American General, Alexander Haig acted as such a negotiator in the Falkland Islands war between the United Kingdom and Argentina.[516]

The procedure of mediation is simply an extension of good offices. A mediator is a person approved by the opposing parties whose task is to suggest the terms and conditions of a settlement, so that he or she is actively involved in the negotiation. United Nations envoys, for example, have been active in this type of process with regard to the conflict in former Yugoslavia. Mediation and good offices are thus a preliminary procedure of negotiation.[517] A number of rules governing these two procedures are laid down in The Hague Conventions for the Pacific Settlement of Disputes of 1899 and 1907.

4.3 Inquiry

Generally speaking, a commission of inquiry can be set up in which reputable observers investigate the evidence in detail when differences of opinion on factual matters underlie a dispute between parties. The parties to a dispute will agree to refer the matter to this impartial body who will engage in an unbiased fact-finding task.[518] It is up to the parties to negotiate a settlement based on its findings and just like the other procedures noted above, the settlement has no legal binding force. Although established as a fact-finding body, the commission of inquiry works according to the judicial pattern in the sense that its reports contain legal conclusions. This is not surprising since the majority of the members of the commission are usually lawyers.[519]

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[515] M. Shaw, ibid (n 512) 723.
[516] Although just how neutral Haig was is now a matter of debate, see for example comments by John O'Sullivan, How the US Almost Betrayed Britain, Wall Street journal, 2 April 2012, http://online.wsj.com/article/SB10001424052702303816504577313852502105454.html. Accessed 2 April 2012 in relation to US official papers released 30 years after the conflict.
[517] More on the procedures, see *International Court of Justice Report 1969*, in the North Sea Continental Shelf Cases, 3, 47, also, *ICJ Reports 1974 in the Fisheries Jurisdiction*, 3, 32.
[518] M. Dixon, ibid (n 512) 224.
[519] *The Red Crusader Case* which concerned a British trawler and a Danish fisheries protection vessel which subsequently involved a British warship (a frigate) in 1962. The commission of inquiry came to the conclusion

4.4 Conciliation

Conciliation can be regarded either as a non-judicial or as a semi-judicial procedure for the settlement of international disputes. The procedure of conciliation implies the reference of a dispute to a third party, usually a commission or committee, whose task it is to propose recommendations for settlement. Conciliation commissions are different from commissions of inquiry because the latter do not produce concrete proposals for settlement. The 'semi-judicial' aspect of the work of a conciliation commission derives from its competence to elucidate facts, hear the parties and formulate decisions in the form of proposals.[520]

The rules which define conciliation were drawn up in the General Act on the Pacific Settlement of International Disputes of 1928, revised in 1949. Under this procedure, a settlement is generally proposed by a neutral third party and has no legally binding effect. One example of a conciliation procedure is the *Jan Meyen Conciliation Commission (Iceland v Norway)* in 1981[521]. In practice, the settlements proposed by conciliation commissions form the basis for the arbitration of further settlement procedures.

4.5 Arbitration

The procedure of arbitration was held to be the most effective and equitable manner of settling international disputes where diplomacy had failed. The procedure grew to some extent out of the processes of diplomatic settlement and represented an advance towards a more developed international legal system.[522]Like all methods of pacific settlement in international law, arbitration is voluntary and may take place on an *ad hoc* basis or according to any other specific arrangement that the parties involved might have agreed upon. Prior to this process, the States concerned must consent to the exercise of jurisdiction by the arbitrators.[523]

The most notable arbitration procedure that was ever carried out and is still regarded as the model of modern arbitration was the Jay Treaty of 1794 between the U.S.A. and Great

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that the British frigate had 'exceeded the legitimate use of armed force'. *See* Malcolm Shaw, International Law, *ibid* (n 38) 726.

[520] Ian Brownlie, *Principles of Public International Law*, *ibid* (n 512) 704.

[521] Full details see: http://untreaty.un.org/cod/riaa/cases/vol_XXVII/1-34.pdf, accessed 16 Jan 2013

[522] Malcolm Shaw, *International Law*, *ibid* (n 38) 737-738.

[523] M. Dixon, *International Law*, *ibid* (n 38) 228.

Britain. The procedure was successfully used again in the *Alabama Claims* arbitration[524] of 1872 between the two countries, and resulted in the compensation payment by Great Britain to the U.S.A. for breaches of contractual obligations on the building of warships. Subsequently, in accordance with the Conventions signed in The Hague in 1899 and 1907 (particularly Articles XV and XVIII), a permanent Court of Arbitration was established.

Actually, it is not really a court as such since it does not consist of a fixed number of judges. Rather, it consists of a panel of persons nominated by the contracting States (with a maximum of four national representatives), and comprises individuals of 'known competency in questions of international law, of high moral reputation and disposed to accept the duties of an arbitrator'.[525] Arbitration tribunals may thus consist of a single arbitrator or of a collegiate body of judges.

In 1958, the General Assembly adopted the Model Rules on Arbitral Procedure proposed by the International Law Commission.[526] These rules were, however, merely optional. In 1992, the Permanent Court of Arbitration itself adopted the Optional Rules for Arbitrating Disputes between Two States[527]. Generally, the law to be applied in arbitration is international law, but the parties may agree upon certain principles to be taken into account by the tribunal and specify this in the *compromis*[528]. This principle was applied in the *British Guiana and Venezuela Boundary*[529] dispute and in the *Trail Smelter Case*[530].

It is an important characteristic of arbitration that the tribunal has the competency to determine its own jurisdiction and therefore to interpret the relevant legal instruments determining that jurisdiction. Once an arbitral award (that is, the decision) has been made, it is final and binding on the parties concerned, but in certain circumstances the award itself

[524] J. B. Moore, *International Arbitrations*, New York, 1898, vol. 1, p.653.
[525] Article XLIV of the Hague Convention as revised in 1907.
[526] General Assembly Resolution 1262 (XI) (1958).
[527] These were based on the UNCITRAL (United Nations Commission on International Trade Law) Arbitration Rules adopted by the UN General Assembly on 15 December 1976 in its resolution 31/98. *See*, for example, Ian Brownlie, *Principles of Public International Law, ibid* (n 38) 706.
[528] A *compromis* is a kind of arbitrational decision based on the parties' consent and agreement. It is final and binding.
[529] British Guiana v Venezuela, 89 BFSP, 1896 57
[530] USA v Canada; 9 AD 315: Full details of case <http://untreaty.un.org/cod/riaa/cases/vol_iii/1905-1982.pdf,> accessed 17 Jan 2013.

may be regarded as null. Nullity of award occurs when the tribunal exceeds the powers that it was given by mutual consent in the *compromis*.[531]

5 A Brief Analysis of These Types of Dispute Resolution

It is clear that these procedures for settlement of disputes by peaceful means deal specifically with grievances between states. They do not relate to individual complaints. Besides, the grievances dealt with under these procedures do not concern human rights violations by any means. As mentioned above, complaints about human rights violations are dealt with by special bodies under special procedures according to special laws and provisions.

Of all the international legal resources mentioned above, none can be invoked by individuals claiming that their rights have been violated as a result of State abuses or poor national legislation. This takes us to the next step in the search for a better protection of individuals in the field of human rights.

6 International Judicial Review as a Complementary Procedure

The following sections deal with two crucial issues on which the possibility of making international judicial review available is hinged: who shall possess the power of judicial review and by what legal principles is it underpinned? Prior to discussing these questions, I will enumerate some of the advantages of international judicial review as a complement to other existing mechanisms.

6.1 The Complementary Functions of International Judicial Review

In the previous discussions, it has been noted quite extensively that the existing international legal tools for the promotion and protection of individual human rights only provided individual victims with limited redress. The disadvantages of the procedures came by and large from the defending bodies' inability to produce legally binding decisions on the parties involved in human rights violations and from the fact that communications before these international bodies were generally only acceptable on the condition that all available and effective domestic avenues had been exhausted beforehand.

[531] Malcolm M. Shaw, International Law, *supra* (n 512) 740.

It is precisely in connection with these frustrating limitations that the proposed international judicial review might constitute a breakthrough. As in national law, the outcome of international judicial review proceedings could have legally binding force on the parties involved. Besides, in order to ensure the acceptance and implementation of its decisions, it could consider some form of enforcement such as international sanctions; other available measures could be authorized such as reparation or censure. The power to exercise this judicial review of the UNSC might be given to the International Court of Justice as a court; it would certainly deliver final and binding judgment upon all parties.[532]

Another major advantage of the procedure would be the bypassing of the need for the "exhaustion of domestic legal avenues" requirement found in the procedures before the treaty bodies. As mentioned above, it can take individuals a very long time to meet this requirement even if there are some exceptions possible where the existing domestic remedies are unavailable, ineffective or even non-existent. It is also fraught with uncertainty, not to mention the heavy financial and possibly, psychological burden, that individuals may have to bear in the process. In short, it is just "as good as impossible" for individuals to fulfil their obligation in this particular area in relation to legislation enacted as a result of UNSC resolutions.

Under the proposed international judicial review, which attempts to target this issue, this prerequisite could be scrapped. As in domestic law, the individual could be permitted to file a lawsuit requesting a court review of the lawfulness of a particular act or legislation, without having to exhaust other "preliminary" procedures first[533]. This way, if an individual claimed that, by international standards, his or her human rights had been, or might be, violated as a direct result of the imposition of legislation or government acts in response to UNSC resolutions then he or she would be allowed to file a lawsuit directly to the International Court of Justice instituting judicial review (or appeal).

Although it seems possible at this point to conclude that international judicial review is necessary to complement other international procedures currently in force under various forms, it is not a simple matter of need. It is also a matter of finding legitimate and reasonable answers to some fundamental questions such as who shall possess that power, should there be

[532] Articles 59 and 60 of the Statute of the ICJ.
[533] See and compare discussion on judicial review in chapter 6

judicial review power for the ICJ, what is the source of the power and what is the scope of this type of judicial review.

7 Who Shall Possess the Power of Judicial Review?

For cases of human rights violations based on legislation and considering Scheinin's argument and idea[534], the ideal judicial institution to possess the power of international judicial review would be some sort of '*world human rights'* court. It is the authors' contention that although a specific world court might be tempting to suggest as an ideal, the most pragmatic way to establish a comparable world court capable of reviewing human rights violations on the international plane would be to utilise the expertise and established system already employed by the ICJ.

Constitutional law theory and practical national law models suggest that the competence of judicial review is one of a court's functions. Judicial review is a procedure whereby an individual challenges an allegedly unfair or unlawful decision or action by an international organisation of a State. In the course of the examination process, the court shall declare whether or not the action or decision is legal. If it is found to be illegal such as being *ultra vires* or unconstitutional, or as contrary to the charter provisions, then the decision must be declared invalid and may be revoked or revised in accordance with the rule of law[535].

At the international level, despite all the limitations due to Charter regulations, the International Court of Justice (ICJ) has been the principal judicial organ of the United Nations. As a World Court,[536] the ICJ has proved to be capable and impartial in settling

[534] See Scheinin on the "*tentative characters of a World Human Rights Court*"., at , note 479 at p 6

[535] See, among others, Stanley de Smith, H.K. Woolf., A.P. le Seur, & J.L. Lowell, *judicial Review of administrative Action*, (5th Ed): Sweet & Maxwell, London,1995; Grahame Aldous, & John Alder, *Application for Judicial Review: law practice of the Crown office*, (2nd ed)., Buttersworth; London, 1993; Sue Arrowsmith *Government Procurement and Judicial Review*, Carswell; Toronto, 1988, cf.

[536] *First sentence* of the Foreword of the booklet on the International Court of Justice, *Jennings,* the former president of the Court used this term occasionally to refer to the ICJ, which probably goes back to Judge Manley O. Mason. The term is current in legal literature in English and not in Spanish, French or Arabic. It is thus familiar mainly to common-law jurists. The expression ultimately suggests that it is a court of, and for, the whole world. Moreover, it is also a judicial organ of the international legal order, a higher court on a world level and as an instrument of world governance. *See*, Georges Abi-Saab *The International Court as a World Court*, Cambridge University Press, Cambridge, 1996, Vaughan Lowe, and Malgosia Fitzmaurice, (Eds)., *Fifty Years of the International Court of Justice*, Cambridge University Press: Cambridge, 1996, 3-16. For an extensive essay on the ICJ as the World Court, *see*, Shabtai Rosenne, *The World Court, what it is and how it works, (*5th ed)., Martinus Nijhoff Publishers: Dordrecht, 1995.

international disputes. In the light of these facts, the International Court of Justice should be entrusted with the power of judicial review.[537]

7.1 Should there be a Power of Judicial Review for the ICJ?

While discussion on the possible establishment of a world human rights court has merit, overall use of the International Court of Justice is a better option. A multi-level approach to this issue will be used by emphasizing two of its aspects: the inherent competence of the International Court of Justice and the ever- increasing demand for a new world order.

7.2 The Inherent Competence of the International Court of Justice

As a court for the settlement of international disputes and as the principal judicial organ of the United Nations, the International Court of Justice should possess the power of judicial review. It is a role the Court already plays in a limited way as it gives advisory opinions and delivers decisions on matters such as the interpretation and implementation of treaties and resolutions.[538]

Article 92 of the Charter states that the 'Statute of the International Court of Justice is an integral part of the Charter'. This statement points to at least two possible interpretations of what 'integral part' means. The first is that the Statute is essentially dependent on the Charter. The second and more generally accepted view is that any problem of interpretation is to be solved in line with the general direction and functions of the United Nations. This

[537] For personal view of the former President of the Court, see, Nagendra Singh, *The Role and Record of the International Court of Justice: 1946 – 1988, in celebration of the 40th annivers*ary: Martinus Nijhoff Publishers, Dordrecht,1989, 76-82 (more general in chapter five) also, compare with Renata Szafarz, *The Compulsory Jurisdiction of the International Court of Justice*, Martinus Nijhoff Publishers, Dordrect, 1993 in particular at 1-14.

[538] Since it began work in 1946, to 1996 the ICJ has given 23 advisory opinions and delivered 61 judgments. The General Assembly has requested 14 advisory opinions of the Court 13 cases, for example, The Conditions of Admission of a State in the united Nations (Article 4 of the Charter); the Security Council has requested advisory opinion of the Court concerning the Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding security Council Resolution 276 (1970); the ECOSOC has requested advisory opinions of the Court in two cases, one of them is the Applicability of the Article VI section 22 of the Convention on the Privileges and Immunities of the United Nations; the Executive Board of the UNESCO has requested advisory opinion of the Court in the case concerning Judgments of the Administrative Tribunal of the ILO upon Complaints Made Against UNESCO; WHO has requested advisory opinions of the Court in two cases, one of them is the Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt. A complete list of advisory opinions can be found at <http://www.icj- cij.org/icjwww/ibasictext/advisoryopinions.htm> accessed 23 Oct 2001. Some of the Court's decisions: the Provisional Measures in the Questions of Interpretation and Application of the 1971 Montreal Convention (Lockerbie Case - Libya Arab Jamahiriya v. United Kingdom) of 14 April 1992, Judgment of 30 June 1995 on the Jurisdiction of the Court and Admissibility of the Application (The East Timor Case).A complete list of Court's orders and judgments at: http://www.icj-cij.org/icjwww/idecisions/casesbycountry.htm, accessed 17 Jan 2011.

outlook implies in its turn that the Statute would certainly be able to support a power of judicial review even if it was not mentioned in the Charter.[539]

Article 24(2) of the Charter, for instance, states that the Security Council must exercise its power "…in accordance with the purposes and principles of the United Nations". Elsewhere, the Charter requires that these purposes and principles be carried out "… by peaceful means and in conformity with the principles of justice and international law." On the basis of these requests, the Court should possess the power of judicial review to examine legally, but not politically, whether the United Nations' recommendations have been duly implemented.

As a Member of the United Nations, a State has the obligation to introduce international human rights principles and standards into its national law (articles 1, 55, 56 of the Charter). In accordance with this principle, it is not such a huge step to go one step further and also adopt measures so that the Court is able to examine whether or not the Security Council or a member State has fulfilled its obligation to the Charter in the field of human rights.

The Statute emphasises that the Court is the principal judicial organ of the United Nations (Article1). The Court's competence is outlined in Chapter II and its jurisdiction specifically addressed in Article 36. Although no mention is made of any power of judicial review, it would certainly be acceptable for the Court to be entrusted with such a power as the principal judicial body at international level. As Sir Robert Jennings, a former president of the Court once maintained, it is only a matter of "… when and to what extent the Court might or should have powers of judicial review of administrative action and of political decision. These are not simple but rather complex questions of basic importance for the legal character of the United Nations; and it is a gratifying sign of the maturity of the system that they should be dealt with by the ICJ, one way or another."[540]

7.3 A New World Order[541]

The call for the International Court of Justice to assume a more prominent role in settling international disputes as part of a new world order has never been so intense as it is to date. The role and function of the Court as 'the principal judicial organ of the United Nations' is

[539] Ken Roberts, "Second-Guessing the Security Council: The International Court of Justice and Its Powers of Judicial Review" in Pace International Law Review, spring 1995, http://www.igc.org/globalpolicy/wldcourt/roberts.htm, accessed 16 April 2012

[540] "*The Role and Functioning of the Court*" in *ICJ Yearbook, 1992 – 93*, 251.

[541] Generally, this refers to the post-Cold War era of the 1990s.

manifold: it is at once a court for the whole world, a judicial organ of the international legal order, a higher court on a world level and an instrument of world governance, which in turn has implications that go beyond the Court's position within the international legal order.[542]

Through its special contribution to the settlement of international disputes, the Court partakes in world governance by taking a preventive approach to the pursuit of the purposes of the United Nations, namely the maintenance of peace and security, which according to the UN charter should be done with 'conformity with the principles of justice and international law' whilst promoting and encouraging respect for human rights and for fundamental freedoms for all, without distinction[543]. In playing this role, the Court attracts an ever-increasing volume of work and this testifies to its growing involvement in the establishment of a new world order and the development and evolution (*novum*) of international law.[544]

In the cases Passage through the Great Belt (Finland v. Denmark[545]) and Certain Phosphate Lands in Nauru (Nauru v. Australia[546]) for instance, the perception that recourse to the Court might usefully have been employed at an earlier stage of the dispute has been more widely accepted. In those two cases the parties have settled their disputes out of court after pleading them before the ICJ. This kind of intervention of the Court can be said to partake of 'preventive diplomacy' *lato sensu* by opening the way to a direct settlement of the dispute.[547] If it were entitled to practise judicial review, the Court may well be able to play that kind of role in preventing human rights violations caused UNSC Resolutions that failed to comply with human right standards. In the words of Sir Robert Jennings: "Whenever the Court or its procedure can help in this way, the Court is, in an important sense, still productively at work."[548]

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[542] Cf, *ibid* note 539
[543] Article 1 UN Charter
[544] This is the era where the Court is beginning to be seen as 'a resort to be employed in close relationship with normal diplomatic negotiations rather than as a last resort' where all else has failed (Sir Robert Jennings' address to the General Assembly as the president of the ICJ [UN Doc. A/48/PV.31] of 8 November 1993). On the contributions made by the Court for the development of international law, *see*, Nagendra Singh, *The Role and Record of the International Court of Justice*: Martinus Nijhoff Publishers, Dordrect Boston, 1989, 137-164
[545] *ICJ Reports*, Yearbook 1992, 348.
[546] *ICJ Reports*, Yearbook 1993, 322.
[547] Georges Abi-Saab, "International Court as a World Court", Ibid (n 536) 213
[548] Ibid. (n)545, ICJ Yearbook 1992 – 93

8 The Source of Judicial Review

In this particular part of the discussion, it will be suggested that the International Court of Justice may already possess powers of judicial review. In support of this argument, four possible sources of power will be examined: the United Nations Charter, the Statute of the International Court of Justice, historical facts or *travaux preparatoires* of the Charter and certain developments of case law.

8.1 The U.N. Charter

Chapter XIV of the Charter deals specifically with powers attributed to the International Court of Justice. Article 92 states that the Court shall be the principal judicial organ of the U.N. and shall function in accordance with the annexed Statute of the ICJ. By virtue of this article, especially the phrase "principal judicial organ", it may actually be implied that the Court possesses judicial review power if the States parties agree that there should be a judicial body with the authority to examine the validity of acts issued by other organs of State governments. However, it is obvious that no judicial review power can be based solely and directly on this provision of the Chapter[549]. Furthermore to review judicial decisions of the Security Council or any other organ of the UN it will require a change to the present statute, which is discussed in the following chapter.

8.2 The Statute of the ICJ

The next possible source of judicial review power for the Court is the Statute of the International Court of Justice. Article 1 of the Statute confirms the specific existence of the ICJ as the principal judicial organ of the United Nations. The 'complete' competence of the Court is outlined in Chapter II while its jurisdiction is set down in Article 36. The connection between the Statute and the Charter is formalised by Article 92 of the Charter, which states that the Statute is an integral part of the Charter. On the strength of this argument, the Statute would certainly be able to support the Court's power of judicial review even if it did not exist in the Charter[550]. However, there is not a single paragraph or line in the Statute which mentions any power of judicial review in so many words. Once again, it can only be implicitly deduced from the phrase that the Court is the 'principal judicial organ of the United Nations'. At best therefore, it is a potential role which the Court could play, but would

[549] Ken Roberts, *Ibid, note* 539.
[550] Ken Roberts, *Ibid, note* 539.

probably require some type of modification to the Statute in order to enshrine such a role from a legal perspective.

8.3 Historical Facts

The history of the U.N. Charter shows that there was originally a strong desire to grant the Court a power of judicial review, although the *travaux preparatoires* of the Charter in the San Francisco Conference on International Organisation was sternly against the idea. Belgium was the leading country proposing that a judicial review power should be given to the Court. The idea was based on the assumption that the Security Council might make decisions which would breach the rights of Member States, which it is submitted has come to pass with the inclusion of targeted sanctions lists at the UN level and forms the crux of this thesis. It was suggested that the proposed amendment would be added into the Charter's Chapter VI on the Pacific Settlement of Disputes. But this did not come to pass because it was feared that the Belgian Amendment would weaken the Security Council too much and that sufficient checks and balances were already in place within the charter itself to make this unnecessary.[551]

Later on, still in the same Conference, Belgium once again raised the issue of empowering the Court with judicial review competence, but this time before the Committee on legal problems. The proposal was to establish a proper interpretative organ for certain parts of the Charter with the Court being the obvious possibility. The proposal was once again rejected on the ground that the General Assembly, the Court or *ad hoc* committees could perform the role themselves[552]. The French amendment, which strongly supported the idea of giving judicial power to the court, was also rejected[553]. It was clear that although the majority of the participants were not in favour of giving full judicial review power to the Court but they were certainly not against the procedure *per se*. The Charter itself recognises judicial review-like practices in case Member States disagree with each other about the interpretation of the Charter. The Court will then be asked for its advisory opinion on the matter. Therefore, it can

[551] Proposal at the San Francisco Conference in International Organisation, UN Doc. 433/III/2/15 or Conference (UNCIO) Documents Nos. 47 and 48 (1945).
[552] UN Doc. 664, IV/2/33, UNCIO Doc. 633 (1945).
[553] That was a concept made by the French delegation to the Conference, suggesting points similar to that of Belgium's.

be argued that the final Charter itself gave rise to the idea of the establishment of permanent judicial review procedure, despite the views of the conference at the time.[554]

8.4 The Development of Judicial Review in Case Law

Examples of the Court's power of judicial review can also be found in the decisions of the Court in certain cases.

a. Certain Expenses Case

In this case, the General Assembly requested an advisory opinion from the Court on whether Member States had to pay expenses related to the United Nations operations in Congo in 1960-61 and in the Middle East in 1950. The requested opinion was about Article 17(2) of the Charter which stated that the "expenses of the Organisation [should] be borne by Member States as apportioned by the General Assembly". The question was whether or not this rule included expenses incurred by such operations. The opinion of the Court was basically in support of the view that each organ must determine its own jurisdiction.[555] It called for the Court to decide first whether the expenditures authorised by the General Assembly were in conformity with the Charter. Despite the fact that the request was not granted, the Court reserved for itself, if it so wished, the right to examine whether the act of the General Assembly was in line with the Charter provisions.

The Court's statement was that as long as the act fulfilled one of the stated purposes, "the presumption [was] that such action [was] not *ultra vires*." It would appear that the Court reserved for itself the power to review the validity of actions taken by the organs of the United Nations. Since then the 'presumption of validity' has served as the Court's standard of review.[556]

b. The Namibia Case

In this case, the Court was asked for advisory opinion on the Security Council Resolution No. 270 demanding South Africa's withdrawal from Namibia because, due to its apartheid

[554] Ken Roberts, *ibid* (n 539) 6.
[555] *Certain Expenses Case*, (ICJ Report, 1962) 168.
[556] Ken Roberts, *ibid* (n 539) 7.

practices, it had violated the Mandate that it had been given.[557] The resolution thus put an end to the Mandate. The Court's opinion on this case was that the Council had not violated the 'presumption of validity' principle in its resolution despite claims by France and South Africa that the Council's decisions were *ultra vires*.[558]

This opinion reflects the view that the Court, when asked to do so, may not avoid putting to the test the legality or validity of any resolution made by any organ of the United Nations.

c. *Lockerbie Case (Provisional Measures)*

In this case the Court was asked once again to give its advisory opinion based on the suits filed by Libya against the U.S. and the U.K. alleging that both states had violated the Montreal Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation (Sabotage) of 1971 by continuing to attempt to gain custody of two Libyan nationals implicated in the case. In its application, Libya argued that the Security Council resolutions[559] regarding the bombing incident, upon which the U.S. and the U.K. based their demands, were *ultra vires* because they violated Article 7 of the said Montreal Convention. It further asked the Court to order provisional measures regarding the imposition of sanctions.[560]

Article 7 of the Montreal Convention, recognising the *aut dedere aut judicare* principle, establishes that the country of origin of the suspects of air sabotage may choose either to surrender its nationals to foreign jurisdiction for trial or to have its own court procedure. On 14 April 1992 the Court, in relation to the refusal to comply with Resolution 731, ruled that:

> the rights claimed by Libya under the Montreal Convention…were not appropriate for protection by the indication of provisional measures; an indication of the measures requested by Libya would be likely to impair the rights which appear prima facie to

[557] Mandate of the League of Nations authorising South Africa to administer the so-called Mandate for Namibia in the territory then known as South-West Africa following World War I.
[558] *Namibia Case*, ICJ Reports 1971, 53.
[559] Security Council Resolution 731 on 21 January 1992 requested that Libya surrender its two nationals involved in the bombing of Pan Am flight 103 over Lockerbie, Scotland [UN Doc. S/Res. 731 (1992)] and Resolution 748 adopted on 31 March 1992, imposing universal and mandatory diplomatic and economic sanctions on Libya [UN Doc. S/Res./748 (1992)].
[560] Letter from Ibrahim M. Bishari, the Secretary of State of Libya, to the ICJ dated 3 March 1992.

be enjoyed by the two respondent States (the U.S. and the U.K.) by virtue of Security Council Resolution 748.[561]

In conjunction with Resolution 748 particularly, the Libyan application essentially left the Court with three jurisprudential options. Firstly, it could have maintained that the sanctions ordered by Resolution 748 should be suspended until such time as the merits of the claim might be ascertained, after which, the claim could have been declared groundless. Secondly, it could have decided that since no sufficient case of mala fides or ultra vires had been established by Libya at this preliminary stage, there were no grounds upon which the Court could order such interim relief. Or thirdly, the Court could have declared that no relief would be forthcoming at any stage of the proceedings if granting that relief would require the Court to find out whether the Security Council had exceeded its Charter-mandated power (Chapter VII). It is obvious that the first two choices imply the right of judicial review whereas the third implies judicial restraint or abdication.[562]

So what did the Court choose in the end? It appears that the Court chose a soft version of the second option. The majority (11-5 votes) of the Court found that "both Libya and the United States, as Members of the United Nations, [were] obliged to accept and carry out the obligations imposed by Security Council in accordance with Article 25 of the Charter", including obligations contained in Resolution 748. It further concluded that "the obligations of the Parties in that respect [prevailed] over their obligations under any other international agreement, including the Montreal Convention."[563]

Before handing down judgment, the Court was once again minded to decide the matter in the judicial review-like manner in which it examined the lawfulness and conformity of the Council resolutions with the Charter and the 1971 Montreal Convention.

d. Bosnia-Herzegovina v. Federal Republic of Yugoslavia (Serbia and Montenegro)

[561] *Lockerbie Case* (Libya v. U.K.), (*ICJ Reports 1992*) 29.
[562] Thomas M. Franck, *The Powers of Appreciation: who is the ultimate guardian of UN legality?* American Journal of International Law, July 1992, 14-28, http://www.globalpolicy.org/ wldcourt/franck.htm. Accessed 28 March 2011.
[563] Thomas M. Franck, Ibid, 23.

In March 1993 Bosnia-Herzegovina submitted an application to the Court seeking provisional measures in order to stop Yugoslavian acts of genocide. In response to this request, the Court ordered Yugoslavia to stop any genocidal actions and also indicated further measures that needed to be taken.[564] However, this order could not stop the violence and so another request was filed with the Court by Bosnia-Herzegovina on 27 July 1993 asking that the Security Council's Weapon Embargo Resolution 713 in 1991 be declared invalid.

The resolution was adopted when Bosnia-Herzegovina was still part of federated Yugoslavia, but by 1993 it had split into two different states. Bosnia-Herzegovina based its argument on the fact that due to the weapon embargo imposed through the resolution, it could not defend itself against Yugoslavia. Yugoslavia was clearly taking advantage of the provisions in the resolution. However, these provisions were in breach of Bosnia-Herzegovina's inherent right to self-defence under Article 51 of the Charter in particular and customary law in general.

This request led to a second order of the Court on 13 September 1993. In this decision, one of the central issues considered by the Court was whether the weapon embargo provisions set forth in the Security Council Resolution 713 were valid or not. This time again, the Court could not avoid reviewing the validity of the Resolution, using as basis, not only the Charter, but also the principles of customary international law e.g. *jus cogens*[565]. This proves that there have been cases dealt with by the Court in the manner of judicial review. Thus, without explicit power entrusted to it, the Court has been using judicial review procedure in its journey of work to settle international disputes.

In addition, there are also statements or opinions from experts and judges in favour of the judicial review power of the Court.[566] Judge Bedjaoui, for example, favouring the judicial power of the Court as opposed to the dominating power of the Security Council, asserted that a degree of balance should be achieved and that "the Court should not be displaced from

[564] Court Order on the case, 8 April 1993, *see*, Bosnia-Herzegovina v Yugoslavia *ICJ Reports 1993*, 332.
[565] Ad hoc *Judge Lauterpacht*, for example, asserted that the prohibition against genocide has long been established as a principle of *jus cogens.* See, *ICJ Reports 1993*, *at* 440.
[566] Brief quotations of these opinions can be read, for example, in Ken Roberts' *Second-Guessing the Security Council: the International Court of Justice and its Powers of Judicial Review* supra note 539, at 10 – 15.

exercising its primary judicial function." He felt that its primary judicial function should include judicial review power on legislative acts and actions[567].

In light of the cases mentioned above, it appears that from now on, there is increasing inevitability for the Court to be granted powers of judicial review.

9 Summary

Whilst traditionally it was State acts and actions have become the main cause of gross violations of human rights, there is now added to this the threat of the UN Security Council itself acting in a quasi-judicial/legislative role without any form of insight or review. Abusive acts and actions often assume the form of alleged legitimate action, i.e. the fight against terrorism, through resolution or legislative enactments. By issuing edicts or laws that abuse human rights, it appears that UN and member States are attempting to legitimise their misconduct which violates the rights of individuals.

Despite the availability of a number of international procedures for the protection of human rights against abusive acts or regulations, these provisions may still be regarded as insufficient due to the limitations of these measures and the unwillingness of those involved at the decision making level to comply with international human rights standards. The decisions by the UN made under such procedures are legally binding on the States parties. The present UN Committees, should they disagree with these concluding remarks, are not courts in the true sense. They do not hand down judgments, they merely give their opinions or views in which recommendations and suggestions are formulated. Neither do they have authority to review the actions of the UN itself. The implementation of these recommendations heavily depends on the willingness of the State party, despite the fact that their contents can be very specific (e.g. amendment of legislation).

Other major weaknesses in the implementation of this system are time and tangible as well as intangible costs, e.g. feelings of frustration. This is mainly caused by the individual's endeavour to meet the requirement of 'exhaustion of all domestic legal avenues'. Having to first trail through years of domestic legal procedures can cause an individual more suffering than the initial human rights abuse. This aberration can be found even amongst countries

[567] Ibid, at 16.

where legal systems provide for adequate procedures for individuals claiming that their rights, according to internationally recognised standards, have been violated[568].

Therefore, it is time to make another procedure available to individuals, in addition to the already existing instruments, so that the UNSC itself may be made accountable for its actions in relation to alleged violations of its own internationally accepted human rights obligations[569]. Hopefully, this measure will be able to better protect individuals against the excesses of the Security Council in exercising its legislative and executive functions. The proposed procedure is for the international judicial review of the United Nations Security Council in respect of Resolutions passed that targeted an individual or other entity and that breach their human rights.

Any decision coming from this procedure will be legally binding and have legal force on all Member States of the United Nations because it will be issued by the International Court of Justice. By becoming part of the United Nations, every Member State recognises the judicial competence of the ICJ to hand down judgment as the principal judicial organ of the United Nations.

It is of course true that at this stage, there is no explicit legal basis for the Court to hold a power of judicial review of the types of cases discussed. However as the principal judicial organ of the UN and on the strength of its own jurisprudence over nearly 70 years, it is no longer inconceivable the ICJ could not be given such a power. When one considers all of the recent developments in international law concerning the rights of the individual, then such as power to review or appeal these specific cases is needed.

[568] See case comment on HM Treasury v A (and others) [2010] UKSC 2 with regard to the hardships found by those subjected to asset freezing in the UK

[569] For a discussion on the role of the ICJ in relation to UN sanctions see, Marko Divac Öberg, *The Legal Effects of Resolutions of the UN Security Council and General Assembly in the Jurisprudence of the ICJ*, The European Journal of International Law Vol. 16 no. EJIL 2006, for discussion on the role of the ICJ generally see, A. Zimmermann, C. Tomuschat, and K. Oellers-Frahm, (eds). *The Statute of the International Court of Justice, A Commentary*, Oxford University Press, Oxford, 2006; Shabtai Rosenne, The Law And Practice of The International Court, 1920-2005, Martinus Nijhoff, 4th Revised edition, 2006. Matheson, Michael J. Matherson, '*Judicial Review in International Organizations: ICJ Review of Security Council Decisions'* 36 George Washington ILR, (2004) 615–622.

CHAPTER 9
A PROPOSED PROCEDURE FOR INTERNATIONAL JUDICIAL REVIEW

1 Preliminary Remarks

The previous chapters have outlined the case for the need of an international judicial review and appeal procedure in relation to Security Council targeted or smart sanctions. This is necessary in order to complement the other existing international procedures for dealing with individual complaints of human rights violations as none of the existing procedures allow for an individual or entity to challenge any acts of the United Nations Security Council, even when the Security Council appears to have taken on a hybrid quasi-judicial role. This is because at present the Security Council both makes the accusations against those named on the sanctions lists whom have alleged terrorist connections (analogous to the role of the executive branch) and imposes asset seizures and travel bans on those so named (a judicial function). This requires the individual to have both an effective judicial review mechanism to examine the evidence against them and an appeal procedure to contest the result of those findings. This is necessary in order for the UNSC to comply with the principles of justice and international law encompassed within the UN charter (article 1) and with internationally accepted human rights standards, (that can be implied from article 3). Whilst there is much debate over the legality of the UNSC to act in this manner, in the first place, with several commentators suggesting the Security Council has acted in an ultra vires manner in relation to its own Charter powers this is not the focus herein. This author takes the view that legality issues aside, the focus must be on developing a lawful, pragmatic solution to the situation which complies with international law.

1.1 Dealing with Article 103 UN Charter

As previously mentioned Article 103 states the following;

> In the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail

Article 103 has been the source of much comment[570] regarding human rights violations in respect of UNSC resolutions by academics and the judiciary (see chapter 4). Whether under the Articles of Responsibility of International Organisations discussed in chapter 7 it could still be used to circumvent breaches of international law is still has to be seen given that the draft articles were only introduced in late 2011. Article 103 would not be of concern to the reformed ICJ even if it has been such a hindrance to national and regional courts in the past when they have considered cases involving the United Nations Security Council for the following reasons;

1. Article 103 only applies to a State's obligations with its compliance under the UN charter, such as following UNSC resolutions with any other international treaty it is part to, such as the European Convention on Human rights. It therefore would not apply to the ICJ which is formed as an organ of the United Nations and therefore not in conflict with any other treaty obligations as it like the UNSC is not a signatory to any such treaty.

2. The article only applies to other 'international treaties' the court would in any event be exercising human rights as define by the rights outlined in the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights, which are now widely considered customary international law in conjunction with the principles of the UN to respect and promote human rights norms.

3. Article 103 would not be applicable where the Security Council resolution in question is made outside its own powers (*ultra vires*) for example by not pursuing the purposes of the UN charter, which include respect for and promotion of human rights norms, a it only applies where there is a conflict to the legitimate aims of the UN.

The Courts main function in its role of judicial review/appeal in these limited cases would be to balance the UN's objectives of maintaining peace and security, with promoting human rights. These are not mutually exclusive and when considering any application brought under the revised procedure, the Court would act in similar manner to that of a domestic court in the balancing of rights as they consider any complaint. The ICJ would do this as a comparative

[570] See n115

organ of the UN, which is of equal standing of the Security Council, established under the same charter. The ICJ would simply be given the additional function of judicial review in these limited circumstances as outlined in the previous chapter.

1.2 Proposal for ICJ to Provide Judicial Review/Appeal function

It is suggested that in cases involving those subjected to UNSC smart or targeted sanctions the powers of judicial review and appeal should be entrusted to the International Court of Justice as a body most qualified and capable of executing this task. It has already been demonstrated that this role has to a greater extent already been used by the ICJ in various judgements handed down by the Court. This appears to be a logical, if contentious, extension of the court's role. Logically, the next question is: "How would this procedure operate and which potential procedural rules are required?"

These questions are narrowly connected to certain issues such as who may bring an action before the Court, the conditions relating to the admissibility of an application and identifying the different procedural stages. However, of utmost importance, is identifying the parties to the procedure. This issue is related to the inherent problem that this study needs to address, namely, can an individual person or a group of people, other than a State, be party to a case before the International Court of Justice? Further, can a person or a group of people eligible to submit a petition to the Court? This question needs to be answered satisfactorily before other queries are discussed.

Although this chapter will be dealing with these issues, it should be noted that the rules and stages of procedure proposed in this section are not conclusive. At this stage, they exist as a hypothesis only but one formulated with regard to the standard procedures generally adopted for the petitions which are brought before the International Court of Justice and its existing Committees. The author is keenly aware that this would also require the considerable political will of the membership, particularly amongst members of the Security Council.

2 Who Can Bring a Case to the Court?

2.1 Preliminary Remarks

Article 34(1) of the Statute of the International Court of Justice[571] confirms that only States are eligible to initiate proceedings before the Court. International organisations, other collectives and private persons are not entitled to bring a case to the Court. All Member States of the United Nations are entitled to be heard before the court.[572]

Under no circumstances is an individual, a private person or a group of people allowed to bring a petition i.e. for them to have any *locus standi* before the Court. The only possible way of permitting individuals or groups to submit an application before the Court is via amendment to the Statute. It can be amended only in the same way as the Charter, i.e. by a two-thirds majority vote in the General Assembly and ratification by two-thirds of member States, including the permanent members of the Security Council.[573]

Should the ICJ consider it desirable for its Statute to be amended, it must submit a proposal to this effect to the General Assembly by means of written communication addressed to the Secretary- General[574].

2.2 How the ICJ Statute Could be Amended

The amendment proposal should, in the first instance, apply to Article 34(1) which declares that "only states may be parties in cases before the Court". It should also be added to this particular paragraph of the article that individuals should also be entitled to submit their cases to the Court, but only if they have a complaint in relation to their human rights following inclusion on a sanctions list proposed by the United Nation as a result of UNSC resolutions. (This issue will be discussed in the conclusion to this study to consider whether this could be expanded to include a wider ambit of other human rights violations). The complaint maybe either, that the association to terrorism is wrong, or that the sanctions imposed have exceeded that which the Security Council intended, such as banning travel for family and friends, or seizing assets not owned directly.

2.3 Further Required Adaption of the ICJ Statute

[571] For full details of the Courts Statute see the International Court of justice home page at; http://www.icj-cij.org/documents/?p1=4&p2=2&p3=0, assessed 19 June 2010.
[572] *See* "Who can bring a case", ICJ homepage at http://www.icj-cij.org/icjwww/iba…sictext/ibasic_who bringcases.html, accessed: 21/03/2011.
[573] *Article 108* of Charter of the United Nations in conjunction with *Article 69* of the Statute of the ICJ.
[574] Article 70 of the Statute of the ICJ.

However, this formulation still needs to be extended further since, in this context, individual persons would be severely limited to bringing only those cases before the Court involving petitions specifically related to violation of international human rights relating to Security Council Resolutions. This necessarily leads to the next step of the amendment proposal; namely the addition of another paragraph to Article 34 stipulating the specific type of instances in which a private person, or a group of people, may submit a petition to the Court to institute a judicial review procedure.

The additional paragraph would then read "The Court, subject to and in conformity with its Rules and other applicable international provisions of human rights, may hear and decide communications brought to it by individuals, or a group, or groups of people, seeking judicial review of, or appeal against, decisions made by the Security Council, to which they are subject, alleging that this act and/or resolution is in contravention of international human rights provisions".

3 Proposed Changes to the ICJ Statute

In full, the proposed amendments to Chapter II encompassing Articles 34 to 38 (proposed amendments shown in bold type) would read as follows:

Chapter II Competence of the Court

Article 34

1. States **and in specific circumstances, in relation to acts of the Security Council, individuals, or a group, or groups of people** may be parties in cases before the Court.

2. **The Court, subject to, and in conformity with its Rules, and other applicable international provisions of human rights norms, may hear and decide communications brought to it by individuals, or a group, or groups of people seeking judicial review, or appeal against decisions made by the Security Council, to which they are subject, alleging that this act and/or resolution is in contravention of international human rights provisions.**

3. Paragraphs 2 and 3 of the present Statute remain, but now become paragraphs 3 and 4.

Article 35 --- unchanged ---

One cannot dismiss, however, the issue of whether such an amendment is in any way realistic or likely. In response, it could be argued that it certainly is, because the Statute is not sacrosanct and can, and in fact has, been amended. Within the Court itself, amendments are by no means "taboo", firstly by virtue of Articles 69 and 70 of the Statute and secondly, because it has already happened to the Rules of Court twice.[575] One might wryly comment on the universality of change, and the need for change, in accordance with the prosaic reality of *panta rhei*, or note, more simply, that 'Everything changes.'

3.1 Is Such a Change Legally Possible?

A more apposite question perhaps, may be the likelihood of such a change taking place in the near future. This is, of course, entirely dependent on whether there is sufficiently strong political support from the international community for such a paradigm shift, but as noted earlier these changes have already begun to appear on the international horizon.

What is needed is the impetus that has been the driving power behind the creation of the International Criminal Court. The maxim 'where there is a will there is a way' will find its true meaning in this exceptionally challenging situation. One could also say that desperate cases require desperate remedies. In addition to this, if one takes into account the results that have been achieved so far in trying to secure the protection of human rights under existing mechanisms, one realises that the will for change by the international cummunity already exists and requires only implementation to become reality.

Failure to act may well lead to further embarrassing situations which threaten to undermine the authority and integrity of the UNSC such as can be said to have occurred in the case of *Kadi.* [576]Much has been written on these proceedings and it is not the purpose of this thesis to

[575] The first amendment was in 1972. The latest took place on 5 December 2000 and constitutes a revision of Articles 79 and 80 of the Rules of Court of 14 April 1978, and entered into force on 1 February 2001. Details of the changes can be seen in the Background Note by the Registry at htt://www.icj-cij.org /icjwww/ibas…ic_RulesofCourtbackgroundNote.htm, accessed 26/10/2011.

[576] Case C-402/05 P Yassin Abdullah Kadi v Council of the European Union and Commission of the European Communities, see discussion on this and others in chapter 4.

discuss this matter in great detail[577]. It should be noted however that throughout the eleven years that Mr Kadi was listed and subjected to UN sanctions it may appear that the European Court of Justice contravened the will of the UNSC on two separate occasions, certainly many commentators have suggested this, due to its finding of a breach of human rights and a lack of judicial remedy available to him. However the European Union did not actually defy the will of the Security Council as Mr Kadi remained on the sanctions list throughout until as previously mentioned he was removed from the sanctions list on 5 October 2012.

4 Stages of the Procedure

Applications to the Court for judicial review should be dealt with under the proceedings of contentious and not of advisory cases. The stages of the proposed judicial review procedure would, therefore comprise three inseparable examination processes: receipt of communication, determination of the admissibility of communication and delivery of judgment[578].

A further amendment to the Rules of Court would be necessary to accommodate these stages of procedure, for the present Rules do not make provisions for this procedure. *Materiae* of this possible amendment should cover the following issues.

4.1 Receipt of Communication

By virtue of the provisions set out in the present Statute and Rules of Court, *all* communications with the Court must be channelled through the Registrar[579]. In this proposed procedure, too, the Registrar should carry out his function accordingly. This

[577] For a further detailed discussion and case comment on Kadi case see; A Tzanakopoulo, Disobeying the Security Council Countermeasures against Wrongful Sanctions 2011, OUP, J Almquist, 'A Human Rights Critique of European Judicial Review': counter-terrorism sanctions' (2008) ICLQ 57(2), 303-331, Amandine G, Cambridge Law Journal, 2006, Case Comment, *'Is it really for the European Community to implement anti-terrorism UN Security Council resolutions*?' C.L.J. 2006, 65(2), 281, A Aust: Kadi: ignoring international legal obligations. I.O.L.R. 2009, 6(1), 293-298, A Bianchi, 'Security Council's Anti-terror Resolutions and their Implementation by Member States: An Overview', (2006) Journal of International Criminal Justice 1044, and A Bianchi, Assessing the effectiveness of the UN Security Council's anti-terrorism measures: the quest for legitimacy and cohesion. E.J.I.L. 2006, 17(5), 881-919, R Brown , Case Comment, *Kadi v Council of the European Union and Commission of the European Communities*: executive power and judicial supervision at European level, E.H.R.L.R. 2006, 4, 456, G Harpaz , Judicial review by the European Court of Justice of UN "smart sanctions" against terror in the Kadi dispute, E.F.A. Rev. 2009, 14(1), 65-88, C Tomuschat C, Case Analysis, 2006, 42 C.M.L.Rev. 5

[578] Details on the Proceedings before the Court are provided by: Chapter III, Articles 39 – 64 of the Statute and Part III, Articles 30 – 101 0f the Rules of Court. Details on the examination procedure under treaty monitoring bodies, refer to discussion in Chapter 6

[579] Articles 40 of the Statute, 26(1)(a), 30 and 31 of the Rules of Court.

procedure would either replace or enhance the role of the UN Ombudsperson (the current role and procedure of the Ombudsperson for those subjected to UN 'targeted' Sanctions is discussed in detail in chapter three) or alternatively, the registrar could work in conjunction with her office for those cases specifically involving UN Security Council Sanctions from the 1267 Committee.

In accordance with Article 40 of the Statute, on receipt of a communication, the Registrar will forward it to all the parties' concerned (paragraph 1).

As noted, all communications including *memorials, counter-memorials, replies* and other documents in support of the evidence shall be addressed to the Registrar before the latter transmits them to all the parties concerned. An exception to this rule is made under Article 30(1) of the Rules of Court which states that "any request made by a party shall be addressed to the Registrar *unless* made in the course of the oral proceedings."

Pursuant to Articles 23 and 27 of the Rules of Court, a Deputy-Registrar shall assist the Registrar in the exercise of his function. Article 27 rules that if both the Registrar and the Deputy-Registrar are unable to carry out their duties, the President of the Court shall appoint an official of the Registry to discharge those functions for a period of time as may be necessary (paragraph 1).

At present the Registrar is not permitted to request additional information relating to the application from the parties to a case. Under Article 31 of Rules of Court, the President shall, in every case submitted to the Court, ascertain the views of the parties with regard to questions of procedure. For this purpose, he or she, shall summon the agents, or representatives, of the parties to meet him, or her, as soon as possible after their appointment, and whenever necessary, thereafter. This first phase of procedure may be called 'registration of application'.

4.2 Admissibility of Communication

In order to decide whether a judicial review communication is admissible or not, the Court would base its judgment on certain conditions. Rules concerning the admissibility requirements of such judicial review communications should be added to the Rules of Court. The present Rules of Court do not make any provision in this regard. With some adjustments,

(by using the Optional Protocol to the ICCPR as a model), the rules of the admissibility of communications could be stipulated as follows:

a) The communication must be compatible with the competence of the Court in accordance with (proposed) Article 34(2) of the Statute (i.e. to review UNSC Resolutions in respect of an individual or other entity that are allegedly in violation of international human rights provisions);

b) The communication must allege a violation of specific human rights provisions contained within the Universal Declaration of Human Rights and/or other accepted international human rights documents as deemed applicable by the Court[580];

c) The communication must be in writing;

d) The communication must come from an individual entity or a group or groups of people subject to the UNSC resolution complained of;

e) The communication must not be an "abuse of rights of submission" (that is, it should have facts or law to support the claim);

f) The communication must not be anonymous;

g) The violation referred to in the communication; although under examination by another international investigation, or settlement procedure, may still simultaneously be submitted to the Court[581.]

The first two requirements specify the characteristics of the cases that the Court will consider, namely that it must be a request to review an act, or resolution, from the UNSC the purpose of which is to clarify whether or not the Security Council has acted lawfully and is not in breach of its own human rights standards. Consequently, the submission of other communications which do not conform to the proposed Article 34(2) of the Statute will be rejected. Moreover, in such communications, it is not permitted to include any political motives or context as a basis for the Court's consideration. The basis for consideration is legal only if it concerns the wording or interpretation of the resolutions, although the Court may consider how it has been interpreted by a national court or government and whether that interpretation has complied with the terms of the resolution. Therefore only those actions or

[580] That is, the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights together with its two Optional Protocols and the Convention on Economic, Social and Cultural Rights

[581] See and compare with Sarah Pritchard and Naomi Sharp, Communicating with the Human Rights Committee; a guide to the Optional Protocol to the International Covenant on Civil and political Rights (Human Rights Booklet No. 1) Sydney, Australian Human Right Information Centre, Faculty of Law UNSW 1996

laws legally in force as a direct result of the imposition and communication of Security Council Resolutions may be scrutinised.

Furthermore, no communication will be declared admissible if it is not submitted in writing together with all necessary documents such as any official text and interpretation (where applicable) of the legislation in support of the communication. Oral communications will not be permitted. Although there will be no official or fixed form of written communication, a model communication shall be developed by the Court for efficiency's sake[582].

Individuals, or a group, or groups of people, or their representatives requesting judicial review from the Court must support their applications with strong evidence which clearly demonstrates the actual violation of an international human rights norms that are a direct result from Security Council Resolution[583]. Failure to meet this requirement leads to a declaration of inadmissibility. The said evidence should consist of a detailed explanation of the UNSC Resolution and how it has been interpreted by the national legal system, (this could include examination of any court decisions and other relevant decrees or regulations whose enactment alone may violate international human rights). To assist the Court in its examination, the evidence shall be provided in the original language, English and French.[584] The author(s) must be clearly identified when submitting communications to the Court. No anonymous communications will be accepted. In the case of a communication being submitted by an individual, his or her name and signature must be clearly written at the end of the document. Where possible, the position, occupation and other relevant details of the individual are specified. If a communication is brought to the attention of the Court by a group or groups of people, the head and the secretary of the group, or other members appointed specifically for that purpose, are to sign the application. In the former situation, the individual concerned must enclose proof of personal identification while, in the latter situation, all members of the group(s) must put their signature to the letter of authorisation.

If a communication invoking judicial review of the Court has already been submitted, be it by a private person, a group or groups of people, the same application will not be accepted a second time. This is understandable since this subsequent communication will be

[582] For a comparative purpose, *see* model communication developed under Optional Protocol to the ICCPR, at appendix three
[583] See for example the discussion on HM Treasury v A (and others) [2010] UKSC 2 in Chapter 4
[584] Article 39(1) rule, that the official languages of the Court shall be French and English.

seeking the same rule or order from the Court, namely to declare that the act or legislation is in breach of the human rights documents already stated and must therefore be modified or ceased in order to accord with internationally accepted human rights standards prevuosly discussed.

The Court will decide this matter with the assistance of the screening function performed by the Registrar. In order to assist the Registrar to carry out this function, a summary of the communication needs to be completed by its authors. In this summary, the applicant should briefly explain what the complaint is all about (*ratione materiae*), who the parties are (*ratione personae*) and when the violation took place (*ratione temporis*). This last point is clearly related to the time when the legislation comes into force.

If it is discovered that a communication pursues the same objectives as an earlier one, the Registrar will let all parties concerned know that the initial communication is currently being examined or has been examined by the Court and that, for this reason, the later communication will not be considered. In deciding the matter the Registrar only needs to consult the Judge(s) assigned for that specific purpose and not necessarily via the process of the official hearing then these matters can be dispensed with by an interlocutory process rather than a full or formal hearing[585]. The entire process of determining the admissibility of an application at this particular stage can be referred to as *pre-trial proceeding*, which was the case with the trial of the former president of Yugoslavia, Slobodan Milosevic.[586]

4.3 Determination of the Merits of Communication and Delivery of Judgment

As is the case for treaty-based procedures, once the Court has decided that the communication is admissible, the parties concerned are asked to explain the problem in detail and to indicate whether anything has been done to resolve it. It may be that, during the period of registration of communication and pre-trial proceeding, the UNSC has changed its listings and removed the complainant or has put into place a new procedure under which the validity of the provisions may be suitably reviewed to comply with the standards required under

[585] Compare with the *Proceedings before the Chambers* as laid down in Articles 26 and 29 of the Statute and Articles 90 – 93 of the Rules of Court.

[586] In one of the many Court's pre-trial hearing in: Prosecutor v Slobodan Milosevic, IT-02-54-AR108bis & AR73. Mr Milosevic denied as unfounded all the charges put to him by the Prosecutor, Ms Del Ponte. This type of proceeding could also be instituted to determine the admissibility of judicial review applications brought before the Court by individuals, or a group, or groups of people.

international human rights standards. If this occurs then this will not bring to an end the proceedings if the parties wish to claim for damages as a result of the procedure already in place.

Alternatively, it may also be that the UNSC wishes to counter the argumentation upon which the application is based. In countering the applicant's argumentation, for example, the Security Council may present evidence indicating that the application is legally unfounded due to abuses of *ratione materiae, ratione temporis* and *ratione personae*, or that the same application is currently being examined under the same procedure. In such cases, the Court will refer the matter back to the pre-trial Judges and the latter will decide it in Chamber-type proceedings (see above).

According to Article 30 of the Rules of Court, all these disputes must go through the Registrar if the parties intend to put down their differences in writing. If the parties wish otherwise, they can also explain their case orally and the Registrar will document the proceedings accordingly[587].

Once all these issues have been sorted out, the Court shall proceed to the next step of the procedure, which would be referred to as a *determination proceeding*. According to Article 43 of the Statute, the Court proceeding exists under two forms: written and oral (par. 1). The written proceeding shall consist of the communication to the Court and to the parties of memorials, counter-memorials and, if necessary, replies; also of all papers and documents in support of the evidence (par. 2) and all these shall be made through the Registrar in the order and within the time determined by the Court (par. 3). The oral proceeding shall consist of the hearing by the Court of witnesses, experts, agents or representatives, counsel and advocates (par. 5).

Both the oral and written proceedings can be referred to as an examination of evidence proceeding. In this examination proceeding, the Court will gather all the relevant information that it will use later on as a basis for its judgment directly from the parties involved, including witnesses and experts. Unlike proceedings under treaty-based procedures, the Court will collect this information not only in writing but also orally. In the examination

[587] The complete rules of written proceedings are set forth in Subsection 2, Articles 44 – 53 whilst the complete rules concerning oral proceedings provides Subsection 3, Articles 54 – 72 of the present rules of Court.

procedure under the Optional Protocol to the ICCPR, for instance, the HRC does not hear oral testimonies and relies solely on the written information provided by the author of communication or State party, as well as relevant supporting documentation.[588]

The Court should set a general rule as to which types of evidence it will consider admissible. Such a rule will serve only as a guideline. Amongst other things, the Court could make provision that any information or documentation can be regarded as evidence as long as it has a direct connection with the case. The information or documentation might include statements from the parties including their witnesses and experts, medical and/or psychiatric reports, texts of domestic court judgments and texts of relevant laws, policies, and codes of practice, guidelines, decrees, executive orders and other relevant documents.

Like the procedure before the Committees, the burden of proof should not rest upon the applicant alone. Often, evidential information is far more accessible to the Security Council than the applicant. The burden of proof should, therefore, also rest upon the Council. However, the applicant must at least be able to establish that there is *prima facie* a case to be heard.[589]

The Court should also determine the standard of proof it will use in the procedure. Unlike the standard of proof under treaty-based procedures, which is the "balance of probabilities", the Court must at least measure its decision by the higher standard of "beyond reasonable doubt".[590]

When all these proceedings have been completed, the Court may deliver its judgment. But prior to handing down judgment, the Court shall, as in a normal court of law, hold deliberation sessions. These should be held in closed meetings and not be open to the public.[591] By virtue of the provisions of the present Rules of Court, when the Court has completed its deliberations and subsequently adopted its judgment, the parties shall be notified of the date on which it will be read and this should take place in a session which is open to the public.[592]

[588] See discussion on the procedures before various Committees in Chapter 6.
[589] See note 581 *above*.
[590] See note 581 above at para 22
[591] Compare with *Article 54* of the present Statute of the Court.
[592] By virtue of, and compare with, Article 58 of the Statute and Article 94 of the Rules of Court.

In the same way as decisions made under treaty-based procedures, the said judgment, which shall state whether it is made by the Court or the Chamber, should include:

- the date on which it is read;
- the name of the judges participating in it;
- the names of the parties;
- the names of the agents, counsel and advocates of the parties;
- a summary of the proceedings;
- the submissions of the parties;
- a statement of the facts;
- the reasons in point of laws;
- the operative provisions of the judgment;
- the necessary steps to be taken (e.g. adjustment or amendment of resolution);
- the decision, if any, in regard to costs;
- the number and names of the judges constituting the majority, and
- a statement as to the text of the judgment which is authoritative.[593]

The judgment made by the Court should be similar to the decision made in cassation trials in the domestic legal system. The decision is thus final and there would be no recourse to appeal.[594] The judgment shall become binding on the parties on the day of the reading.[595]

According to Article 58 of the Statute, the President and the Registrar shall put their signature to the decision.

Pursuant to Article 88 of the present Rules of Court, the parties may, either jointly or separately, discontinue the proceedings before the final judgment has been delivered. Such request must be submitted to the Court in writing via the Registrar and he or she will issue an order indicating the discontinuance of the proceedings and the removal of the case from the list (par. 1).

[593] Compare Article 95 of the Rules of Court and the content of the views of the Human Rights Committee in Prichard & Sharp, 581 at para 23.
[594] Article 60 of Statute of the Court.
[595] Compare Article 94(2) of the Rules of Court.

If the parties have agreed to discontinue the proceedings resulting in the settlement of the dispute, the Court may record this in the aforementioned order. Otherwise, the terms of the settlement may be entered into the order itself or else added on to it in an annexure (par.2). The rule concerning the discontinuance of proceedings would not be applied under the proposed international judicial review procedure. This is because the *raison d'être* of the application concerns the abuse of the international obligations of the Security Council of the United Nations to implement international standards of human rights on UNSC Resolutions.

4.4 Appraisal and Prospects

Unlike decisions made under treaty-based bodies, the judgment of the Court has legally binding force on the parties as it will be supported by the amendment of the relevant Security Council resolution. State compliance with the Court's decision is mandated by the Charter of the United Nations under article 103.[596] As the measures have been put in place in the first instance as a result of Security Council compliance with obligations imposed under the UN's Charter it is highly likely that the same States would comply if ordered to remove, alter, or amend, their practice in relation to the said individuals or entities.

Pursuant to the provisions laid down in Article 94, each Member of the United Nations undertakes to comply with the decision of the International Court of Justice in any case to which it is a party (par. 1). This article extends a cautionary note to States making it clear that non-compliance with any judgment will render it liable to the imposition of sanctions by the United Nations. Paragraph 2 of the same article states that "if any party to a case fails to perform the obligations incumbent upon it under the judgment rendered by the Court, the other party may have recourse to the Security Council, which may, if it deems necessary, make recommendations or decide upon measures [sanctions] to be taken to give effect to the judgment". In other words a successful application to the court could result in a rather bizarre situation in which the UN Security Council could impose sanctions on a state that did not remove sanctions from an individual who successfully argues their case. This is of course extremely unlikely and it is more probable that if the Security Council endorses a removal from the list by the International Court of Justice who have had an opportunity to examine all the evidence in the case then more probable is a state's compliance.

[596] Article 94 of the Charter.

The underlying implication of this provision is that failure to comply with a decision of the International Court of Justice would create further political ramifications, and the Security Council is given wide powers to deal with the consequences. This type of situation would be similar to that which confronted the federal authorities of the United States in *Brown*[597]. In this case, the local educational authorities in Little Rock, Arkansas refused to comply with the Supreme Court's decision not to remove black students from a high school. The situation forced former President Eisenhower to send federal troops to ensure compliance with the judgment. Whilst it is not suggested that the Un would use these methods the principles still exists.

This kind of law enforcement is certainly not ideal as a means of ensuring State compliance with the judgment rendered by the International Court of Justice in human rights related violations, especially in the proposed judicial review procedure. Not only could this sort of sanction lead to another human rights problem, but it could also be deemed rather 'inhumane', rash and very costly.[598]It is suggested that removal from a sanctions list would be sufficient for the individual to entity to seek return of their assets and a removal of travel bans without recourse of further legal action.

Unlike the decisions resulting from treaty-based procedures, and even though the means available to the Court might not be as effective as those of a national legal system, the Court's decisions, as the voice of an international organisation, have generally been complied with satisfactorily; even in cases which were emotionally charged and involved important questions of national prestige and honour.[599]

It is therefore contended that the availability of a power to review the United Nations Security Council Resolution for breaches of human rights in relation to being named under security council resolutions as being involved in terrorism, should be vested with the International Court of Justice as the most qualified and logical judicial organisation to take on the role of human rights complience. It could certainly provide a more effective means to

[597] *Brown v Board of Education* 347 U.S. 483 (1954) for full discussion see Shabtai Rosenne, Terry D. Gill, Erik Jaap Molenaar, Alex G. Oude Elferink, *The World Court: what it is and how it works*, 6th Edition, United Nations Publications, 2003

[598] More details on the problems and difficulties in imposing United Nations sanctions including their types and effect so far and the guidelines to future use of sanctions, see, Willem van Genugten and Gerard A. de Groot (Eds) *United Nations Sanctions, Effectiveness and Effects, Especially in the Field of Human Rights. A Multi-disciplinary Approach*: Intersentia, Holland, 2003 at 135 – 152.

[599] Shabtai n 597 at 48.

fight internationally recognised breaches of agreed human rights violations. This should not be dismissed as idealistic if *sumum ius* (supreme justice) is an international community priority and the particular breaches are occurring under the very auspices of United Nations actions[600].

[600] For a full discussion on the development and working of the court and its relationship within the United Nations see Shabtai Rosenne, Yaël Ronen,*The Law and Practice of the International Court, 1920–2005: The Court and the United Nations*: Martinus Nijhoff Publishers, 2006

CHAPTER 9
FURTHER RESEARCH- THOUGHTS AND CONSIDERATIONS

1 Preliminary Remarks

From the outset this thesis has been proposed as a discussion document with a theoretical solution proposed to a highly complex political/legal problem. It is by no means suggested as the only solution, or even a likely one in the near future concerning the way forward to deal with those subjected to smart sanctions by the United Nations Security Council. The chance of the Security Council being willing to devolving power to the ICJ in order for them to review or appeal their decisions may seem nothing more than a fanciful naive notion, however it has been shown by this study that it is based on sound legal reasoning and is not simply an exercise in academic endeavour.

Ten years ago many would have thought that a functioning International Criminal Court was nothing more than a fantasy However whether this proposal is likely ever to succeed or not one thing does seem clear from almost every commentator on international law in general and those who represent international human rights in particular, that something within the United Nations in respect of international terrorism and the sanctions lists must change as the current system for dealing with the quasi-judicial/executive role of the UNSC it not fit for purpose in the 21st C if human rights and the rule of law are to be encouraged and respected. Even with the UNSC resolutions designed to change to the role and remit of the UN Ombudsperson it can be said that these do not go far enough to address the real issues and represents nothing more than a temporary sticking plaster over a legal wound. Much of what has been achieved is down as much to the personality of the ombudsperson Hilary Prost as it is to the Security Council desiring an equitable solution. There is warning from history of the dangers of short term political gain on rights. Benjamin Franklin said, 'those who would give up essential liberty to purchase a little temporary safety deserve neither liberty nor safety.'

There are many who complain that the UN cannot profess to uphold and support the rule of law in other whilst ignoring the concept in its own functions. Human rights are not items to be abandoned when the going gets tough as clearly the spectre of international terrorism is, but should be upheld to demonstrate universal principles of freedom and individuality. A policy of simply removing those who are listed if it becomes too politically embarrassing is

not really an acceptable legal method of dealing with these issues. It would be a whole different study to suggest that the Security Council rescinds its judicial powers in order to stops making these kinds of decisions which in the present case are more based on the Security Council's distrust of certain states to add names to the international lists of terrorist suspects than a desire to follow the rule of law.

2 Considerations Regarding Highly Sensitive material

Another matter to consider is that whilst this thesis has not considered in detail the minutiae of how the actual practice of hearing evidence would work beyond how the legislation and function of the court itself would function from the legislative perspective, this could be the subject of further research. That is not to say it has not been considered during this study. One of the reasons for this consideration is that during the research it has become apparent that those placed on the lists maintained and approved by the UN are often done so with the use of highly sensitive secret material from the member states. Information that individual States would be reluctant to share in any open court system would be likely to cause an impasse? Quite possibly, particularly as the UN is not the repository for international terrorist intelligence and information, it is only a conduit for the results in order to publish the lists. This is in fact part of the problem in the ability of the UN to test the information given to it used to place individuals and entities on the lists in the first place. It must as an organisation rely on the member states to supply the details of those they want on the lists without disclosing the information or evidence that would make them liable for inclusion. However States are able to conduct hearings within their own municipal court setting involving ultra-sensitive material and various systems have been developed to deal specifically with these situations. There of course is a plethora of debate regarding a number of legal issues surrounding these proceedings however suffice for this study to suggest that models do exist and that they could be modified to be of use at the international level in the given circumstances. Further study could examine best practice and suggest a model to be used in such cases that balances the needs of both the individual accused and the protection of the source of the information or whatever is the particular issue involved.

3 Suggested model Special Immigration Appeals Commission

One model that could be modified to be used by the ICJ in examine the merits of a person's inclusion on a sanctions list is that of the UK's Special Immigration Appeals Commission

3.1 Background to SIAC

SIAC deals with appeals against decisions made by the Home Office to deport, or exclude, someone from the UK on national security grounds, or for other public interest reasons. It also hears appeals against decisions to deprive persons of citizenship status.

The Special Immigration Appeals Commission (SIAC) is a superior court of record created by the Special Immigration Appeals Commission Act 1997. It deals with appeals in cases where the Secretary of State for the Home Department (Home Office) exercises statutory powers to deport, or exclude, someone from the UK on national security grounds, or for other public interest reasons.

SIAC also hears appeals against decisions to stop someone becoming a British citizen, under the British Nationality Act 1981, as amended, (BNA 1981). Section 4 of the Nationality, Immigration and Asylum Act 2002 introduced changes to the British Nationality Act 1981 (BNA 1981) relating to the deprivation of British nationality or status.

The BNA 1981 (as amended) provides that a person may be deprived of their citizenship status if the Secretary of State certifies that to do so would be conducive to the public good. A person may not be deprived of their citizenship status if this would make him stateless. Where the Secretary of State has certified that the decision to deprive was based wholly or partly in reliance on information which he believes should not be made public, the appeal is heard by SIAC.

As specified in the 1997 Act, the SIAC panel consists of three members. One must have held high judicial office; and one must be or have been a senior legally qualified member of the Asylum & Immigration Tribunal (AIT). The third member will usually be someone who has experience of national security matters

The presumption is that SIAC hearings are heard in open court and the public and press can attend. The judge can decide to hear evidence in closed sessions. In this case the public and press would be asked to leave. Most of the cases before SIAC are under anonymity orders so the individuals cannot be named. Appellants can apply to SIAC to waive their right to anonymity.

The Secretary of State may wish to rely on material which he or she objects to disclosing to the appellant or his representative for reasons of national security or public interest. In such cases, Section 6 of the SIAC Act 1997 allows for a Special Advocate to be appointed to represent the interests of the appellant in an appeal hearing before SIAC.

Rule 35 of the SIAC Procedure Rules 2003 sets out the functions of a Special Advocate, namely to cross-examine witnesses, make written submissions and to make submissions at any hearings from which the appellant parties have been excluded. Onward appeal from SIAC is to the Court of Appeal on points of law. The special advocate system can operate in the Court of Appeal although, given that these appeals are on points of law, it is less likely to be necessary.

It is fair to say the current system in the UK is not without its critics and it would be a challenging study to suggest a more equitable system that balances both halves of the fair trail need for secrecy equation.

This notion would require additional research, but it appears there is a case to suggest the ICJ could adapt its procedures to utilise a similar structure. Article 26 of the ICJ Statute allows for the formation of 'Special Chamber' consisting of three or more judges. These could be staffed with additional specialist advisors in order to allow the process to proceed.

4 Other International Groups

One of the limitations of the current UN Ombudsmen system is that 1267 Committee only deals with those persons connected to the Al Qaida or the Osama bin Laden network, with the proposal made in the proceeding chapters an effective judicial review/appeal procedure would exist for all those listed as being connected to international terrorism and those who could be listed in the future with the legal safeguard of an effective tribunal capable of offering an effective relief.

Some form of judicial review/appeal could also eventually be extended to cover other specific issues such as international or transnational crime involving drugs, people trafficking, arms smuggling and nuclear material where assets have been seized or restrictions imposed that have no domestic or regional legal solution. One of the main problems with the present system of smart sanctions is that they are based on an assumption

that freezing of assets will help prevent or suppress international terrorism. There is little evidence to support this and some to suggest the reverse. This may be because although much of the work of international terrorism is analogous to criminal activities in their organisation and methods of operation there are some fundamental differences, the most obvious being ideology[601]. As was shown after the investigation into 9/11, the financing of the attack was estimated between $4-500K. This was not an issue for a terrorist network that has an annual turnover of millions. As has been seen in London, Madrid and even Boston, it takes very little in the way of finance to create acts of terror[602]. Perhaps as was shown by the UK in its experience in Northern Ireland it takes number of different government approaches to both suppressive the activities of terrorist groups, combined with willingness to negotiate a peaceful settlement with them that inevitably involves some form of devolved power. Perhaps that is the only lasting solution to being able to defeat terrorism. A study into the effects of terrorist legislation on the activities of terrorism could be carried out to see what in those cases where it has been stopped effectively has brought about this solution to the problem. Where terrorism has not been eradicated it requires that the population needs to be vigilant and have resilience to cope in order to stop these actions from gaining a political foothold. That resilience is not only in the form of dealing with terrorist actions but being subjected to personal restrictions in a free society in order to combat them. A further study on the effect of terrorism legislation would give a better understanding of these issues.

The issues of whether or not these individual sanctions have been effective if they have raised or lowered the threat of international terrorism would also make for some interesting further study, as would the personal effect of the current asset freezing legislation on those subjected to the freezing orders, which although highly contentious would an interesting study in being better able to understand the legislation and suggest any changes to it.

These are only a few of the possible further areas of research that is suggested as a result of this study.

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[601] J. Fisher, et al, *Assessing the impact of the USA PATRIOT Act on the financial services industry*, Journal of Money Laundering Control 2005, J.M.L.C. 2005, 8(3), 243-251

[602] According to According USA Department of treasury financial investigation centre (FinCENs) money laundering in the USA in 2002 totalled $123.4bn. Of that, the share laundered by terrorist groups was estimated at 0.26 per cent of the total. The rest involved drugs, smuggling, and other crime. From the 288,343 SARs completed by financial institutions in 2003, only 495 (0.17 per cent) refer to 'terrorist financing' as the reason for filing. Unlike traditional organised crime whose goal is to maximise income, terrorists require relatively small sums to commit the most heinous of crimes.

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