Restriction of Powers
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Human Rights Protection in the context of Security Council

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Tiivistelmä/Referat – Abstract

Is about the sanctions and procedures of the United Nations Security Council and the problems their application in practise may cause. Two cases are presented to exemplify the problems from an individual's standpoint as well as that of the states bound by obligations towards individuals.
The Kadi case represents a very direct breach of the rights of individuals attempted to justify with the need to protect and maintain international peace and security. It is argued that principles of necessity, proportionality, due process and legality are not paid sufficient attention and that the sanctions imposed by the Security Council should not be targeted on individuals since adequate means for legal protection are not available against such sanctions dictated by an intra-governmental organ without the capacity to arrange court hearings should the targeted individual wish to defend their self against the accusations.
The facts of the Kadi case are presented along with the assessment of the human rights that conflict with the Security Council Resolutions in question. The improvements made into the procedures of the Sanctions Committee are noted despite the conclusion that they are not sufficient to make up for the inherent deficiencies of the sanctioning system in terms of human rights guarantees.
In the Lockerbie case, the thesis argues, the Security Council was utilized to circumvent an international treaty to allow for a result that satisfied two of the permanent members of the Council, which again led to a violation of the rights of an individual.
The Security Council demanded Libya to adjust its claims under the Montreal Convention which essentially prevented the International Court of Justice from effectively applying its jurisdiction. Instead being given the opportunity to trial its own nationals, Libya was pressured into allowing an international ad hoc court to try the suspects in the Netherlands. As a result, the individuals in question were put through a trial in which their rights as the accused where blatantly overlooked. Whether the convicted individual or any Libyan national for that matter, was responsible for the bomb aboard the Pan Am flight that exploded above Lockerbie in 1988 Is left uncertain.
The authority and function of the Security Council and the historical background of it is presented in the third chapter. The reality of international politics is taken into account when deliberating the options for the restriction of the actions of the Council. The instances that are examined in sought of possible solutions include the International Court of Justice, the United Nations Charter, the General Assembly, human rights and international law.
Assessment of the possible restrictions is performed taking into consideration the continuing need for an effective organ with the means to intervene when something threatens international peace or security. The credibility of the institution and the present and (possible) future compliance issues are reflected on. The European development in especially the field of human rights protection is presented as a possible source of inspiration for improving respect for fundamental human rights within the United Nations.
The conclusions present the need to balance the different goals of the international community and the Security Council as the instrument of international law enforcement. Effective peace maintenance and human rights protection need to find correspondence with the interests of both the members of the Security Council and the general membership of the United Nations to allow both individual and common benefits realized.
Being aware of the difficulties in changing greatly influential, international documents such as the United Nations Charter, which was obviously a result of various compromises to begin with, changing the Charter directly, is mostly disregarded as an option for updating the function of the Security Council. The thesis relies on the assumption that changing the Charter is not a realistic option at the moment and looks for solutions to the presented problems elsewhere. Gradually changing the present standpoints, deliberation procedures could amount to a sufficient correction of the power locus around the Security Council. If not, the International Court of Justice adopting a more teleological style of interpretation to reign in the actions of the Council could pose as a last resort to finding the necessary check to the balances.

Avainsanat – Nyckelord – Keywords
International Law, United Nations Charter, Security Council, Human Rights, Legal Protection, International Security

Säilytyspaikka – Förvaringställe – Where deposited

Muita tietoja – Övriga uppgifter – Additional information

Table of Contents

1 Introduction

In the famous *Yassin Abdullah Kadi and Al Barakaat International Foundation v Council of the European Union and Commission of the European Communities [2008] ECRI-6351* case the European Court of Justice overruled the decision by The Court of First Instance based on a need to respect the human rights obligations. The Court did however admit to having no competence to "review the validity of a Resolution of the United Nations Security Council.[1] Did the Security Council exceed its authority with the Resolution concerning freezing the funds of individuals who were suspected of connections to terrorist organizations? Or can authority even be exceeded if the extent of it is left for the operator of the authority itself to determine? What are dangers of allowing an intra-governmental organ the power to set its own limits? I will start the thesis by presenting the *Kadi* case along with the Human Rights that have been considered relevant in connection to the case as they are portrayed in the United Nation's Universal Declaration of Human Rights. One of the rights that need to be considered is the right to a fair trial. Also the right to be heard and, the right to property, are relevant in the framework of the *Kadi* case. The principle of legality also needs to be reviewed, or even emphasized, when it comes to sanctions that are not strictly based on law.

I will also briefly refer to some of the arguments the European Court of Justice made concerning the necessity of respecting human rights. I will also try to argue that the Security Council's Resolutions do conflict with the fundamental rights protected by many of the constitutions of the United Nations member states and the Universal Declaration of Human Rights. For the purpose of viewing the newer functions and inherent problems of those functions of the Council I will present the relevant facts of the *Kadi* case and the Resolutions of the Council connected to it.

Next I will look into the details of the Lockerbie case. This time, the threat the process posed for the protection of human rights was not due to the Security Council

[1] ECJ, Joined Cases C-402/05P and C-415/05P, Yassin Abdullah Kadi and Al Barakaat International Foundation v Council of the European Union and Commission of the European Communities [2008] ECR I-6351 269-271.

obtaining the role of a judicial organ, but the use of the Council's authority yet again for political gain of some of the permanent members, disregarding international law – the form of law that allows the Council the authority it has. The actions of the Security Council in these two cases raise a question. Has the development of the possibilities to use the nearly unlimited authority the United Nations Charter provides the Council with, turned the Security Council into a pawn in the game of international politics instead of a reliable and much needed replacement of traditional law enforcement for international law?

The Aerial Incident at Lockerbie case before the International Court of Justice was based on an attempt of the Libyan government to seek recognition to their right under international law, to try their own nationals rather than extraditing them to a foreign state. What was instead recognized was the supremacy of the Security Council resolutions over other of international law.

The Security Council, trumping international law based on the Montreal Convention, stepping on the toes of the International Court of Justice by making a Resolution just before the Court had the opportunity to decide a case brought before it and disrespecting the sovereignty of Libya by denying it the right to try its nationals accused of a terrorist attack instead of turning them over to a foreign state. All of the above was based on the powers given to the Council to "maintain peace and security". What was the outcome? *Ad hoc* court hearings in the Netherlands with a widely debated result.

In light of the *Kadi* and Lockerbie cases disregarding principles of international law or human rights does not seem beyond the technical, legal authority of the Council. Since the Council was never a neutral organ without the involvement of governmental politics, it should not be seen fit to acquire the role of a court of law or the protector of human rights, but it, too, needs a monitoring organ to limit the use of its power – or rather, restrain the governments of the permanent member states from using the Council's power for their own purposes instead of those enshrined by the Charter.

After the presentation and assessment of the two noteworthy cases described, I will view the authority and function the Security Council has under the United Nations Charter and the sanctions it has the right to impose. The historical background of how and why the Council was allowed such extensive power is mentioned, in order to ensure a more extensive understanding as to why many of those reasons and purposes no longer apply.

The existing structural and political restrictions of the authority of the Security Council deserve some attention too, if for no other reason, then to debate whether

there are any and if so, can they be strengthened to create a sufficient counterweight to balance out the powers of the Council. The International Court of Justice, human rights, general international law, sovereignty of states and international politics can all provide reasons for consideration on the Council's part, even if they cannot actually limit the exercise of the Council's powers.

The newer functions of the Council have earned attention from international law scholars. The quasi-legislative and quasi-judicial roles the Council has taken upon itself under its Chapter VII powers will therefore be assessed through the criticism they have received. I am not going to claim, however, that the Security Council exceeds its authority by performing what have been called quasi-judicial or quasi-legislative acts[2], but I will be viewing its newfound role in both aspects and question the fact that United Nations as a whole is still not bound by any human rights instrument even when its arguably most powerful organ can now apparently both legislate and govern in the field of international law.

In my thesis I will attempt to effectively argue that the sanctions the United Nations Security Council imposes on individuals may constitute a problem for those many member states of the United Nations bound by human rights conventions and constitutional norms and should do so for United Nations itself as an international organization. I will compare the protection and the development of human rights within the European Union to that on the more global scale, especially considering the United Nations and present the teleological interpretation exercised by the Court of European Communities especially in the beginning of the development of the practises and law of the European Communities. The Court helped shape the present-day European Union to what it is and in effect with the help of the European Court of Human Rights brought the human rights to the spotlight in the development of the Union.

The European development in the protection of and respect for human rights is inspiring when contemplating ways to limit the actions of an international organization or its organs. In recent past also the European Union was criticized for the fact that it itself was not bound by any human rights treaties while all of the member states had obligations to respect human rights connected to both their constitutions and their involvement in human rights conventions, mainly the European Convention on Human Rights.

[2] Johnstone, Ian: Legislation and Adjudication in the Un Security Council: Bringing down the Deliberative Deficit, The American Journal of International Law, Volume 102, Number 2, 2008 p.275-308

The situation caused conflicts or at least risks of conflicts between honouring the human rights commitments of the member states and their commitment to the supremacy of the treaties of the Communities and later the Union. Especially the constitutional courts of Italy and of the Federal Republic of Germany were reluctant to accept the supremacy of European Union law and expressly the exclusive right of the European Court of Justice to determine whether the European Community laws were in conflict with human rights commitments of the member states or not[3]. The European development has been portrayed as a model possibly adaptable to a worldwide organization such as the United Nations.[4]

I will also briefly review the concept of democracy and the democratic entitlement of governments to govern the people of their state, since originally human rights were very much a concept set to protect citizens from governments that abuse their power to deprive people of their fundamental rights and debate whether the roles have turned inside out, if the states and their constitutional human rights guarantees may need protection against organs created by international law? Should the United Nations move towards the direction the European Union did, finally accepting the responsibility of being committed to a human rights instrument, a binding convention?

I will, as implied, be arguing that the concept and existence of the Security Council as it is might already be outdated – despite the fact that it has only started fulfilling its original function a couple of decades ago – and go through some of the improvement suggestions. These will not include suggestions for changing the United Nations Charter though, partly because of the limited space, partly because I feel that the authority of the Security Council and the permanent members of the Council are not close to being restricted through alterations of the Charter.

It need not be mentioned that for democracy to actually be realized in full, much of the decision-making should happen on a national instead of the global level[5], which to me seems like the ultimate dilemma of international politics as well as international law. Global policy and decision making is all the more important in a changing world, despite the inherent problems the concept entails. The process of decision-

[3] Weiler, Joseph: Eurocracy and Distrust: Some Questions Concerning the Role of the European Court of Justice in the Protection of Fundamental Human Rights within the Legal Order of the European Communities, Washington Law Review, Volume 61, 1986 p. 1106

[4] Petersmann, Ernst-Ulrich, Time for a United Nations "Global Compact" for Integrating Human Rights into the Law of Worldwide Organizations: Lessons from European Integration p. 648-650

[5] For the people to be able to influence the decisions that affect their interests. See eg. Franck, Thomas M: The Emerging Right to Democratic Governance, The American Journal of International Law, Volume 86, Number1, 1992, on the construction of the concept "democratic entitlement".

making in the Security Council has been accused of its exclusive nature and suggestions have been made to allow even the slightest of change in the circumstances[6].

I have chosen the two cases of *Kadi* and *Lockerbie* to be viewed in my thesis for the purpose of portraying how the authority of the Council can be abused in two different ways to achieve the aspired goals often connected to national interests. A great number of states are more or less bound by at least some human rights treaty or instrument. Obviously, the nature of human rights treaties requires them to restrict the actions of governments and states they bind, which is not always a desirable outcome for the government in question.

Human rights are, nevertheless, not the only restriction the governments face when deliberating possible actions at the time of conflicts or problems – other states constitute, or better yet, their sovereignty constitutes one as well. Both restrictions are often produced and organized by international law and international organizations. The Kadi case exemplifies how the authority of the Security Council can be used to circumvent the restrictions of the first, the Lockerbie case the latter.

Of course, human rights are not a concept free of political interpretations and discretion and have been subject to criticism as well. There are dangers in allowing human rights as a source of teleological interpretation, since the discretionary powers can prove vast enough for new opportunities to abuse the power. Granting judicial organs the power to challenge legislation has been suspected to result in an international community lead by judges alone.[7]

As stated, the thesis will review the background of the authority held by the United Nations Security Council, two cases that I consider excellent examples of the problems created by the seemingly unlimited powers of the Council and possible sources of restrictions to those powers. The teleological interpretations of the European Court of Justice that helped shape the development of the European Communities is also presented as an example of the creativity that can allow the otherwise slow process of international law-making to keep up with the more rapidly changing reality.

What I am essentially trying to prove maintaining, is that the United Nations and the Security Council as they are today cannot be taken as a lasting solution for maintaining international peace and security in future, preserved in the design that was created in very different circumstances right after the Second World War. Constant

[6] Johnstone, 2008 p. 275-308
[7] Weiler, Joseph: 1986 p.1103-1105

development is needed to meet the requirements of the constantly evolving world and the challenges the changes bring.

Like mentioned already, the thesis is built upon the assumption that changing the Charter is not a realistic alternative at the moment and looks for solutions to the presented problems elsewhere. Gradually changing the present standpoints, deliberation procedures could amount to a sufficient correction of the power locus around the Security Council. If not, the International Court of Justice adopting a more teleological style of interpretation to reign in the actions of the Council could pose as a last resort to finding the necessary check to the balances.

2 Kadi Case

2.1 Sanctions in Practice

The Security Council has not ruled on the specifics of the sanctions on its own, but has rather delegated its powers to special committees created to manage the sanctions in practise, starting with being in charge of the lists of the individuals the sanctions will concern. The Sanctioning bodies proceed to supervise the implementing of the sanctions and controlling the lists of targets.[8]

The Council appointed a ”1267 Committee” (according to Resolution 1267) to control and oversee the sanctions that were to be imposed. The Committee maintains a list of individuals and entities that the sanctions are targeted against and the Counter-Terrorism Committee oversees the implementation of said sanctions. The main issue with the regime and the so-called Consolidated List it maintains is the procedure for listing or de-listing. Listing of an individual may occur if a listing proposal is put forward and no Committee member opposes to it. The criteria to proposing a new listing are not specifically determined. Before November 2002 it was also not possible to apply de-listing and even then continued to be a procedure with which the individual in question will need the help of a government.[9]

When a de-listing procedure was introduced in reaction to the criticism the

[8] Farral, Jeremy Matam: United Nations Sanctions and the Rule of Law, Cambridge University Press, 2007 p.146-155

[9] Finley, Lorraine: Between A Rock and A Hard Place: The Kadi Decision and Judicial Review of Security Council Resolutions, Tulane Journal of International & Comparative Law, Vol. 18 Issue 2, 2010 p. 479-482

Security Council sanctions regime received, some de-listings occurred swiftly[10]. This alone should prove that the original listing procedure was deficient, since it allowed new listings to be made without clear criteria that needed to be met. Also, the listing procedure suffered from lack of transparency, since all the supporting facts as to why a certain individual shall be listed are processed within the Committee.[11]

Furthermore, the introduced de-listing procedure was still quite rigid and inflexible, as the individual that wished to be de-listed needs to contact a government of a state and apply for the de-listing through them. Human rights were originally intended as a protection for individuals against arbitrariness of the governments, so making the realization of one's rights depended on a government again, was most definitely not the ideal solution. It appears that if a person failed to convince the government of his country of citizenship or of residence that his rights had been violated, he could not effectively advance his cause in any way.

After the de-listing procedure was created, any individual had the right to approach the Committee directly, but only governmental authorities were allowed to apply for a person to be removed from the list. Each committee member also still has a right of veto, so if any of the members refuse the requested removal and the Security Council agrees, the individual who deems his rights infringed is left with no other possible remedies.[12]

In addition, the Guidelines of the Sanctions Committee did not oblige the Committee to provide the appellant with any reasons or evidence as to why his name was submitted to the list or why the requested removal could not be agreed to. In the *Kadi* case, no such evidence or reasoning had been presented to the appellants, nor had they been informed of the fact that their funds would be the target of freezing. This gave the appellants no possibility to defend themselves, as no direct accusations were ever made to them.[13]

The wide-ranging criticism to the sanctioning policies of the 1267 Committee has compelled the Security Council to improve the transparency of the procedure and introduce a de-listing procedure with new amended resolutions. At first, no de-listing could

[10] Finley, 2010 p. 483
[11] Finley, 2010 p. 481-482
[12] ECJ, Joined Cases C-402/05P and C-415/05P, *Yassin Abdullah Kadi and Al Barakaat International Foundation v Council of the European Union and Commission of the European Communities* [2008] ECR I-6351 364
[13] ECJ, Joined Cases C-402/05P and C-415/05P, *Yassin Abdullah Kadi and Al Barakaat International Foundation v Council of the European Union and Commission of the European Communities* [2008] ECR I-6351 345-348 and 369

be applied. Primarily the Sanctions Committee allowed Member states to submit de-listing requests and finally the concept of Ombudsperson was also introduced as a quarter to be approached with such requests. The individual who wishes to be de-listed can request said de-listing from a specially appointed Ombudsperson.[14]

Transparency of the procedure and legitimacy of the sanctions were improved by the decision to release narrative summaries of the reasons the designating states provided when they proposed adding the person or entity in question to the Consolidated List and by obligating the states to submit a detailed statement to the Committee when proposing a new listing. [15]

The narrative summaries entail the reasons the designating state has provided the Committee with when making a suggestion to add new individuals or entities to the list with the exception of matters the state has requested to be kept secret. The designating states need to state their case in detail, which might be considered to improve the probability of legitimacy. The Committee needs to reach a consensus to accept the requested removal from the list. If no consensus can be reached, the matter will be reviewed and decided by the Security Council.[16]

Notwithstanding, the procedure is very much inter-governmental, which does not ensure the individual respect of his rights. The de-listing procedure cannot be considered substitutive of a trial. Also, the person's right to be heard is still disregarded and the person cannot prevent the listing beforehand. Furthermore, for the sanctions to meet the requirement of proportionality, it seems that the freezing of the funds should in no circumstances be applicable to the funds needed to cover basic expenses.

2.2 The Related Articles of the Universal Declaration of Human Rights

2.2.1 The Right to Property and the Right to Leave a Country

The Security Council Resolutions that compels states to apply targeted sanctions on individuals are a cause for concern in terms of fundamental human rights. The sanctions applied on individuals include travel bans and freezing of assets. The following Articles of the Universal Declaration of Human Rights can be in conflict with said travel

[14] UN Security Council Resolution 1904 (2009) 20-25
[15] UN Security Council Resolution 1904 (2009) 11-12
[16] UN Security Council Resolution 1989 (2011) 23

bans and asset freezes.

The Universal Declaration of Human Rights Article 13, paragraph 2 states that:

> "Everyone has the right to leave any country, including his own, and to return to his country."

The Article 17 of the Declaration states that:

> "Everyone has the right to own property alone as well as in association with others and that no one shall be arbitrarily deprived of his property."

What might be considered the more pressing problem though, is the the violation of the rights that allow individuals means to dispute governmental interference in their fundamental rights – namely the violation of the right to a fair trial and the right to be heard.

2.2.2 The Right to a Fair Trial

The Universal Declaration of Human Rights Article 8 states that:

> "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."

In case of a Security Council imposed sanction, however, the national tribunals are not competent to rule for the defendant to be removed from the list of the sanctions committee. No "effective remedy" can be concluded to exist, which is clearly problematic in respect of human rights obligations established by the declaration.

According to the guidelines of the Sanctions Committee, the removal of an individual's or entity's name from the list can be requested through the government of the state of residency or of citizenship[17], but that can hardly be viewed as the "effective

[17] ECJ, Joined Cases C-402/05P and C-415/05P, *Yassin Abdullah Kadi and Al Barakaat International Foundation v Council of the European Union and Commission of the European Communities* [2008] ECR I-6351 324

remedy" conveyed by the article because the person in question could not make the request without the help of a willing government. Even though the Committee guidelines do entail a right for the person in question to address the Committee directly, the lack transparency in the decision making and refusal to release evidence severely damaged the individual's possibilities to defend themselves, until the introduction of the Ombudsperson.

The Universal Declaration of Human Rights Article 10 states that:

> "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 11 of the Declaration, paragraph 2, declares that:

> "Everyone charged with a penal offence has the right to be presumed innocent until proved guilty according to law in a public trial at which he has had all the guarantees necessary for his defence."

The articles do refer to a penal offence and to a criminal charge, while the Security Council works on the ground for "threat to international peace", but I would however take the articles into consideration. Accusing an individual of constituting a threat to international peace and security does not necessarily mean the person has already committed a crime, but presumably is either going to commit one or assist in criminal (terrorist) activity.

Already the framework is relatively vague and effectively proving someone is about to participate in terrorist activity in court proceedings is a harder task to manage than establishing a committee to decide on a list of people who might be suspected of involvement in terrorist activity. It appears that the right to be presumed innocent is not effectively considered in the proceedings of the Committees established by the Security Council to regulate the use of the sanctions.

The Rights established in the Declaration of Human Rights that the sanctions are directly conflict with are the ones that declare right to property and right to leave a country. These rights could be subject to legal limitations on the basis of "international security", if the matter was approached differently.

2.2.3 Restricting Limitations to Human Rights As Established in the Declaration

While securing international peace and security by trying to prevent terrorist operations certainly can constitute a valid argument to restricting individual rights, the limitations should still be applied carefully and accordingly. The Universal Declaration of Human Rights, Article 29, paragraph 2 clearly states that:

> "Everyone shall be subject to -- limitations as are determined by law solely for the purpose of securing due recognition and respect for other rights and freedoms and of meeting the just requirements of morality, public order and the general welfare in a democratic society. "

Attention should especially be drawn to the phrase "limitations as are determined by law". Does the United Nations Charter qualify as "law" in the context and purpose of the Declaration of Human Rights? Does the Universal Declaration of Human Rights not qualify as "principles" the Security Council must act in accordance with even though the United Nations Charter specifically refers to encouraging respect for human rights as one of its purposes in Chapter I?

To be in accordance with the international obligations, the limitations to fundamental human rights, for example to those stated in the Universal Declaration of Human Rights, must meet three requirements: first of all, they need to be determined by law. Secondly, the grounds for the limitations must be legitimate and thirdly the limitations must in proportion to the end sought to be achieved. The requirement the Security Council adopted sanctions most clearly fails to meet is the first – the principle of legality.[18]

The only criterion applied to the principle of legality is not that a legal norm that determines the limitation to a fundamental right exists. Such legal norm must also be accessible and sufficiently explicit for a person to be able to decipher just what limitations have been enacted to restrict the execution of his rights.[19]

A question can be raised to reflect on whether the requirement for proportionality is met either. The regulations of the Sanctions Committee give the national authorities the right to declare the freezing of the funds exclusively applicable to the

[18] Babar, Mohamed Elewa; International Journal of Human Rights, Vol. 7 Issue 4, Winter 2003, p.64
[19] Babar, 2003 p.67-70

owner's excess assets – not funds needed for basic expenses such as accommodation and nutrition. Also funds for "extraordinary expenses" may be unfrozen with the specific permission of the Committee. Furthermore, the funds necessary for basic expenses cannot be excluded from the application if the Sanctions Committee "expressly objects". That is to say, the individual is nevertheless subject to the arbitrariness of the Security Council Sanctions Regime.[20]

The measures taken to prevent terrorist organizations from financing their activities can be regarded disproportionate, since even allowing the listed individuals the funds for the most basic expenses, including accommodation, medical care and food, can be refused without publicly presenting all the evidence against the person in question. Moreover, the unfreezing the funds needs to be requested.[21]

The European Court of Justice took the view that the Council was acting *ultra vires,* as it did not act in accordance with the Purposes and Principles of the United Nations as it must do according to the Charter. It did not however conclude that the human rights in question were in relation *to jus cogens*. The European Court of Justice stated that even though the related human rights norms did not entail *jus cogens*, restrictions to limiting said rights still existed.[22]

2.3 Assessing the Kadi judgment and its significance

2.3.1 The Established Conflicts with Human Rights

The Security Council sanctions regimes are created to deal with specific situations that have arisen to threaten the international peace and security. As such, they are more of ad hoc nature than they are stable, independent judicial or administrative organs. Another fundamental human rights related deficiency of the Security Council sanctions resolutions is the fact that no court of law has been given the competence to rule on their lawfulness. The required "effective remedy" for an individual whose assets have

[20] ECJ, Joined Cases C-402/05P and C-415/05P, *Yassin Abdullah Kadi and Al Barakaat International Foundation v Council of the European Union and Commission of the European Communities* [2008] ECR I-6351 364
[21] ECJ, Joined Cases C-402/05P and C-415/05P, *Yassin Abdullah Kadi and Al Barakaat International Foundation v Council of the European Union and Commission of the European Communities* [2008] ECR I-6351 364
[22] ECJ, Joined Cases C-402/05P and C-415/05P, *Yassin Abdullah Kadi and Al Barakaat International Foundation v Council of the European Union and Commission of the European Communities* [2008] ECR I-6351 266-270

been frozen and who has been given a travel ban, does not really exist –at least not in full.

The idea that the Security Council would have more discretion in limiting human rights than what can be allowed the national governments seems contradictory. If a government cannot deny their citizens or residents their fundamental rights invoking the notion of "national security" without a strict legal basis, why then can the same government be obligated to do so on the basis of "international security" by an international organ that was created by an inter-governmental treaty? The concept can be regarded paradoxical, especially when the individual is left without an effective remedy, supposedly guaranteed to him by the same fundamental human rights.

The individual targeted with the so-called "smart sanctions" do not receive information on the evidence submitted against them, nor can they apply for a right to obtain said evidence. The Sanctions Committee guidelines do not obligate the Committee to deliver any such information to the individuals or entities that have been listed. Furthermore, if any of the Committee Members opposes, no de-listing can occur, even if the person in question has managed to convince a government to aid them in applying the removal from the list.[23]

The person has a right to be presumed innocent, a right to be heard and a right for guarantees necessary for his defence. Nevertheless, a court to which he could appeal to have the ban lifted and assets freed has not been appointed. The only way to challenge the Security Council Resolution, or more appropriately, the decision of the sanctions regime in question, is through political organs. Since the respect for Human Rights is one of the Purposes and Principles mentioned in the United Nations Charter, it seems the Security Council has also failed to act in accordance with the Purposes and Principles of the United Nations, even having an obligation to do so.

The notions to "national security" and "public safety" should be met with reservation when it comes to excusing limitations to human rights on the basis of said concepts as they do not meet the requirements of specificity and definition. Their vague nature allows the states or, in the case of the United Nations Security Council, organs of international organizations the possibility to limit the execution of human rights on the basis of something that might "desirable" rather than "necessary". [24]

The fact that the procedures for listing and de-listing and individual or an entity

[23] ECJ, Joined Cases C-402/05P and C-415/05P, *Yassin Abdullah Kadi and Al Barakaat International Foundation v Council of the European Union and Commission of the European Communities* [2008] ECR I-6351 324-325
[24] Babar, 2003 p.78-83

on the "Consolidated List" have been changed in order to improve the transparency and legitimacy of the sanctions with regard to respect for human rights, needs to be admitted. The introduction of an Ombudsman that can be contacted directly in order to request removal from the list is an important improvement. Furthermore, the release of the narrative summaries of the reasons to enlist the persons or entities allows the individuals concerned a chance to become acquainted with what they are being accused of.

However, no effective remedy by the national tribunals is available and no fair and public hearing is to be organized when a de-listing is requested. The sanctions that impose limitations to the execution of one's rights are still not based on explicit legal norms. The United Nations Security Council expressly states that "all – measures (the Committee is allowed to take) are preventive in nature and are not reliant on criminal standards set out under national law"[25]. That is to say, notwithstanding the punitive effects of the sanctions, the Security Council refuses to be bound by standards that restrict criminal punishment on the basis of human rights obligations.

It appears that it can be concluded that the Security Council sanctions that are applied against individuals are in conflict with human rights, especially with the right to be heard and the right to a fair trial. Since the limitations to fundamental human rights need to be specifically regulated by the law, the framework the Security Council acts within under the United Nations Charter seems too vague to meet the demands for restricting those rights. Operating against international terrorism might be a valid enough reason to limit human rights, but it must be done in accordance with the obligations set forth by the principles of international law and for example the Universal Declaration of Human Rights.

2.3.2 Compliance Issues Resulting from the "Kadi Resolutions"

That what followed from the first *Kadi* case before the European Court of Justice was a renewal of the freezing of the funds and Kadi turned to the European Union judicature again for the reinforcement of his rights. The position of the judicature of the EU had not changed despite the changes in the procedures of the Sanctions Committee or the fact that the European Commission allowed Kadi a chance to comment on a summary of the reasons for targeting him with the asset freeze and the General Court maintained that:

[25] Comparative Table Regarding the United Nations Security Council Committees Established Pursuant to Resolutions 1267 (1999), 1373 (2001) and 1540 (2004)

> "In essence, the Security Council has still not deemed it appropriate to establish an independent and impartial body responsible for hearing and determining, as regards matters of law and fact, actions against individual decisions taken by the Sanctions Committee. Furthermore, neither the focal point mechanism nor the Office of the Ombudsperson affects the principle that removal of a person from the Sanctions Committee's list requires consensus within the committee. Moreover, the evidence which may be disclosed to the person concerned continues to be a matter entirely at the discretion of the State which proposed that he be included on the Sanctions Committee's list and there is no mechanism to ensure that sufficient information be made available to the person concerned in order to allow him to defend himself effectively (he need not even be informed of the identity of the State which has requested his inclusion on the Sanctions Committee's list). For those reasons at least, the creation of the focal point and the Office of the Ombudsperson cannot be equated with the provision of an effective judicial procedure for review of decisions of the Sanctions Committee."[26]

The General Court also, reviewing the earlier *Kadi* judgment of the Court of Justice, indicated that the freezing of funds could not be allowed 'immunity from jurisdiction' by virtue of the supremacy of the Security Council Resolutions under Chapter VII of the UN Charter and due to the fact that measures on European Union level were taken to implement such Resolution.[27]

The key problems of the freezing of assets had remained unaltered. The Court found itself unable to review the lawfulness of the measures, since no evidence against Kadi was provided for investigation by the judicature. Due to lack of information as to why Kadi was suspected and thus to be sanctioned, the Court considered the applicant's right to effective judicial review violated.[28] Further, the Court held that:

> "—[T]he contested regulation was adopted without any real guarantee being given as to the disclosure of the evidence used against the applicant or as to his actually being properly heard in that regard, and it must therefore be concluded that the

[26] T-85/09 Kadi vs. European Commission article 128
[27] T-85/09 Kadi vs. European Commission article 132
[28] T-85/09 Kadi vs. European Commission articles 182-183

regulation was adopted according to a procedure in which the rights of the defence were not observed --."[29]

The measures taken to freeze the funds of Kadi were annulled once more and the judgment was not the first siding with the appellant since the renewal of the freezing of Kadi's funds. Switzerland had delisted Kadi already before the first ruling of the European Court of Justice, not being bound by European Union legislation.[30] The Supreme Court of United Kingdom followed by delisting Kadi in the judgment of the case Her Majesty's Treasury v. Mohammed Jabar Ahmed and Others even after the renewal of the listing for Kadi's part by European Commission and the Security Council Sanctions Committee clarifying the grounds for listing him in the first place.[31]

3 Lockerbie – rule of law in the struggle against terrorism

3.1 Aerial Incident at Lockerbie

In this part of my thesis I attempt to present the facts of the case and also view the handling of the situation by the United Nations, the Security Council and the International Court of Justice and governments of states involved. I will debate the distribution of powers between the Security Council and the International Court of Justice and review the role of the Security Council especially after the Cold War period. I will attempt to focus on the problematic of an intra-governmental organ having a quasi-judicial function and that the authority of said organ can be argued to lack a proper system of checks and balances. I will start with viewing the development and the facts of the case on a relatively general sense and then move on to presenting the relevant treaty articles, such as the Montreal Convention and also other international legal norms that need to be looked at.

Finally, I will conclude the viewing of the case with analysis of the criticism for the Lockerbie case and the actions of the parties involved; the Security Council, the governments, the International Court of Justice and the Scottish court that was created

[29] T-85/09 Kadi vs. European Commission article 184

[30] OMB Watch Timeline of Kadi Litigation in EU and U.S. "The Kadi Case: Court Decisions on Due Process for Terror Listing Differ in EU, U.S," 3 April 2012, Charity & Security Network website

[31] HM Treasury v Mohammed Jabar Ahmed and Others (2010) UKSC2, article 249-251

solely for the trial of the two Libyan suspects. I will also try to review the situation in terms of credibility and legitimacy of the current system in international law and politics, when respect for Human Rights has gained more ground and yet relatively unlimited powers have been given to an intra-governmental organ that is not directly responsible to any democratic instance.

3.2 Lockerbie Case Facts

When Pan Am flight number 103 exploded mid-air and crash-landed into the Scottish village of Lockerbie, international law and politicians faced a new kind of challenge considering how to handle the unavoidable repercussions of the incident. Questions involved included state responsibility, rule of law, international criminal tribunals, extradition, human rights and the threat of terrorism and its management. The crisis caused by the attack was both political and legal.

Pan Am flight number 103, on its way from London to New York exploded above a Scottish village of Lockerbie. All the crew of the aircraft, the passengers and 11 residents of Lockerbie where killed when the plane crashed into the village. The victims were mostly American citizens. Investigations conducted by the Scottish police led to the conclusion that the explosion was caused by a timer bomb placed in the cargo hold of the aircraft.

The people suspected of the attack where to Libyan nationals Abdelbaset ali Mohamed Al Megrahi and Al Amin Khalifa Fhimah, who were also secret service agents of Libya. The United States and United Kingdom both turned to Libya, requesting the extradition of suspects and renunciation of terrorist activity. Libya made a statement renounce terrorism and declaring no involvement whatsoever in the execution of the attack. Libya also offered to co-operate in the investigations and allow the investigators access to the information and documents in their possession. However, referring to the lack of an extradition treaty between the countries, Libya refused the extradition of its nationals and declared competence to try the accused herself.

Under the Montreal Convention, Libya had the right either to try the suspects or extradite them – *aut dedere, aut judicare*. The United States and the United Kingdom however, did not respond to the requests of co-operation but accused Libya of trying to

hide its support for the terrorist attack and continued pressuring Libya into surrendering the suspects to the United States for a trial and taking responsibility for the attacks through the Security Council, which they are both permanent members of. Libya reacted by turning to the International Court of Justice for a verdict stating that Libya has fulfilled its obligations under the Montreal Convention and that the United States and the United Kingdom should refrain from their actions aiming to pressure Libya into extraditing the suspects. The United States and the UK, in turn, sought support to their claims by acting on a Security Council Resolution under Chapter VII of the Charter.

After the Security Council Resolution's interference, which led to the subsequent failure of the International Court of Justice to rule to the advantage of Libya, the situation remained unsolved. The mediation of United Nations finally resulted in a compromise of moving the trial to the Netherlands but creating an *ad hoc* Scottish tribunal to rule on the case. On January 30, 2001 Al Megrahi was found guilty and the other accused, Fhimah acquitted. The succeeding appeal did not result in changes in the verdict. Later Al Megrahi was released on humanitarian grounds due to his terminal illness of which he died last year.

3.3 Comments – International Court of Justice and the Security Council

In the Resolution 731 of the Security Council, the Council expresses deep concern over the "persistence of acts of international terrorism in all forms, including those in which States are directly or indirectly involved", "deplores the fact that the Libyan Government has not yet responded effectively to the above requests to cooperate fully" and "urges the Libyan Government immediately to provide a full and effective response."[32] Since Libya, according to the United States, failed to give such full and effective response, which to them would probably have entailed renunciation of support for terrorism and surrendering the suspects, the Security Council returned to the case with another Resolution.

This time, with the Resolution 748, the Council chose to at under Chapter VII of the United Nations Charter, calling upon states to apply sanctions against Libya, since it had not, in the opinion of the Council, "provided a full an effective response". What constitutes a full and effective response is not explained in detail. Libya could be argued to

[32] Security Council Resolution S/RES/731 (1992)

have given such a response already, having persistently applied the Montreal Convention with precision.[33]

The International Court of Justice refrained from passing judgment on the situation in the light of the Montreal Convention, since according to the United Nations Charter; Security Council Resolutions take priority over all other international obligations of the member states. The respondents, the United States and the United Kingdom denied the Court of having jurisdiction in the case at all, but the Court denied such claims by being able to base its jurisdiction on the Montreal Convention. After the adoption of Security Council measures under Chapter VII of the United Nations Charter, the Court views that the rights of Libya under the Montreal Convention are overridden by the rights conferred to the United Nations by the Security Council Resolution.[34]

3.4 The trial in the Netherlands

The trial in Camp Zeist, the Netherlands was a compromise engineered by the United Nations. The United Nations and the United Kingdom were not able to agree with Libya on the necessity of extradition, so the trial was moved to neutral ground, to the Netherlands. The tribunal set to rule on the matter and on the culpability of Al Megrahi and Fhimah, consisted of Scottish judges, acting under Scottish law with the exception of ruling without a jury.[35]

The prosecution presented their conception of the events as follows. The bomb was placed inside a piece of unaccompanied luggage on a flight from Luqa, Malta to Frankfurt, Germany. They viewed that the introduction of the luggage at Malta pointed towards Libya. The luggage containing the bomb was transferred from Frankfurt to London and placed on the hold of the Pan Am flight 103.

Some of the clothing in the bag with the bomb was identified by a Maltese shop owner as having been bought at his shop. The Maltese shop owner also identified Al Megrahi as the customer who purchased the items found in the same suitcase with the bomb. The police found a piece of the circuit board of the bomb and was able to make a

[33] Weller, Mark: The Lockerbie Case: A Premature End to the ”New World Order?”, African Journal of Imternational and Comparative Law , Volume 4, 1992 p. 313-314
[34] International Court of Justcie: *Aerial Incident at Lockerbie (Provisional Measures)* 2001 articles 43-44
[35] Knowles, Julian B: The Lockerbie Judgments: A Short Ananlysis, Case Western Reserve Journal of International Law 2004, p 473

possible connection to Libya through the manufacturer. A Libyan informant of the United States identified both suspects as secret service agents of Libya.[36]

Unfortunately, there were several gaps in the evidence led of the prosecution. First of all, the only evidence tying Al Megrahi to the suitcase that contained the bomb, is the shop owner's identification, which he himself would not describe positive and which, given the time that passed between the events and his questioning, his statement cannot be considered entirely convincing. There is also a possibility that he (subconsciously) identified Al Megrahi also based on seeing his face on many occasions in the media. His statement also somewhat changed during the questioning.[37]

Secondly, it was not proven with absolute certainty that the date of the purchase was in fact December 7th and not November 23rd, when Al Megrahi was not in Malta. The report on uncovering the date was based on the shop owner's recollection of the weather that day and statement that there was international football shown on television on the day of the purchase. In fact, the presented evidence seemed to prove that it was more likely the purchase was made on the 23rd. Yet, the judges held it proved that the date of purchase was precisely December 7th.[38]

Also, even though the circuit board is of the same type that has been ordered by Libya, the deliveries have not been made exclusively to Libya, so it is most definitely a possibility that terrorist of an entirely different nationality would have been able to get a hold of such devices. Identifying of the two suspects as agents of the Libyan secret service was the only part of the testimony of Abdul Majid, the Libyan informant of the CIA, the court found convincing and gave no reasons as to why this was the case.[39]

Another ill-fitting piece of evidence had to do with the suitcase that had allegedly been flown to London from Malta, via Frankfurt. However, there is not record of an unaccompanied bag on the flight from Malta to Frankfurt and there seems not to have been any gaps in the security control of the luggage at Luqa Airport in Malta. Furthermore, such gap was shown to have existed at Heathrow, before the luggage of the flight 103 was taken to the hold of the aircraft.[40]

Nevertheless, the Court's verdict defied logic and found Al Megrahi guilty as charged and sentenced him to life. It did not feel the need to explain why certain pieces of

[36] Knowles, 2004 and Black, Robert: Lockerbie: A Satisfactory Process But a Flawed Result, Case Western Reserve Journal of International Law 2004
[37] Knowles, Julian, B. 2004 p. 477-479
[38] Black, Robert, 2004 p. 445
[39] Black, Robert, 2004 p. 444-445
[40] Black, Robert, 2004 p. 445-448

evidence were disregarded and the evidence of the prosecution was classified as sufficient for a conviction beyond reasonable doubt despite the inconsistencies and conflicts that were pointed out.[41] The eventual appeal did not change the verdict.

3.5 Relevant Norms

3.5.1 The Montreal Convention of 1971

According to the Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation, also know as the Montreal Convention of 1971, Article 1:

> Any person commits an offence if he unlawfully and intentionally:
> a) performs an act of violence against a person on board an aircraft in flight if that act is likely to endanger the safety of that aircraft; or
> b) destroys an aircraft in service or causes damage to such an aircraft which renders it incapable of flight or which is likely to endanger its safety in flight; or
> c.places or causes to be placed on an aircraft in service, by any means whatsoever, a device or substance which is likely to destroy that aircraft, or to cause damage to it which renders it incapable of flight, or to cause damage to it which is likely to endanger its safety in flight.

Article 5

> 1. Each Contracting State shall take such measures as may be necessary to establish its jurisdiction over the offences in the following cases:
> a) when the offence is committed in the territory of that State;
> b) when the offence is committed against or on board an aircraft registered in that State;
> c) when the aircraft on board which the offence is committed lands in its territory with the alleged offender still on board;
> d) when the offence is committed against or on board an aircraft leased without crew to a lessee who has his principal place of business or, if the lessee has no such place of business, his permanent residence, in that State.

[41] Black, Robert, 2004 p. 445-447

Article 6

> 1. Upon being satisfied that the circumstances so warrant, any Contracting State in the territory of which the offender or the alleged offender is present, shall take him into custody or take other measures to ensure his presence. The custody and other measures shall be as provided in the law of that State but may only be continued for such time as is necessary to enable any criminal or extradition proceedings to be instituted.
> 2. Such State shall immediately make a preliminary enquiry into the facts.

Article 7

> The Contracting State in the territory of which the alleged offender is found shall, if it does not extradite him, be obliged, without exception whatsoever and whether or not the offence was committed in its territory, to submit the case to its competent authorities for the purpose of prosecution. Those authorities shall take their decision in the same manner as in the case of any ordinary offence of a serious nature under the law of that State.

It seems safe to conclude that Libya did fulfill its obligations under the Montreal Convention. The presence of the suspects was ensured, the investigations were begun and Libya had expressed its willingness to cooperate in other ways besides extradition. Libya also denied participation and support to terrorism and there was no evidence to prove its involvement in the attack, since the involvement of the two suspects had not been proved either.

The principle of *aut dedere, aut judicare* is clearly stated in the Convention, which confirms that involving the Security Council was both unnecessary and in contradiction to other obligations under international law. A state that abides by its international obligations should not be faced with pressuring measures ordered by a Security Council resolution under Chapter VII of the United Nations Charter, not even though the Security Council does hold the power to override other treaty obligations of the member states. With all likelihood, this power was not intended to invalidate international treaties and allow states a measure for disregarding commitments that do not correlate to their political aims in a precise situation.

With regard to the Lockerbie case, had the Security Council not been asked to interfere by the United States and the United Kingdom, both states would most likely

have had to accept Libya's offer to try the suspects after investigating the case in co-operation. In theory, had the victims of the terrorist attack not been nationals of permanent members of the Security Council, the outcome might have been very different indeed.

3.5.2 The European Convention on Human Rights

The relevant articles of the European Convention on Human Rights are listed here, because the court hearings took place in the Netherlands and were adjudicated by a Scottish court.[42] Article 6 in the European Convention on Human Rights guarantees everyone a Right to a Fair Trial as follows:

> 1. In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.
> 2. Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law.
> 3. Everyone charged with a criminal offence has the following minimum rights:
> a) to be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him;
> b) to have adequate time and facilities for the preparation of his defense;
> c) to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require;
> d) to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;
> e) to have the free assistance of an interpreter if he cannot understand or speak the language used in court.

[42] On the geographic extent of the Convention, see articles 56 and 59.

The procedure in the Netherlands did not fully comply with the requirements set out above. The defense was not provided with all the evidence the prosecution had at hand and the accused was not given the option of choosing their own legal assistance. The facilities to prepare his defense were not provided since the defense was denied access to some of the evidence used by the prosecution. [43]

Furthermore, the right to be presumed innocent may also have been infringed, since the evidence given by the prosecution seems not have been sufficient for proving beyond reasonable doubt that the accused and convicted Al Megrahi was in fact guilty. As expressed above, a great deal of the evidence actually seemed conflicting and even at best, circumstantial.[44]

3.6 The Main Issues of the Lockerbie Case

3.6.1 Questionable Action of the Security Council

Lately, there has been much discussion of the limitations to the authority of the United Nations Security Council. The sanctions targeted against individuals have gained much criticism because of the nature of the sanctions comparable to punitive sanctions of criminal behavior. However, sanctions appointed directly by the Council are not the only issue caused by the lack of judicial review or limitations to the authority of the Council. Also its interference in matters not directly threatening to the peace and security may be cause for concern.

In the Lockerbie case, the situation might have been diplomatically challenging, but whether Libya actually caused a threat to the international peace and security by refusing to extradite though willing to co-operate in all other possible ways and to try the suspects, seems like a relevant question. Granted, the United States and United Kingdom might have a reason for suspicions considering the impartiality of the trials in Libya, but trying the suspects in a third country had also been brought up as a possibility.

Acting through the Security Council to prevent the International Court of Justice from actually reviewing the matter under Montreal Convention, was at the very least a questionable measure to be taken, which suggests that the United States and the UK were aware of the fact that legally they did not have a valid case against Libya in the

[43] Koechler, Hans: The Lockerbie Trial and the Rule of Law National Law School of India Review, 2009 p. 152-154
[44] Black, 2004, p. 443-444

context of the Montreal Convention. International politics and international law can get uncomfortably intertwined, not the least when included in a dispute concerning international terrorism and the individuals entangled in the matter may regrettable be those who carry the consequences if they are not guaranteed the execution of their fundamental rights.

Did the political influence of the United States and United Kingdom in the end also result in a miscarriage of justice? Was an innocent person convicted? That will most probably always remain unknown, but it can be concluded that the process, as it was, did not fulfill the necessary requirements of an impartial, fair trial enshrined in human rights instruments. Whether Libya and Al-Megrahi were responsible for the attack can never be uncovered, because of essential flaws in proceedings of the case.

3.6.2 Human Rights Issues

A person has a right to be presumed innocent, a right to be heard and a right for guarantees necessary for his defense. Nevertheless, a court to which one could appeal to have the ban lifted and assets freed cannot be appointed when it comes to Security Council Resolutions. Since the respect for Human Rights is one of the Purposes and Principles mentioned in the United Nations Charter, it seems the Security Council has also failed to act in accordance with the Purposes and Principles of the United Nations, even having an obligation to do so. In the Lockerbie case, the Security Council did not directly affect the result of the trial, but its interference had an impact in how the trial was to be arranged.

The notions to "national security" and "public safety" should be met with reservation when it comes to excusing limitations to human rights on the basis of said concepts, as they do not meet the requirements of specificity and definition. Their vague nature allows the states or, in the case of the United Nations Security Council, organs of international organizations the possibility to limit the execution of human rights on the basis of something that might "desirable" rather than "necessary". [45]

The problem with having an organ of an international organization hold so much power, is the lack of democracy in the its processes and means of controlling the fairness of the outcome. There is no rule of law, when the "law" or in this case, treaty is too vague to significantly limit the actions of the organ. International law can never be law

[45] Babar, Mohamed Elewa; International Journal of Human Rights; Winter 2003, Vol. 7 Issue 4 p. 78-83

in the traditional sense, because sovereign states cannot be bound by obligations in a similar way as governments in a domestic sphere.[46] Getting the international organs to respect the obligations the governments are required to comply with is the key factor, but without a single instance able to override for example the Security Council resolutions, not much can be done to bring back the respect for the rule of law, should the Council decide to disregard such limitations.

Professor Martti Koskenniemi has argued that international law is not in fact law, but merely politics[47] and unfortunately, this seems to hold true. The actions of the Security Council, as well of the International Court of Justice in the Lockerbie case, showed that the reality of the international politics can have a greater impact on the outcome in certain situations, despite treaty articles and promises to respect human rights or the sovereignty of other states.

The Security Council may have been created as an organ to guarantee peace and security for the world as a whole, but with the immense and somewhat unlimited power it possesses, it can also be used to uphold and promote political agendas of the leading nations. It can easily be concluded that usage of the Security Council for furthering an individual state's political agendas is an astounding error in the system that was created to protect peace and security in the entire world. Altogether, the design of United Nations and the Security Council was always a flawed one, since in the beginning getting the Council to act was challenging because of the power politics and the shift in the power balance cause a new kind of problem in restricting the actions of the Council.

Furthermore, protection of human rights, or at the very least, any guarantee to such protection is lacking in the current system. The United Nations Charter vows to promote respect for inalienable rights of humans[48], but is itself not bound by any existing human rights convention or treaty and does earn criticism for that fact.

The importance of human rights is paramount, as it is one of the most important limitations to individual state governments and parliaments in using their authority over their citizens and it should not be possible to supersede these rights by turning to international organizations that are not bound by the same commitments. States form the membership of the United Nations and if the members are bound by the obligation to respect certain fundamental rights, the organization that ties the international community

[46] Koskenniemi, Martti: The Politics on International Law: European Journal of International Law 1990 p 31-32
[47] Koskenniemi, 1990 p. 31-32
[48] United Nations Charter, Article 1

together, should surely not be in the position to disregard such obligations. The lack of unity in obligations can reduce the credibility of the existing system.

Should the Security Council be appointed a court to perform judicial review over its actions? Perhaps, since as it is, the Security Council is too convenient a tool to be used to further the interests of certain states – at the expense of others. The Court, having a possibility to legitimize the actions of other organs of the UN, should not be taken as a hindrance to the effective functioning of those organs[49].

This might result in disrespect and incompliance of the resolutions[50] even when the Council is actually performing its original duties in maintaining peace and security, which might have disastrous consequences. After all, there was a reason for the creation of an organ with the capacity to swift action. The concerns over maintaining the effectiveness of the Council and the suitability of the International Court of Justice to provide a restriction to the powers of the Council is to be debated further on, in another chapter of the thesis.

4 Authority and Function of the Security Council

4.1 Historical Background of the Creation of the Security Council

The Security Council is one of the most significant organs of the United Nations. It was established due to a need of an effective means to operate in case of a serious threat to peace and security. The objective was to avoid a new catastrophe such as the two World Wars had been. Originally, the Security Council was in several occasions unable to perform its duties, due to the tensions between the permanent member states and their power of veto. After the Cold War, however, the Security Council has been accused of exceeding its powers rather than failing to use them[51].

The predecessor of the Security Council, the League of Nations, was miserably unsuccessful in its task to maintain peace and prevent the occurrence of another

[49] Gowland-Debbas, Vera: The Relationship Between the International Court of Justice and the Security Council in the Light of the Lockerbie Case, American Journal of International Law, Volume 88, 1994 p. 677
[50] Johnstone, Ian p. 308
[51] Manusama, Kenneth: The United Nations Security Council in the Post-Cold War Era; Applying the Principle of Legality, Martinus Nijhoff Publishers, Leiden 2006p. 1-6

World War by failing to appeal to the states essentially holding power in the world.[52] The architects of the United Nations did not want to repeat the mistakes and awarded the victors of the Second World War the right to permanent membership in the Security Council and the power of veto that it entailed, allowing them to keep the power in their hands. The permanent membership of the Council echoed firmly the outcome of the war, allocating the privilege to the Allies, the United Nation, United Kingdom, France, Soviet Union and China. The purpose was for the great powers to provide a system of checks and balances for each other and first the plan worked perhaps too well, virtually incapacitating the Security Council altogether. The combined powers of the permanent five were expected to have the capability to take effective measures in order to maintain collective peace and security in the world.[53]

Also the Security Council was designed to give the United Nations an effective organ, able to execute the decisions and bind member states to apply them. The League of Nations, not having had a similar locus of power, was even more depended on the Great Powers, to enforce its decisions, than the United Nations is today.[54]

4.2 The Basis of the Authority in the United Nations Charter

The United Nations Charter declares that the member states bestow the Security Council with the primary responsibility for the maintenance of international peace and security. The Charter empowers the Council to take action when a threat to the peace or a breach of peace occurs. What constitutes a threat to the peace or a breach of peace has been left for the Council to determine.[55]

The United Nations Charter states a range of sanctions the Security Council has the authority to apply, when breach of peace or threat to it has been identified. The range includes complete and partial interruption of economic relations and of rail, sea, air, postal,

[52] This can be exemplified by mentioning the fact that the main designer of the League of Nations, a The United States, never joined the League itself.
[53] Hossein, Kamrul: Limits to Power? University of Lapland Printing Centre, Rovaniemi 2007 p. 3
[54] This notion naturally refers to the predominance of the five permanent members of the Security Council, when it comes to deciding about enforcement action towards a state or an entity that poses a threat to peace or is in breach of it.
[55] Hossain, 2007 p. 9-14

telegraphic, radio and other means of communication and the severance of diplomatic relations[56].

The Security Council resolutions to impose sanctions are legally binding to United Nations member states who must implement them. The Security Council, acting under the United Nations Charter, holds extensive power, being virtually at liberty to decide when a threat to the international peace has occurred and what the appropriate measures to be taken are.[57]

While paragraph 2 of Article 39 states that the Security Council must apply its sanctioning powers in accordance with the United Nations Purposes and Principles, it has been argued that the paragraph does not form a specific enough restriction to significantly limit the Councils authority. This however, seems to have been intentional, as the founding states of the United Nations wanted the Council to be able to act swiftly and effectively and drafted the limitations to its powers to a rather flexible form.[58]

The sanctions can be applied against single states, multiple states, non-state entities and individuals. Lately the Security Council has targeted the sanctions against individuals more often, which has also been called a "smart sanctions" policy. Directing the sanctions towards individuals who are, or might be, responsible for organizing terrorist movements, has been regarded “smart” due to the fact that the targeted sanctions presumably have more effect on the people actually responsible for the threat to or breach of peace. The measures most suited to target individuals include travel bans and asset freezes. Asset freezes aim to prevent the targeted individuals from funding or assisting terrorists or participating in their activity.[59]

However, as discussed in connection to the *Kadi* case previously, the human rights issues related to allowing an intra-governmental organ to impose sanctions on particular individuals is questionable to say the least. The rights of the individual can be very hard to guarantee, when the organ deciding on the sanctions has not originally been designed to perform judicial functions or to handle appeals.

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[56] Farral, Jeremy Matam: United Nations Sanctions and the Rule of Law, Cambridge University Press, 2007 p. 64
[57] Farral, 2007 p. 62-68
[58] Schweigman, David: The Authority of the Security Council under Chapter VII of the UN Charter, Kluwer Law International, The Hague, 2001 p. 27-30
[59] Farral, 2007 p. 131-132

4.3 Development of the Security Council Practise after the Cold War – New Functions of the Council

4.3.1 The Security Council as a Judicial Organ

The Security Council has been interpreted to have acted in a quasi-judicial ability. Recommendations of the Security Council to settle a dispute between states can turn into binding resolutions coercing one of the parties of the dispute to comply with what originally was a mere recommendation.[60] An example of such judicial action was seen in relation to the Lockerbie case, when the United States and United Kingdom succeeded in getting the Council to give a resolution prior to the International Court of Justice having an opportunity to release their judgment on the case before them. In fact, it could be argued that the Security Council stepped in to prevent the International Court of Justice from performing a duty assigned to it by the Charter.

The International Court of Justice, the judicial organ of the United Nations was assigned by the Charter to the role of solving treaty interpretation disputes between states, not to review the decisions of the political organs of the UN[61]. Instead of being allowed a chance to effectively rule on the interpretation of the Montreal Convention, the creative interpretation of the concept of "a threat to the peace" by the Security Council in fact solved the dispute by trumping the Montreal Convention by supremacy of Security Council Resolutions.

The engagement of the Security Council in judicial activity escaped criticism when the quasi-judicial declarations it made concerned situations where it was considered necessary in order to put an end to crises threatening peace. When the Council expanded onto establishing sanction against individuals that were for example, suspected of involvement in funding international terrorism, the reception was quite different. [62]

The secretary-general got involved by addressing the Security Council with specific list of the requirements the necessary human rights guarantees such as the right for

[60] Hossein, 2007 p. 87
[61] 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?, International and Comparative Law Quarterly, Volume 46, 1997 p. 326
[62] Johnstone, 2008 p.294-296

a fair process[63] impose on the work of the Sanctions Committee and several other instances studied the procedures of the Committee with concern. The Security Council did ultimately seize on the proposals, but the concerns did not entirely evaporate. The General Court, as noted, was not convinced enough had been done to guarantee individuals the protection of their fundamental rights and the sanctions were still not permissible for implementation in the European Union law.

4.3.2 The Security Council as a Legislator

The legislative actions of the Security Council have also gotten a wary response. Whether and when Security Council resolutions constitute legislation, has been debated. Technically, since the Security Council produces binding obligations for member states without specific consent of those states, the resolutions might all be argued to generate new international legislation. However, it has been viewed that only resolutions that contain general and abstract obligations, not limited in time and applicable to an indefinite number of cases should be considered international legislation.[64]

Arguments for the Security Council to be allowed wide discretion in determining "a threat to the peace" the key to its powers under Chapter VII of the Charter can be based on the rapid development of the circumstances. That is to say, existing forms of threat to the peace have escalated and the Security Council needs to be able to interfere in threats that might have a variety of different manifestations to fulfil its purpose of maintaining peace and security. The abstract nature of the threat should not form an obstacle impossible to overcome or the object and purpose of the Security Council will become unattainable.[65]

It has thus been argued that the generalization of the obligations posed for the member states of the United Nations, does not create a situation where the Security Council exceeds its authority, since it is uncontested, that it has the authority to establish binding obligations of a more particular nature[66]. Naturally, the need to ensure the efficacy of the Council, which has been emphasized throughout, would suffer if the Council was

[63] The right to a fair trial, see chapter 2 of the thesis.
[64] Talmon, Stefan: The Secuirty Council as World Legislature, American Journal of International Law, Volume 99, 2005 p. 175- 178
[65] Talmon, 2005 p. 177-181
[66] Talmon, 2005 p. 181-182

limited to giving resolutions in particular cases at hand and forced to produce new resolutions for each manifestation of the same threat, for example international terrorism.

The defects observed in the Security Council wielding legislative power[67] include the indeterminacy of the resolutions compared to treaty-based legislation. The Resolutions have thus been described "more akin to directives than to regulations in European Community law". Due to the compromises made in preparing the resolutions, the language used may often be ambiguous and non-specific and states are left with the opportunity to apply the resolutions in accordance with their conception of the contents.[68]

As noted before, the nature of international law as actual "law" has been questioned. This is due to the dichotomous relationship the international law has with one of the basic elements it relies on, namely the concept of sovereignty. The state needs its sovereignty to enter into treaties that constitute international law. But if a state is sovereign, can it be bound by a treaty, should it wish to be unbound by it? The dilemma has led researchers of international law to conclude that international law is, in fact, not law at all, but merely international politics.

4.3.3 Failures and Successes

As stated before, the Security Council faced challenges in efficiency during the Cold War era. Since then, it has both succeeded and failed in its assignment for maintaining peace and security in the world. Most scholars applaud the handling of the Iraqi invasion of Kuwait in 1991, but skeptical evaluation of the reasons behind the success has also been presented. The existence or lack of national interest in any upcoming crisis will have a great input in the outcome. [69]

The lack of national interest in the peacekeeping missions of the Council has already proved to be a hindrance for the necessary swift and effective responses to threats to the peace and security. Even acts of genocide have not proved enough of an incentive

[67] Unless a definition according to which any obligations of the member states created by the Security Council is used, See, Talmon, 2005 p. 175-177 for the alternative definitions of the term "international legislation".
[68] Talmon, 2005 p. 189
[69] Mahbubani, Kishore :The 16 Singapore Law Review Lecture Does The United Nations Security Council Enhance or Undermine International Law? Singapore Law Review, Volume 23, 2003, reminds during his lecture that the where the crisis takes place may very well affect the outcome more than it should, p. 41-42. The success in Kuwait might thus be connected to the resources in the area.

for more active involvement of the United Nations through Security Council practice. The most alarming failures of the United Nations have been patched up with some more creative interpretation of the authority of the Council by the creation of ad hoc tribunals to manage the aftermath of the horrors in Rwanda and Yugoslavia.[70]

4.4 Restricting the Actions of the Security Council

4.4.1 The Need for Defining Restrictions

Since the Security Council took up a more active role after the end of Cold War, the extensive authority it can exercise has also given rise to a growing concern considering the applicability of any limits to the actions of the Security Council. Possible restrictions to the authority of the Council has been sought from human rights, jus cogens, general international law, sovereignty of states and the United Nations Charter itself. The following is an overview of the different sources of restriction.

4.4.2 The United Nations Charter

The United Nations Charter can be considered the Constitution of the United Nations and due to the exceptional nature of the organization that essentially also makes it the constitution of the international community. The nature of the Security Council under the United Nations is political, but its authority is based on a legal document and should therefore be limited by law as well.[71]

An expectation that the purposes and principles of the Charter provide a limitation to the powers of the Council is plainly logical, since an international organ cannot be proven to have powers beyond the source of those powers. In the case of the Security Council, the source is the Charter and acting beyond the scope of the Charter cannot be acceptable to the international community. The question remains, what the limits

[70] Mahbubani, 2003 p.38
[71] Hossain, 2007 p. XIV and 86-89

to the scope of the Charter are and has the Council, interpreting the concept of "a threat to the peace" extended its own authority too far?

The Charter provides the Council power to take measures to maintain peace and security and it has been stated that some quasi-legislative actions might be necessary in the fight against the myriad of threats present or following. However, the Charter has also been considered a restriction to the power it allocates to the Council, since the implied legislative authority is limited to a specific sphere of legislation, namely peace and security and the maintenance of that sphere. [72]

The Council cannot be seen fit to create general legislation to fields of international law outside its sphere of authority, that is to say, when the matter at hand is not directly in correspondence with matters of peace and security. On the contrary, such general development of international law has been left to the General Assembly. [73]

The notion of necessity has been encountered in the chapter concerning the *Kadi* case when listing the human rights issues of the sanctions the Council has targeted against individuals suspected of funding international terrorism. Proportionality is an important aspect, when limiting the execution of human rights and contemplating the relationship between two conflicting rights.

Proportionality has been sought after also in the Security Council practise, noting that the Council should refrain from actions that are not strictly necessary or that are possible to carry out in another manner, less intrusive of the sovereignty of the member states. Council-driven legislation of a general nature might have been necessary when it came to the fight against international terrorism, since the usual means of international law-making had resulted in a convention not many states were committed to. [74]

What remains questionable in the light of human rights protection in the Security Council resolutions 1373 and 1540 is not the general, but the particular nature of the legislative character of those resolutions. The creation of the Sanctions Committee and the list of persons and entities the sanctions were to be targeted at forced the member states to freeze the funds of specific individuals and organizations, without the opportunity to investigate, whether the sanctions where rightfully targeted at people involved in funding

[72] Talmon, 2005, p. 182-183
[73] Talmon, 2005 p. 182-183
[74] Talmon, 2005 p. 184-185

international terrorism as described by the resolutions due to the binding nature and supremacy of the Security Council.

Arguments to the effect that only gross disproportionality of the object, maintenance of peace and security, and the means taken by the Council could lead to the Council exceeding its authority are based on the wide discretion the Charter grants the Council.[75] However, the Charter allowing the Council to determine the proportionality of its actions does not eliminate the possibility that the legislation of the Council could be perceived illegitimate, if the requirement of proportionality is overlooked.

The deduction that the Council cannot impose entire treaties on states that are not bound by said treaties has been considered another limit to the powers of the Council.[76] This seems more like restriction relating to legislation technique, since the Council can, in any case, impose the core obligations of a treaty on a state that has not agreed to it.

The constitutional character of the United Nations Charter has nonetheless been debated too, because unlike constitutions usually do, it only covers certain sectors of international law, like protecting international peace and security and is supplemented by other treaties, each responsible for regulation of their respective sectors or fields of international relations.[77]

4.4.3 Limits for the Purpose of Protecting Human Rights

Since one of the three categories of the United Nations' field of operation is human rights and humanitarian, human rights earn the privilege to be considered one of the restrictions to the powers of the United Nations Security Council. One suggestion contains improving the expertise of the Sanctions Committee by replacing diplomats with legal specialists who would be better equipped to deal with the legal and humanitarian issues connected to imposing sanctions.[78] This to me would distantly resemble creating a judicial committee to manage the appeals and pleas of the individuals and organizations targeted

[75] Talmon, 2005 p. 185
[76] Talmon, 2005 p. 185-186
[77] De Wet, Erika, The International Constitutional Order, International Comparative Law Quarterly, Volume 55, Issue 1, 2006 p. 53-54
[78] Hossain, 2007 p. 328

with the sanctions, the lack of which has been one of the problems emerging from the use of "smart sanctions".

The reluctance of governments to include human rights clauses into international treaties is connected to the fact that the national human rights obligations might prove difficult to merge with the international ones due to the diversity of human rights standards around the world.[79] Despite the fact that human rights are not a concept free from reasons for criticism and should not be deemed unproblematic and morally harmonius, especially in a fundamentalist or formalist manifestation, it is a concept that allows a powerful set of arguments for the promotion of freedom. This is considered to be caused by the nature of rights as both universal and particular.[80]

The promotion of human rights in for example economic integration treaties has been considered especially beneficial to the less developed countries, allowing the individuals more room for self-development, when the fair distribution of goods and opportunities is globally regulated. It has even been stated that the democratic legitimacy of the treaties derives from the promotion of respect for human rights,[81] which can perhaps be applied to establishing legitimacy for a fundamentally undemocratic organ such as the Security Council.

Erika De Wet has observed the constitutionalization of the international law in her article. Despite the fact that she does not consider the United Nations Charter a constitution she calls for recognition and execution of norms based on common values such as fundamental human rights. She also introduces an idea of a layered reality of international value system, where norms are either *jus cogens*, have gained the status of *erga omnes* instead of just being based on an idea of bundles of bilateral obligations or are norms which do not yet have the status of *erga omnes* or peremptory norms but are gaining wide recognition.[82]

De Wet questions the significance of democracy as a guarantee of legitimacy and finds proof by comparing the constitutions around the world to the peremptory or *erga omnes* norms of the international sphere and concluding that a great deal of similarities can be detected. She also analyses the roles of the national and international courts and tribunals in protecting and maintaining what she calls the "common values" in the world and in providing a check for powers of the supra-national organs such as the United

[79] Petersmann, 2002 p. 625-626
[80] Koskenniemi, 2001 p. 41-44
[81] Petersmann, 2002 p. 630-632
[82] De Wet, 2006 p. 57-59

Nations Security Council. Allowing the national courts to examine the legality of the Security Council resolutions may cause the supremacy of the resolutions to suffer and decrease the efficacy of the Council. [83]

Development back towards national hegemony and creating distance to the idea of common values of mankind has caused concern. The return to an international society were decision-making occurs exclusively within nation-states without an agreed ground of common values, might put the rights of the individuals in danger.[84]

Human rights can prove an invaluable asset in promoting common values. The human rights that have caused much discussion through their conflicts with Security Council resolutions are portrayed in more detail in Chapter 2 of the thesis.

4.4.5 Judicial Review of the Security Council – The Relationship with the International Court of Justice

The problem with the Security Council imposed sanctions is not just the fact that some of them do not always meet the requirements set forth by the Universal Declaration of Human Rights and other fundamental rights obligations, but also that there is no judicial organ competent to coerce the Security Council to change its procedures or to reverse the sanctions. As noted in a previous section, instead of being under the jurisdiction of the International Court of Justice, the Security Council has even taken action to interfere in proceedings before the Court.[85]

Earlier, when drafting the United Nations Charter, it was suggested that the International Court of Justice should be competent to review the action taken by the Security Council, but as the purpose of establishing the Security Council was to create an organ that would be able to act swiftly when necessary, the states decided not to limit the Security Council's authority by obligating it to answer to the International Court of Justice. In theory, this gave the Council virtually unlimited power.[86]

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[83] De Wet, 2006 p.69-70
[84] De Wet, 2006 p. 71-76
[85] This, of course refers to the interruption of the Aerial Incident Over Lockerbie, Provisional Measures proceedings by the Council Resolution insisting that Libya should succumb to the demands of the U.S and the UK.
[86] Farral, Jeremy Matam: United Nations Sanctions and the Rule of Law, Cambridge University Press, 2007 73-75

The International Court of Justice might receive an opportunity to give an advisory opinion on the limits to the authority of the Security Council, if two thirds of the General Assembly agree to request one. Gross disregard of possible authority issues by the Council could lead to the International Court of Justice declaring action of the Security Council ultra vires. Regardless of the advisory nature of such declaration, this would no doubt be a result the Council would wish to avoid. The compliance pull of the resolution would surely decrease notably if the Court found it in conflict with the Charter.[87] Again, it is essentially in the hands of the General Assembly to choose to resort to these measures. Applying such pattern of control would return the power to the "parliament of the United" Nations, which might relieve the democratic deficit of the international law by allowing the non-members of the Security Council more influence.

The practical difficulties in assigning such power to the Court might prove overwhelming though. The general jurisdiction of the International Court of Justice is not accepted without provisions even in the current circumstances. How the permanent member states of the Security Council would react to extending the Court's jurisdiction is undetermined. The notion of utilizing the "uniting for peace" conception as more of an incentive for the Council to carry out its duties accordingly rather than actively applying such an innovative measure might gain more success in practise.

The International Court of Justice never ruled on the merits of the Lockerbie case, because the parties of the dispute withdrew the case. Whether the International Court of Justice could have taken up the authority to annul Council legislation, remained thus unanswered[88]. However, admitting the supremacy of the Council resolution when handling the provisional measures implied that the Montreal Convention would not have been applicable after the Council had obligated Libya to provide the mentioned "full an effective response" to the demands of the United States and United Kingdom.

The relationship between the Court and Council has been described through the differences in the nature of the organizations; the Court having been appointed the legal function of the United Nations and the Council the political.[89] As has been described

[87] De Wet, 2006 p. 65-66
[88] Matheson, Michael, J.: ICJ Review of Security Council Decisions, George Washington International Law Review, Volume 36, 2004 p. 618
[89] Gowland-Debbas, Vera:The Relationship Between the International Court of Justice and the Security Council in the Light of the Lockerbie Case, American Journal of International Law, Volume 88, 1994 p.57-59

in this thesis, though, the functions of the Council are not merely political in nature, but it has been argued to have acquired legislative and judicial capacities as well. The measures the Security Council can take on behalf of the United Nations to preserve peace have been considered legal sanctions for threatening the peace, but the absence of a condition for the Security Council to apply the sanctions only in cases of breach of international law can defeat the comparison. [90]

The International Court of Justice may have been considered unsuitable to review the Council's decisions due to their political nature. However, if the ICJ is considered the supreme judicial organ, which should not be considered sufficient grounds for extension of the ICJ competence over the matters left for the Council to determine, should it not then at least have the power to review the resolutions of the Council, when the Council is effectively acting in a quasi-judicial role?

4.4.5. Other Sources of Restrictions

For example in the Lockerbie case, a multitude of concepts would have spoken for a different outcome. The sovereignty of states provides states the right to assume that their international relations will be governed according to their treaty commitments. Democracy has been viewed as a prerequisite for legitimacy of national governments. Traditional concept of democracy is unfortunately ill suited to provide legitimacy for international government, at least when the obligations imposed on the states are not ones that the national government has directly agreed to[91].

The obligations the Security Council Resolutions under the Chapter VII can impose on states are not depended on express approval of the national governments but rather; take supremacy over all other obligations the states may have committed to willingly. It has been argued that the consent of the states to be bound by the United Nations Charter does not suffice to qualify the decision making of the Council democratic.[92]

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[90] Gowland-Debbas, 1994, assessing draft articles on state responsibility p.58
[91] Bodansky, Daniel: The Legitimacy of International Governance: A Coming Challenge For International Environmental Law? The American Journal of International Law, Volume 93, Number 3, 1999, p.597
[92] Bodansky, 1999 p. 597-598

The problematic behind the idea of democracy as an indicator of legitimacy, and how poorly the concept of democracy fits the international sphere of activity should be pointed out. While state consent continues to be the most important indicator of legitimacy of international legal instruments, the world should pursue a different solution to managing co-operation of states in order to create an effective means for battling the common problems of mankind.[93]

5 Future Developments and the New World Order?

5.1 Current World Order and the Security Council?

Kanthian theory on the creation of a world government describes its occurrence connected to a catastrophe that would bring the world together to act "rationally" in an extreme situation. It has been stated, that it cannot be known what would actually happen in such a post-catastrophic situation. However, we have seen the creation of the most extensive international organization yet arise from the ashes of a devastating intercontinental war that left behind both direct victims of the war and victims of a genocide.[94]

Next catastrophe to inspire the sovereign states to release some of their domestic authority to global actors can very well be environmental rather than military. The reliability and legitimacy of the international organizations, such as the United Nations and the executive organ, like the Council needs to be increased by allowing the subjects to affect the decisions of the decision makers more – that is, to incorporate democracy into the process.[95]

While several options from Marxist global proletariat to a world without international relations have been presented to rival the existing order, it has also been thoroughly argued that any drastic enough changes that would lead to the demise of the state system are not probable in the foreseeable future. On the contrary, the state system is mostly accepted as the inevitable base to any possible changes in the political environment of the world.

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[93] Bodansky, 1999 p.599-600
[94] Bull, Hedley: The Anarchical Society, New York, Palgrave, 1977 p. 252-253
[95] See, Franck, Thomas: The Emerging Right to Democratic Governance, American Journal of International Law, Volume 86, Number 1, 1992 p 46-52 on the democratic entitlement.

It is highly unlikely though, that any of the great states would give up their status as super powers, in order to allow the formation of a global government. It can be seen clearly enough in the reluctance of the United States to sign away the right to prosecute their own citizens, even when charged of an international crime such as genocide, in favour of the International Criminal Court . Environmental treaties, like the Kioto Convention have not gained much more success. In general, the European countries have been more willing to tie themselves to the global rules of an international society, while the Americans are more in favour of a unilateral take on the world.[96]

Regionalists see the current state system as just a one of the stages of development of the state system and regional joint states as the tendency of the future. Although some regionalists have even gone far enough to create a division of states into regional interest groups, because the possibility of superpower-lead world politics is seen as a threat to the interests of the Third-World countries.[97]

The concern is that international politics lead solely by the great powers would increase the unjust nature of the world order and not allow some parts of the world any influence on the development. But regionalism can be criticized by pointing out that even regional rule would put some of the states in to an unfavourable situation, where the most influential state of the region would take over regulation of the internal affairs.[98]

Some are also afraid that when international relations are handled through government networks more so than within international organisations, the weaker states lose ground to the stronger great powers, because government networks are not as visible and are therefore harder to keep track of. Governments of influential states may have even more possibilities to dictate the direction of joint global actions. This is also one of the key issues of extensive authority the Security Council wields along with the human rights concerns.[99]

5.2 Sovereignty as a Prerequisite of International Law

Sovereignty has been claimed to have lost its "resonance" as a defensive shield against the interference of other states to domestic affairs. Despite the objections of states, the norm of sovereignty does not extend quite as wide anymore. Human rights and

[96] Fukuyama, Frances: State Building, Profile Books, London, 2004, p.143
[97] Bull, 1977 p.294-299
[98] Bull, 1977 p.294-299
[99] Cohen-Tanugi, Laurent: The Shape of World to Come, New York, Columbia University Press, 2008 p.116-117

other global values have stepped on the toes of sovereign states even where there is no competent international organ to monitor respect for them. [100]

The Security Council, with the powers it has been allowed by the Chapter VII of the United Nations Charter, intrudes upon the sovereignty of the states by virtue of the sovereign states having accepted the Charter willingly. Monitoring of the Security Council, that is, of the governments of the member states, has not yet been organized to match the trend in increasing demand of respect for human rights. Nonetheless, the resolutions mentioned earlier have raised arguments showing concern for the lack of human rights guarantees in the Security Council resolution process.

A very central problem in all international law is culminated in the concept of sovereignty and convincing states to commit to treaties without too many provisions, especially when common interests like environmental issues are at stake. After all, what good is a treaty, if all the states involved have made an endless array of provisions to its application or if the states involved do commit to applying the treaty without provisions, but only a few states take part in it? Keeping super powers such as the United States involved in the United Nations, but trying to get them to agree to and abide by common standards and rules seems to be the ever-present challenge of the international community.

5.3 Inspiration from the Regionalist Approach

Laurent Cohen-Tanugi describes the influence of European Union as a sort of "soft power" while the United States have felt the need to resort to the use of "hard power", that is military force, to attain their influence. Also Ian Kerns and Glenn Hook refer to "soft" and "hard" aspects, but in terms of regional co-operation. They see the "soft" approach as more connected to regional co-operation on a more social level. Within European Union the cultural and social similarities have been enhanced when there has been an aim to promote a sense of "natural unity".[101]

Regional approach can also help balance the influencing power struggle between smaller states and superpowers. If smaller states form regional "alliances" or new federal states, their combined influence would be far greater than any of the states could

[100] Farer, Tom: Toward an Effective International Legal Order: From Co-Existance to Concert, International Journal on Human Rights, Vol. 5, 2006 p. 151-171
[101] Hook, Glenn and Kearns, Ian: Subregionalism and World Order (edited by G.H and I.K) London, MacMillan Press Ltd 1999

amount to on their own. Was the European Union not partly designed to create a balancing power in response to the dominance of the United States in world politics since the downfall of the Soviet Union?

European Union has promoted regionalism, but also globalisation in the sense that the European states have been willing to give up their sovereignty to some extent to form a new union. The achievements of the European Union have been overlooked though, claiming, that "the European bubble" of peace and safety is actually provided by the military force of the United States. [102]

The fact that the International Court of Justice refused to grant Libya provisional measures to ensure its right to refuse to extradite its citizens due to the Security Council resolution on the matter clearly indicates that the Court, given the opportunity or left the obligation to rule on the merits of the case, would not have been willing to override a decision of the Security Council. According to the Charter, the Court is not entitled to assess whether Security Council resolutions are consistent with the Charter. Possibly a change in the relationship of the Security Council and International Court of Justice would be called for if there were a change in the status of United Nations in terms of human rights obligations.

In an article published in the American Journal of International Law, Eric Stein goes over the development of European Community law through the jurisprudence of the Court of Justice of the European Communities. He states that the difference between most international treaties and the European Community Treaties was actually created or at least heavily enforced by the Court. Without the Court's decisiveness in making the member states abide by the treaty and interpreting the treaty "in the spirit" of it, he argues the treaty would have been just as any other international treaty instead of creating a quasi-federal community of states. [103]

Stein analyses the development with a special interest on how the states, the Council, the Commission, the Advocate General and the Court formed their opinions on the cases that were brought to the Court and notes that most often states have opposed the development towards more effective emphasis on the Community legislature and

[102] Fukuyama, 2004, p.159
[103] Stein, Eric: Lawyers, Judges, and the Making of a Transnational Constitution, The American Journal of International Law, Volume 75, Number 1, 1981 p. 1-27

Commission has been more likely to support it. National governments, however, tend to oppose changes that emphasize international legislation.[104]

Stein also finds that the defining moments of the development included the introduction of "direct effect", "supremacy" the move from "horizontal to vertical effect" and the change from the mere effect of negative obligations to also enforcing positive obligations, which were all brought about by the Court of Justice of the European Communities. By creating a judicial body, the member states took their treaty to another level compared to most existing international treaties. The effect of the treaty would have been far less intrusive on the national legal orders without the enforcement of Community legislature by the Court – even when the states were unwilling to abide by their obligations.[105]

The European Court of Justice took the liberty of reviewing the execution of human rights standards in European Community legislation even before the Treaty establishing the European Economic Communities included any notion of human rights to be respected. Originally the Treaty did not refer to human rights protection. The Court based its actions on the common constitutional traditions of the member states and on the European Convention of Human Rights, despite the fact that the Communities were not bound by the Convention. This emphasis on human rights constructed by judicial activism was mostly welcomed by writers.[106] Actually, before the European Communities grew from a treaty with its emphasis on the economic aspects, to a Union with a bill of rights of its own, the adoption of human rights was called after as the "core policy" of the organization.[107]

The judicial review the European Court of Justice took to performing even interfered with the right of the national constitutional courts to review the compatibility of the Community legislation with the national constitution, which was not accepted by the constitutional courts of Germany and Italy.[108] Naturally, to confirm that all member states would apply Community legislation uniformly, claiming the exclusive right to evaluate the conformity of the Community legislation with the human rights standards of the constitutional traditions of the member states was absolutely necessary.

Achieving similar uniformity to the application of Security Council Resolutions, a corresponding take on the protection of human rights might silence some of the critics of

[104] Stein, 1981 p. 1-27
[105] Stein, 1981p. 1-27
[106] Weiler, 1986 p. 1103-1106
[107] Von Bogdandy, Armin*:* The European Union As A Human Rights Organization? Human Rights and the Core of the European Union, Common Market Law Review, Issue 37, 2000 p. 1309-1310
[108] Weiler, 1986 p. 1106

the Council, considering how well the activism was received. If the International Court of Justice claimed the authority of reviewing the conformity of the resolutions with the necessary human rights guarantees. After all, as has been presented, a great deal of the criticism and even incompliance of the Council actions has to do with concerns regarding the execution of human rights.

The entry of the United Nations into a binding human rights convention might even become somewhat unnecessary if protection of the rights was covered through what might be called judicial creativity. The European Union did eventually get a bill of rights included in the constitutional treaty[109] and the legal personality allowing it the capacity to enter into the European Convention of Human Rights.

Writers have been considered to disagree whether the accession of the EU to the Convention was necessary or if the protection of human rights had already reached a sufficient degree within the scope of European Union through the judicial practice of the European Court of Justice.[110] This suggests that the basis of the protection is not always found as relevant as the practical manifestation.

However, in my view legal certainty may be better served through a more firm legal basis, namely including the United Nations in a binding instrument of human rights. The common constitutional tradition that the European Court of Justice leaned on is much more difficult to define in a global setting and in any case judicial activism can backfire and eventually defeat the original intentions of strengthening the human rights safeguard.

A likely benefit of the allowing the International Court of Justice the authority to review the Council resolutions exclusively for the protection of human rights would be the limited amount of strain put on the effectiveness of the Council. However, the option might be wise to avoid rather than to rush into using. As stated, the knowledge of the possibility that the General Assembly might lean on the Court to might be enough of an incentive for the Security Council to pay more attention to the possible human rights issues of its resolutions.

The Court would perhaps require more creativity than can be accepted to adopt teleological interpretation style utilized by the European Court of Justice to allow itself to rule on the possible human rights issues of the Security Council resolutions. However, the purpose of the drafters of the Charter cannot have been to allow the Council to strip

[109] Though it was in the end not called "constitutional", probably due to the political resistance the name generated.
[110] Weiler , 1986 p. 1106-1107

individuals of their rights without regard to proportionality or necessity, especially considering the atmosphere of the post-world-war-era, when the horrors of the Nazi regime were revealed in full. Hope for the United Nations (and its Security Council) to be able to maintain peace is expressed in connection to reaffirming "the dignity and worth of the human person."[111]

6 Challenges and Suggestions – The Future of the Security Council

6.1 Inclusion and Openness

In his article written for the American Journal of International Law, Ian Johnstone has viewed the problems in Security Council acquiring roles of both a quasi-judicial and a quasi-legislative organ in addition to being an intra-governmental organ, the primary function of which was to enable the representatives of the most powerful nations to have a more effective environment for reaching consensus to avoid conflicts such as the two World Wars, than what the heavier, more inflexible machinery of the General Assembly provided them. In the two cases presented in this thesis, the Council has acted in both roles, using its authority to override principles of international law and treaty obligations – for the political gain of some of the permanent members more than anything else? It could possibly be argued, of course, that keeping the permanent members of the Security Council satisfied does entail avoiding global conflicts such as a new World War would be.

Johnstone analyses the quasi-legislative and quasi-judicial functions of the Security Council and stresses that improving the quality of deliberation is especially necessary in connection to these branches of the powers of the Security Council and possibly even inapplicable to the traditional "crisis management" task. He assesses in particular the Resolutions 1373, 1540 and 1267. Johnstone also goes through the criticism that has been targeted towards Security Council "branching out" to legislative and judicial functions.

He presents three different strategies for improving the legitimacy of Security Council decisions, namely inclusive consultation, public justification and independent review. He finds the idea of global democracy unrealistic, but views that that does not

[111] See, the Preamble of the United Nations Charter, "reaffirming faith in fundamental human rights".

mean the benefits of democratic deliberation are unattainable, since making the undemocratic international organs justify their claims in a public debate, allows the public a chance to evaluate the legitimacy of the claims and decisions then based on them.

He states that if an organization should be effective, it is also important for its actions to be perceived as legitimate. He presents the theory of Jürgen Habermas as the setting of the value of deliberative democracy as it proves that there is value in an open discourse where the better arguments prevail and the goal is to justify one's opinions in a credible way. Johnstone also seems to feel that what is important is not necessarily to assure the others that one is right but that at least are good reasons behind their views.

In his article, Johnstone talks about deliberation, communication and improving the argumentation of states and international organs when making decisions that affect all. He states that well-crafted arguments and the maintaining a certain quality in the deliberation is useful for the powerful states as well as for the less influential nations operating on the international field.

Making the opposing side believe that one's arguments are well-founded, even if they do not agree with what the resulting proposal is, makes them more likely to comply with the resulting decisions of the more influential states rather than questioning their authority to make those decisions. Especially on the international level, since states are sovereign and cannot be obligated to enter into treaties, it is of fundamental importance to assure the other states that one's opinion or goal is legitimate and well founded.

Pressure to comply might be applied against a few states, but it is impossible or at least too costly to force general compliance and for this reason improving the perceived legitimacy of the decisions is important. The effectiveness of the Security Council might suffer from an increase in deliberative practises, but the effectiveness created by the willingness of the member states to implement and execute the decisions should not be overlooked either.

In the current international political situation, it seems that everything must be done at the terms of the superpowers, as even the United Nations Charter was formulated on an assumption that peace could be maintained best in a process uniting the powerful states of the Security Council. The unjustness the power politics uphold towards the third world countries has not changed. The setting has received much justified criticism towards western countries that are urged to learn to share global power with the non-

democratic "developing countries" and to adjust their views on the juxtaposition of the western states and the rest of the world.[112]

The power of veto was designed to be used in matters where pressing national interests where in question, to involve the great powers in the United Nations by allowing them a special privilege in the decision-making. The power of veto is thus not always used accordingly, but exploited also in matters far more unimportant, such as procedural questions.[113]

Decreasing the use of veto would allow the non-permanent members more influence, which might enable a wider involvement of the general membership thus increasing the level of democracy of the Security Council actions. As has been noted before, democracy, in turn, is still strongly considered one of the indicators of legitimacy.

The key problem seems to be, that the very factor, namely power-state influence, that is keeping the Security Council from performing its peacekeeping function effectively and with sufficient neutrality, is also the factor allowing it the credibility its predecessor lacked. Solution to the problem should for that reason not be sought in changing the Charter all the make-up of the Council altogether.

The role of the non-members of the Council is debatable. On one hand, their approval is sought after by the permanent members. The lack of power of veto does, however, tilt the balance of influences notably. The eroding support of the Kadi resolutions mentioned earlier is considered a sign that even when passed unanimously, the resolutions might not truly be backed by the general opinion. [114]

Legal changes, restricting the actions of the Security Council distinctively and therefore restricting the sphere of discretion of the permanent members, might cause a rift between for example the United States and the United Nations. The credibility of the institution would naturally suffer from such rift. Changes of a more political, diplomatic nature would perhaps be more easily welcomed. Even explicitly widening the jurisdiction of ICJ might cause the United States to not so much as attempt to seek legitimation to its urges, since it has taken critically to the general jurisdiction of the ICJ.

Johnstone has taken this into account by merely suggesting the proceedings of the Security Council should be modified to allow a more open, inclusive debate on the matters at hand. Instead of changing the decision-making of the Security Council

[112] Cohen-Tanugi, Laurent: The Shape of World to Come, New York, Columbia University Press, 2008 p. 116-117
[113] Mahbubani, Kishore, 2003 p. 44
[114] Johnstone, 2008 301-302

altogether or limiting its authority, Johnstone proposes increasing the opportunities of non-members of the Council to voice their opinions and raise their concerns earlier on, before the resolutions are given.[115]

It has been argued that even non-binding treaties do have a certain compliance pull on states, even if it is not as strong as binding treaties carry. That has been estimated to have a connection to the value states give to their reputations.[116]

Now, the key that still gives the permanent five members of the Security Council incentive to try and persuade others to agree to their actions, namely to seek the Security Council's blessing in the form of a resolution, before acting on the urges their national interests generate, could very well be the attempt to maintain a perception of legitimacy for their actions. It is not unheard of that states make a great deal of effort in making the unlawful decisions and actions seem perfectly legitimate. For example, when the National Socialistic party was in control of Germany, the laws to create ethnic discrimination were carefully constructed so as to assume a perception of legality in hope of achieving legitimacy in the process.[117]

What should not be forgotten is that even within a nation state, those who hold the authority to enact laws, also have the authority to change them. Human rights and certain other paragraphs have been deemed so inalienable, that changing them has been made more difficult. There are often requirements of vast majorities and time restraints such as waiting periods for passing the laws. No written law exists that can in no way be changed, as texts are always interchangeable. What I would imagine can keep states from interfering with human rights as a part of their constitution, are their international obligations.

As noted before, during the Cold War the Security Council was criticized for its inability to act in its peacekeeping capacity due to the collision of superpowers and their power of veto, but since then it has sometimes been criticized even more for acting when no objectively verifiable threat to the peace was involved, like seems to have been the situation with the Lockerbie case. That is, unless a unilateral act of aggression by the United States or the United Kingdom was the threat to the peace the Council attempted to avoid, in which case the means to achieve that goal can at the very least be described controversial.

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[115] Johnstone, 2008 p. 303-308
[116] Guzman, Andrew, T: The Design of International Agreements, The European Journal of International Law, Volume 16, Number 4, 2005 p. 596
[117] Campbell, A.H: Fascism and Legality, Law Quarterly Review, Volume 62, London, 1946 p. 141

When the United States has not been able to persuade the Security Council to act according to its urges, it has instead resorted to unilateral acts[118]. The United States is of course protected by its veto power from ever having its actions officially proclaimed illegal or illegitimate. This does provide a credibility issue for the Security Council. During the Cold War, when the Security Council was rendered incapable to fulfil its duty of preserving peace, the General Assembly stepped in to fill the void in the structure of the United Nations, with the "Uniting For Peace Resolution". It can be debated whether such creativity can be utilized in other situations as well, to substitute for the Security Council or even override a Council resolution. Substitution of the Security Council by the action of the General Assembly may be appropriate in situations where protection of human rights is at risk due to the inactivity of the Council.[119]

However, since inactivity of the Security Council may not be the only obstacle in the way of ensuring protection for human rights but the activity of the Council may also threaten the execution of those rights, turning to the General Assembly for support might not prove an effective way to defend fundamental rights. The Security Council was designed for swift action, whereas the General Assembly represents a more traditional approach to international law making and needs the support of a larger part of the membership to take measures.

As it was noted before in the thesis, the United Nations itself, as an international organization, is not bound by any human rights treaty or convention and the human rights instruments that have been created under the guidance of it[120], have been left without binding force. The General Assembly, "Uniting for the Protection of Human Rights" is therefore an idea hard to justify, especially if it would require the General Assembly to annul decisions of the Security Council. Again, international law is generally not a field of law prone to swift and dramatic action, but rather, changes in the procedures that were once created may be hard to accomplish.

Giving the International Court of Justice the power to overrule decisions of the Security Council to strengthen the protection of human rights and prevent any ultra vires action of the Council has also been suggested[121]. Having reviewed the encouraging results in the development of the human rights protection in Europe after submitting the

[118] Quigley, John: The United Nations Security Council: Promethean Protector or Helpless Hostage? Texas International Law Journal, Volume 129, 2000 p.140-155
[119] De Wet, 2006 p.64-67
[120] The Universal Declaration of Human Rights, as the most comprehensive example, was established under the United Nations.
[121] De Wet, 2006 p.66

actions of national authorities to the scrutiny of a specially appointed judicature, the proposal seems appealing.

6.2 The Future of the Security Council

6.2.1 Expectations

The Security Council will constantly be facing new challenges and maintaining, or perhaps even restoring, a perception of legitimacy towards its actions will not be the least of them. While attempting to avoid tension with human rights and catering to the interests of the great power states enough to ensure their involvement in the United Nations and answering the demands of the third world countries by developing more open-natured procedures of decision making to allow them more influence in the international society in order to break down the unjust distribution of power in world politics, the Security Council will need to find a way to balance the interests and ambitions of the governing and the governed.

The Security Council has been expected to bring about the "New World Order" before and in my view, it still has the best means to do it, due to the enormous powers it was entrusted with when the Charter was crafted. Unfortunately, like no international organization or an organ of one, it cannot succeed without the support of the states holding in together. Restricting the actions of the Council will need to happen in order to prevent the power from being gathered to the hands of a few powerful states even more than is inevitable, all the while still allowing the Council enough power to even strengthen its ability to perform its peacekeeping duties.

While it has been mostly been accepted that the concept of sovereign statehood is an essential element and building block on the international community as it is and that is not likely recede to be replaced by a world government, the Security Council has probably come the furthest on the road leading to global governance. It has been argued that by relinquishing the responsibility to sustain common security to the Security

Council, states have renounced a key part of their sovereignty, since defending peace and security is a vital purpose of governance.[122]

It has been estimated that increasing the democracy, accountability and representativeness of the Council would make the Council less effective in its peacekeeping ability[123]. The Council has faced problems with its efficiency even now, when faced with situation where the national interests of the Council member states where not at stake, like Rwanda and Yugoslavia. It has been questioned, whether the Council as it is, would handle similar situations any more effectively in the future.[124]

While it can be agreed that taking the power of veto off of the hands of the permanent members is not a realistic option, limits to using that power might be possible to achieve, since it was originally in fact introduced to allow the permanent members to protect their "vital national interests." The application of the power of veto has for example been excluded when merely procedural matters are in question. [125] However, more attention might need to be paid to such exclusions on the concept of the power of veto, since the procedural matters have not in fact been protected from interference of the permanent members with their privilege.[126]

6.2.2 Debating the Options for the Development of the Security Council

Changing the Charter in order to reign in the power of the Security Council might prove an impossible task. Even when the Charter was originally formulated, the process was not straightforward and simple at best, but involved a lot of negotiations and compromising, in order to succeed in creating an organization following in the footsteps of the League of Nations but managing to avoid the issues that had caused the failure of the League. The Charter was, though, created – undoubtedly assisted by the atmosphere the Second World War and the knowledge of the tremendous victim count had caused. Would states still be willing to allow the Council essentially the same powers only introducing a counterweight to the balance by giving the International Court of Justice rule over the Council in limited situations? What would those limited situations be? Would the whole process of changing the Charter just open a can of worms, that is, create a lengthy an futile

[122] Hossain, 2007 p.81
[123] Hossain, 2007 p. 322
[124] Mahbubani, Kishore: The 16 Singapore Law Review Lecture Does The United Nations Security Council Enhance or Undermine International Law? Singapore Law Review 2003, volume 23 p. 41-42
[125] Hossain, 2007 p 324-326
[126] Mahbubani, Kishore, 2003 p. 44

string of negotiations, with several states trying to include their proposals for changes in the discussions.

It has been argued that since the Cold War ended and substantial changed the internal politics of the Council, the power held by the United States has been unmatched by any other. During the Cold War, a sort of a system of "checks and balances" had been in play with the Soviet Union providing the counterweight to the United States. The lack counterweight is exactly what leaves the powers of the Security Council vulnerable to abuse and opens up arguments

The Court of the European Communities is for a large part the instance to thank for the importance of the norms of the Union today (previously the European Communities) and essentially how the European Union became an institution very different from those usually created by international treaties. Without the creation of the Court, the status of the legal obligations of the Union would have been very different. During the first decades of the European Communities, when the domestic politics and unwillingness of states to be bound by foreign, international legal norms threatened the purpose of the treaties of the Communities, the Court resorted to teleological interpretations of the treaties, in order to strengthen the status of those norms and realize the set goals of the Communities. Could a similar interpretive method be applied to the United Nations Charter?

It has been enshrined in the Charter, that one of the purposes and principles of the United Nations is promoting human rights. Applying this notion to practise

Limitations and balance acquired by creating a situation where any arguments have to be accepted by several instances that have no direct interest in the outcome of that particular case at hand. The notion of impartiality is not one without controversies, perhaps especially in international politics, but

Getting the acceptance of those whose own interests are not at play in any other sense than that of reaching the acceptance of others in their future issues, should amount to being able to call the arguments somewhat legitimate – at least more so, than in situations where no such argumentation is necessary due to the power held by the actor. The Security Council can impose obligations on states due to their acceptance of the United Nations Charter without particular acceptance of the resolution in question. No check to the power of Security Council is present in the current situation.

Although human rights as an institution can and should also be criticized and not taken as a concept free of political value judgments[127], the dual nature of rights seems to offer a way to free rights from being merely an apology for any existing order or regime. Rights are applied and preserved on domestic fields and may sometimes form an argument against the application or execution of an international treaty or committing to one.[128]

However, should a sovereign state disregard the rights also portrayed in treaties and conventions the state has bound itself to, rights allow the international community – particularly those also bound by said treaty – a set of arguments in criticizing the actions of the state in breach of its treaty obligations. Though respect for the sovereignty of the state might make the international community refrain from acting to actually prevent the state in breach of human rights obligations, it has been argued that being considered in breach of treaty obligations is not something states take lightly in general.[129]

Could it be stated that the duality of human rights norms provides a ground for them to be protected either through domestic constitutions or international treaties, that is, through states attempting to abide by international norms they have agreed to respect? Should the need arise, states could then possibly refrain from carrying out their duties derived from international treaties[130] and on the other hand, arguments based on the need to protect human rights might be a tool for the international community to take action against a state in breach of said rights. This way, the protection of rights is guarded by two instances, both inside and outside sovereign nation states.

With that said, the political nature of rights can cause the monitoring function to lead to confusion and even abuse of the human rights doctrine. Who is it left to decide when a state is in breach of human rights treaty obligations enough to allow interference on its sovereignty or when applying an international treaty would lead the state to act against its own constitution? Balancing out different interests and deciphering the legitimacy of norms or arguments is undoubtedly an infinite challenge of both international and domestic fields of law.

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[127] Koskenniemi, Martti, Human Rights, Politics and Love, Mennesker & Rettigheter, Issue 4/2001, 2001 p.40-44

[128] See, incompliance with Security Council Resolutions in connection to the Kadi case, chapter 2 of the thesis.

[129] Guzman, 2005 p. 580-583

[130] This refers mainly to possibly disregarding the supremacy of Security Council resolutions if the implementation of that particular resolution would result in a human rights violation.

One suggestion that has been presented as a possible albeit possibly only partial solution consists of adding emphasis on argumentation and deliberation as a form of legitimization and allowing the non-Council members access to the debate and the formulation of the resolutions by making the deliberative process more open. Bringing down what has been called the "deliberative deficit" is portrayed as a possibility in increasing respect and trust the Security Council.[131]

The *Kadi* case also poses an intriguing dilemma to the Member States of the European Union. If the common heritage of human rights in the domestic constitutions of the European Union members and the human rights obligations of the European Union prevent the Union from implementing the sanctions set forth by a Security Council Resolution Under Chapter 7 of the United Nations Charter, how is it then, that the member states themselves would not be in breach of their treaty obligations under European Union law? The European Court of Justice, denying it had the competence to evaluate the legality of the Security Council resolutions, but still declaring the implementing measures had to be annulled, left the member states in a difficult position.

There are dangers in allowing an international court the jurisdiction that includes the monitoring of human rights standards exclusively. For example, in the European context, if the national courts are no longer allowed to evaluate the protection of the rights enshrined in their national constitutions guarding the execution of those rights are left to an organ also responsible for guarding the benefit of the European Union and the development of the legislation. It is pointed out that a fundamental right of an individual might still end up overlooked when pitted against furthering a common goal of the Union.[132] Protecting human rights in the context of the United Nations should thus not be left exclusively to the International Court of Justice.

The European Community has been used as an example of how something that started as an economic integration treaty evolved into a treaty with a constitutional nature – a treaty that now puts a relatively great emphasis on the protection and realization of fundamental human rights.[133] The European development may very well constitute a source of inspiration in the discussion of the future of the United Nations.

[131] Jonhstone, 2008 p. 275-308
[132] Weiler, 1108
[133] Petersmann, 2002 p. 650

The imperative lesson is to find a balance between all the aspects regarding the Security Council as world government in the field of peace and security. The effectiveness of the Council in performing its duties, the credibility it is provided with by the military power of the Council members on one hand, the legitimacy, proportionality and clarity on the other. Restricting the actions of the Security Council to protect the sovereignty of states and fundamental rights of individuals while allowing it enough power to act effectively in preserving both human rights and international peace seems to be the core of the challenge.

7 Conclusions

The United Nations Charter was crafted with the intention of avoiding the mistakes of the League of Nations. The fatal flaw of the League of Nations was considered the fact that its design resulted in the great powers abandoning it, leaving it vulnerable and powerless. The power of veto and permanent membership of the winners of the Second World War has allowed to the United Nations and the Security Council along it to stay in existence and act, more or less, effectively in the peacekeeping ability they were intended for.

After the Cold War, the Council has been far more active and far more able to actually perform its peacekeeping duties. However, there have been failures and the whole concept of the Council has been questioned – not to mention the composition of it. After all, the Council is first and foremost a political organ. The power it holds can – and regretfully has been – used to benefit the permanent members instead of truly preserving peace in the world. Changing the Security Council has been deemed virtually impossible, but it should be noted that changing situations in the power politics in the world can require the Council, and especially the permanent five members to take the opinions of the non-member states (of the Council) into account if they wish to promote a perception of legitimacy of the Council resolutions.

The situation and the political climate of the world have changed a great deal after the creation of the United Nations and the Security Council. The system of permanent membership and especially the selection of states that have been awarded the honor to hold such authority, have gained much criticism. The greatest, most powerful states might no

longer be the five that hold permanent membership of the Security Council and are therefore entitled to the power of veto, when not in agreement with the resolution about to be made. There have been suggestions of changing the United Nations Charter to that end, but understandably, that would most likely create new problems, especially politically.

The idea with allowing few big states the power of veto was that when the great powers of the world agree, they could maintain a balance and have the capacity to persuade others to follow and apply the resolutions. Also, since not all states hold the membership of the Security Council, not all nations and their (democratically elected governments) can affect the Resolutions which leaves most of the world unrepresented when it comes to the decisions made. In an international organization such as the United Nations, where the basis of international co-operation lies in nations being represented by freely elected governments, and thus democracy, it can be said that some of the procedures of the organization itself are fairly undemocratic.

Johnstone argues that more open and inclusive discussion and repairing what he calls the "deliberative deficit"[134] could be a way of addressing the democratic deficit of the actions of the Security Council. Of course, that might propose the problem of decreasing the efficiency of the Council as the organ designed for swift and effective actions when a threat to or breach of the international peace occurs.
The main dilemma would then lie between the efficacy of the Council and the democracy of it, as there are dilemmas between the efficacy of law and the concept of rule of law.

The United Nations is a creation of international law, and as such, should logically not even have been able to acquire more power than that the sphere of international law itself entails. As international law is both based on, and limited by, the idea of sovereignty of each state, drafting an international treaty that binds those sovereign states above all else and unlike any other treaty[135] is bound to result in difficulty with interpretation.

Despite the obvious problems of the European Union which are unraveling with the ongoing economic crisis, it should not be forgotten, that the Union also has a variety of merits – possibly one of the most impressive being the inclusion of the Union in the European Convention of Human Rights and developing the applicability of human rights norms within the Union. Can something similar be achieved on a universal, global level? Perhaps not, but that does not mean that balancing the power of the Security Council

[134] Johnstone, 2008 p. 303-307
[135] On the supremacy of the United Nations Charter, see article 103 of the Charter.

by introducing a form of counterweight to its authority should not be a future agenda of all those concerned of the nonexistent human rights guarantees the Council offers for the time being.

A counterweight to the Security Council's powers, whether connected to the General Assembly or a court of law, could be used to pull back when the authority of the Council is being exploited to further goals other than international peace and security – or human rights. Obviously none of this is unproblematic, but the need for the redevelopment of international institutions and organizations to meet the expectations of an ever-changing world, cannot be overlooked.

Richard Falk emphasizes in his article the importance of international law as a tool working towards world order.[136] International law is still created by sovereign states through negotiations and is a strong stepping-stone on the way to a new world order. Nonetheless, it is a tool that can only be used to promote slow, gradual changes which can prove both its greatest asset and defect. Gradual changes may be easier to promote and adjust to, but may turn out too slow to accommodate the possibly much more rapid changes in the composition of the world.

The non-members of the Security Council are entitled to take part in the Council's otherwise private meetings, when the decisions "specially" affect their interests and it has been debated, whether the legislative action of the Security Council would require the inclusion of a larger part of the general membership of the United Nations in the process.[137] The right of a non-member of the Council to participate in the meetings when the discussed matter is of special importance to that state does not, however, form a prerequisite to the legality of the emerging resolution, should the state or states in question not be present.

The arguments for a more transparent and open process of decision-making in the Security Council to promote a wide support for the decisions in the general membership, although warranted, sometimes fail to note the fact that the approval of the general membership is not strictly necessary.[138] While the support and acceptance of the general membership does facilitate the application of the resolutions, the expectation of

[136] Falk, Richard: Can International Law Contribute to World Order? American Society of International Law Proceedings vol 66, p. 268-271, 1972
[137] Talmon, 2005 p. 186
[138] See Talmon , 2005 p. 186-188 on the reasons for the Council to include the general membership into the decision making.

"legislation unpopular with the wider membership[139]" becoming "dead letters[140]" can be questioned. The supremacy of the Security Council resolutions is still widely accepted, despite the decision of the European Court of Justice to reject the application of the resolutions relevant to the Kadi case within the scope of European Union law, since the Court did still declare itself incompetent to review the legality of the resolutions altogether.

Technically, the Security Council lacks means of enforcement, if a resolution is strongly objected to. However, the permanent membership of the Security Council was chosen specifically to provide the Council with both political and military power and thus generate an impression of credibility, in order to avoid the shortcomings of the predecessor. As yet, non-compliance with the resolutions of the Council has not developed into a problem, despite the criticism the Council's extensive competence and at times broad interpretation of the Charter has evoked.

The statement made here is not to suggest that non-compliance could not be provoked, if the Security Council was to act beyond the powers appointed to it by the United Nations Charter. On the contrary, if the general membership of the Council is provided with reasons to expect the Council to no longer perform the peacekeeping duties for the benefit of the rest of the world as well as for the permanent members, the credibility of the institution would no doubt collapse. That is precisely why several scholars urge the Council to develop the decision-making processes to a more transparent and open direction.[141]

Cracks in the respect and compliance for the decisions of the Security Council, or at least the Sanctions Committee it has established can already be seen to form. The fact that the Security Council Sanctions Committee has to this day still not de-listed Yasin al-Qadi[142] despite the obvious tensions between fundamental human rights and the asset freezes with no regard for due process, has already led the membership of the United Nations to conflict with their human rights obligations.

What remains certain, is that to maintain its effectiveness, the Security Council will need to focus on the legitimacy and credibility of its actions, whether they ever become monitored by an independent, external organ or not. As has been stated, a perception of legitimacy of the actions of the Security Council will draw states to comply with its resolutions and seek its approval for their own actions.

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[139] Talmon, 2005 p. 187
[140] Talmon, 2005 p 187
[141] Mahbubani 2003 p. 43, Talmon, 2005 p. 186-187
[142] See Chapter 2 of the thesis for description of the *Kadi* case.

Keeping both the permanent members and the non-members content with the Council's performance as the peacekeeper and the police of the international community is essential to the survival of the Security Council in the midst of the political and environmental upheavals still to come. In terms of the resolutions obliging states to freeze the assets of individuals or groups suspected of funding terrorist activities, the completion of the list and the detailing of the measures to be taken might be best left to the states themselves. The national courts would be better suited to handle pleas if the targeted individuals should wish to deny the allegations and defend themselves.

Effectiveness of implementation and quality of deliberation have been considered to reflect on each other, so that effectiveness can be increased by improving the quality of deliberation, the conclusion being that the actions of the Council are more legitimate than critics wish to appreciate. This would be because deliberation allows proposals for reform to be heard.[143]

However, the mere fact that it is possible to allow the input of the critics to be taken into account does not seem sufficient to create legitimacy on its own. The Council, with no appointed instance of judicial review can interfere significantly in the individual rights and the fear that the permanent five members might be willing to adjust to that to ensure the ability to combat for example international terrorism, is very much justifiable. Again, citizens are awarded protection against their national governments through legal guarantees that the state will assure a certain sphere of individual rights and freedoms, while states are not protected against obligations produced by international organizations to break their commitments to the citizens? The conflict is evident.

The Security Council resolutions could still very well form an obligation for states to develop their legislation to criminalize certain behaviour or engage in closer cooperation to prevent international crimes, but producing a comprehensive list of individuals to be targeted without including a detailed account of the reasons why each particular person is listed or presenting de-listing options is unacceptable. Regrettably it must be admitted, that the efficacy of the resolutions in the fight against terrorism does suffer if this conclusion is accepted.

States may have a variety of different conceptions between themselves when it comes to defining which individuals or entities need to be put in the list. Coherent and straightforward description of what constitutes terrorism or funding of terrorism is should

[143] Johnstone, 2008 p.298-299

be considered more called for than actual lists of individuals. The backwards approach in the matter resulted in the creation of the latter, but a common definition of terrorism was left unattained.[144]

That being said, I would consider the legislative capacity of the Council a welcome addition to its powers to support its effectiveness, when executed in accordance with the human rights and the purposes and principles of the charter. The judicial function should, however, be reviewed with more caution, especially regarding its usage towards individuals.

Determinacy of norms strengthens their compliance-pull by making them more likely to be applied in the same manner in other similar situations and placing the judiciaries in an important position when improving the determinacy and thus, legitimacy of the international norms. The European Court of Human Rights can be awarded the credit for increasing the determinacy of the norms of the European Convention for the Protection of Human Rights and Fundamental Freedoms. The Court has among other things enhanced the specificity and thus legitimacy of for example freedom of expression by having made distinctions considering the possible legitimate restrictions and the execution of the freedom of expression.[145]

All in all, through the application and development of international law, as well as national law, the emphasis is undoubtedly always in finding a balance between different interests. What I attempt to claim here, is not that the Security Council should be stripped of all the power it holds and that the decision making should firmly return to national parliaments, but that attention must be paid on finding a better balance between the two.

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