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INTERNATIONAL PEACE AND SECURITY  
MR. DIRE TLADI

Codification Division of the United Nations Office of Legal Affairs

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- E. de Wet, *The Chapter VII Powers of the United Nations Security Council*, Hart Publishing, 2004, Chapter 5, pp. 178-216
- D. Tladi and G. Taylor, "On the Al Qaida/Taliban Sanctions Regime: Due Process and Sunsetting", *Chinese Journal of International Law*, vol. 10, no. 4, 2011, pp. 771-789
- D. Bethlehem, "Self-Defense Against an Imminent or Actual Armed Attack by Nonstate Actors", *American Journal of International Law*, vol. 106, no. 4, October 2012, pp. 769-777
- D. Tladi "An Assessment of Bethlehem's Principles on the Use of Force Against Non-State Actors in Self-Defense in the Light of Foundational Principles of International law", *American Journal of International Law*, vol. 107, no. 3, July 2013, pp. 570-575

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**INTERNATIONAL PEACE AND SECURITY**  
**MR. DIRE TLADI**

**Legal Instruments and Documents**

1. United Nations Charter, 1945  
For text, see *Charter of the United Nations and Statute of the International Court of Justice*
2. Constitutive Act of the African Union, 2000  
For text, see Study Book *Introduction to African Union Law and Institutions*
3. Security Council resolution 1970 (2011) of 26 February 2011 8
4. Security Council resolution 1973 (2011) of 17 March 2011 14
5. Security Council resolution 1975 (2011) of 30 March 2011 20
6. Assembly of the African Union, Decision on the Operationalisation of the African Capacity for Immediate Response to Crises (Assembly/AU/Dec.515(XXII)) 24

**Legal Writings**

7. E. de Wet, "An Overview of the Substantive Limits to the Security Council's Discretion under Articles 40, 41 and 42 of the Charter", in *The Chapter VII Powers of the United Nations Security Council*, Hart Publishing, 2004, pp. 178-216 26
8. D. Tladi and G. Taylor, "On the Al Qaida/Taliban Sanctions Regime: Due Process and Sunsetting", *Chinese Journal of International Law*, vol. 10, no. 4, 2011, pp. 771-789 48
9. D. Bethlehem, "Self-Defense Against an Imminent or Actual Armed Attack by Nonstate Actors", *American Journal of International Law*, vol. 106, no. 4, October 2012, pp. 769-777 60
10. D. Tladi "An Assessment of Bethlehem's Principles on the Use of Force Against Non-State Actors in Self-Defense in the Light of Foundational Principles of International law", *American Journal of International Law*, vol. 107, no. 3, July 2013, pp. 570-575 66



**United Nations Security Council resolution 1970 (2011) of 26  
February 2011 (Referral of situation in Libyan Arab  
Jamahiriya to the International Criminal Court)**



## Security Council

Distr.: General  
26 February 2011

*Recalling* the Libyan authorities' responsibility to protect its population,  
*Underlining* the need to respect the freedoms of peaceful assembly and of expression, including freedom of the media,  
*Stressing* the need to hold to account those responsible for attacks, including by forces under their control, on civilians,

*Recalling* article 16 of the Rome Statute under which no investigation or prosecution may be commenced or proceeded with by the International Criminal Court for a period of 12 months after a Security Council request to that effect,

*Expressing concern* for the safety of foreign nationals and their rights in the Libyan Arab Jamahiriya,

*Reaffirming* its strong commitment to the sovereignty, independence, territorial integrity and national unity of the Libyan Arab Jamahiriya.

*Mindful* of its primary responsibility for the maintenance of international peace and security under the Charter of the United Nations,

*Acting* under Chapter VII of the Charter of the United Nations, and taking measures under its Article 41,

1. *Demands* an immediate end to the violence and calls for steps to fulfil the legitimate demands of the population;

2. *Urges* the Libyan authorities to:

(a) Act with the utmost restraint, respect human rights and international humanitarian law, and allow immediate access for international human rights monitors;

(b) Ensure the safety of all foreign nationals and their assets and facilitate the departure of those wishing to leave the country;

(c) Ensure the safe passage of humanitarian and medical supplies, and humanitarian agencies and workers, into the country; and

(d) Immediately lift restrictions on all forms of media;

3. *Requests* all Member States, to the extent possible, to cooperate in the evacuation of those foreign nationals wishing to leave the country;

### *ICC referral*

4. *Decides* to refer the situation in the Libyan Arab Jamahiriya since 15 February 2011 to the Prosecutor of the International Criminal Court;

5. *Decides* that the Libyan authorities shall cooperate fully with and provide any necessary assistance to the Court and the Prosecutor pursuant to this resolution and, while recognizing that States not party to the Rome Statute have no obligation under the Statute, urges all States and concerned regional and other international organizations to cooperate fully with the Court and the Prosecutor;

6. *Decides* that nationals, current or former officials or personnel from a State outside the Libyan Arab Jamahiriya which is not a party to the Rome Statute of the International Criminal Court shall be subject to the exclusive jurisdiction of that State for all alleged acts or omissions arising out of or related to operations in the

*The Security Council,*  
*Expressing* grave concern at the situation in the Libyan Arab Jamahiriya and condemning the violence and use of force against civilians,

*Deploring* the gross and systematic violation of human rights, including the repression of peaceful demonstrators, expressing deep concern at the deaths of civilians, and rejecting unequivocally the incitement to hostility and violence against the civilian population made from the highest level of the Libyan government,

*Welcoming* the condemnation by the Arab League, the African Union, and the Secretary General of the Organization of the Islamic Conference of the serious violations of human rights and international humanitarian law that are being committed in the Libyan Arab Jamahiriya,

*Taking note* of the letter to the President of the Security Council from the Permanent Representative of the Libyan Arab Jamahiriya dated 26 February 2011,

*Welcoming* the Human Rights Council resolution A/HRC/RES/S-15/1 of 25 February 2011, including the decision to urgently dispatch an independent international commission of inquiry to investigate all alleged violations of international human rights law in the Libyan Arab Jamahiriya, to establish the facts and circumstances of such violations and of the crimes perpetrated, and where possible identify those responsible,

*Considering* that the widespread and systematic attacks currently taking place in the Libyan Arab Jamahiriya against the civilian population may amount to crimes against humanity,

*Expressing concern* at the plight of refugees forced to flee the violence in the Libyan Arab Jamahiriya,

*Expressing concern also* at the reports of shortages of medical supplies to treat the wounded,

\* Second reissue for technical reasons (10 March 2011).

Libyan Arab Jamahiriya established or authorized by the Council, unless such exclusive jurisdiction has been expressly waived by the State;

7. *Invites* the Prosecutor to address the Security Council within two months of the adoption of this resolution and every six months thereafter on actions taken pursuant to this resolution;

8. *Recognizes* that none of the expenses incurred in connection with the referral, including expenses related to investigations or prosecutions in connection with that referral, shall be borne by the United Nations and that such costs shall be borne by the parties to the Rome Statute and those States that wish to contribute voluntarily;

#### *Arms embargo*

9. *Decides* that all Member States shall immediately take the necessary measures to prevent the direct or indirect supply, sale or transfer to the Libyan Arab Jamahiriya, from or through their territories or by their nationals, or using their flag vessels or aircraft, of arms and related materiel of all types, including weapons and ammunition, military vehicles and equipment, paramilitary equipment, and spare parts for the aforementioned, and technical assistance, training, financial or other assistance, related to military activities or the provision, maintenance or use of any arms and related materiel, including the provision of armed mercenary personnel whether or not originating in their territories, and decides further that this measure shall not apply to:

(a) Supplies of non-lethal military equipment intended solely for humanitarian or protective use, and related technical assistance or training, as approved in advance by the Committee established pursuant to paragraph 24 below;

(b) Protective clothing, including flak jackets and military helmets, temporarily exported to the Libyan Arab Jamahiriya by United Nations personnel, representatives of the media and humanitarian and development workers and associated personnel, for their personal use only; or

(c) Other sales or supply of arms and related materiel, or provision of assistance or personnel, as approved in advance by the Committee;

10. *Decides* that the Libyan Arab Jamahiriya shall cease the export of all arms and related materiel and that all Member States shall prohibit the procurement of such items from the Libyan Arab Jamahiriya by their nationals, or using their flagged vessels or aircraft, and whether or not originating in the territory of the Libyan Arab Jamahiriya;

11. *Calls upon* all States, in particular States neighbouring the Libyan Arab Jamahiriya, to inspect, in accordance with their national authorities and legislation and consistent with international law, in particular the law of the sea and relevant international civil aviation agreements, all cargo to and from the Libyan Arab Jamahiriya, in their territory, including seaports and airports, if the State concerned has information that provides reasonable grounds to believe the cargo contains items the supply, sale, transfer, or export of which is prohibited by paragraphs 9 or 10 of this resolution for the purpose of ensuring strict implementation of those provisions;

12. *Decides* to authorize all Member States to, and that all Member States shall, upon discovery of items prohibited by paragraph 9 or 10 of this resolution,

seize and dispose (such as through destruction, rendering inoperable, storage or transferring to a State other than the originating or destination States for disposal) items the supply, sale, transfer or export of which is prohibited by paragraphs 9 or 10 of this resolution and decides further that all Member States shall cooperate in such efforts;

13. *Requires* any Member State when it undertakes an inspection pursuant to paragraph 11 above, to submit promptly an initial written report to the Committee containing, in particular, explanation of the grounds for the inspections, the results of such inspections, and whether or not cooperation was provided, and, if prohibited items for transfer are found, further requires such Member States to submit to the Committee, at a later stage, a subsequent written report containing relevant details on the inspection, seizure, and disposal, and relevant details of the transfer, including a description of the items, their origin and intended destination, if this information is not in the initial report;

14. *Encourages* Member States to take steps to strongly discourage their nationals from travelling to the Libyan Arab Jamahiriya to participate in activities on behalf of the Libyan authorities that could reasonably contribute to the violation of human rights;

#### *Travel ban*

15. *Decides* that all Member States shall take the necessary measures to prevent the entry into or transit through their territories of individuals listed in Annex I of this resolution or designated by the Committee established pursuant to paragraph 24 below, provided that nothing in this paragraph shall oblige a State to refuse its own nationals entry into its territory;

16. *Decides* that the measures imposed by paragraph 15 above shall not apply:

(a) Where the Committee determines on a case-by-case basis that such travel is justified on the grounds of humanitarian need, including religious obligation;

(b) Where entry or transit is necessary for the fulfilment of a judicial process;

(c) Where the Committee determines on a case-by-case basis that an exemption would further the objectives of peace and national reconciliation in the Libyan Arab Jamahiriya and stability in the region; or

(d) Where a State determines on a case-by-case basis that such entry or transit is required to advance peace and stability in the Libyan Arab Jamahiriya and the States subsequently notifies the Committee within forty-eight hours after making such a determination;

#### *Asset freeze*

17. *Decides* that all Member States shall freeze without delay all funds, other financial assets and economic resources which are on their territories, which are owned or controlled, directly or indirectly, by the individuals or entities listed in annex II of this resolution or designated by the Committee established pursuant to paragraph 24 below, or by individuals or entities acting on their behalf or at their direction, or by entities owned or controlled by them, and decides further that all

Member States shall ensure that any funds, financial assets or economic resources are prevented from being made available by their nationals or by any individuals or entities within their territories, to or for the benefit of the individuals or entities listed in Annex II of this resolution or individuals designated by the Committee;

18. Expresses its intention to ensure that assets frozen pursuant to paragraph 17 shall at a later stage be made available to and for the benefit of the people of the Libyan Arab Jamahiriya;

19. Decides that the measures imposed by paragraph 17 above do not apply to funds, other financial assets or economic resources that have been determined by relevant Member States:

(a) To be necessary for basic expenses, including payment for foodstuffs, rent or mortgage, medicines and medical treatment, taxes, insurance premiums, and public utility charges or exclusively for payment of reasonable professional fees and reimbursement of incurred expenses associated with the provision of legal services in accordance with national laws, or fees or service charges, in accordance with national laws, for routine holding or maintenance of frozen funds, other financial assets and economic resources, after notification by the relevant State to the Committee of the intention to authorize, where appropriate, access to such funds, other financial assets or economic resources and in the absence of a negative decision by the Committee within five working days of such notification;

(b) To be necessary for extraordinary expenses, provided that such determination has been notified by the relevant State or Member States to the Committee and has been approved by the Committee; or

(c) To be the subject of a judicial, administrative or arbitral lien or judgment, in which case the funds, other financial assets and economic resources may be used to satisfy that lien or judgment provided that the lien or judgment was entered into prior to the date of the present resolution, is not for the benefit of a person or entity designated pursuant to paragraph 17 above, and has been notified by the relevant State or Member States to the Committee;

20. Decides that Member States may permit the addition to the accounts frozen pursuant to the provisions of paragraph 17 above of interests or other earnings due on those accounts or payments due under contracts, agreements or obligations that arose prior to the date on which those accounts became subject to the provisions of this resolution, provided that any such interest, other earnings and payments continue to be subject to these provisions and are frozen;

21. Decides that the measures in paragraph 17 above shall not prevent a designated person or entity from making payment due under a contract entered into prior to the listing of such a person or entity, provided that the relevant States have determined that the payment is not directly or indirectly received by a person or entity designated pursuant to paragraph 17 above, and after notification by the relevant States to the Committee of the intention to make or receive such payments or to authorize, where appropriate, the unfreezing of funds, other financial assets or economic resources for this purpose, 10 working days prior to such authorization;

#### *Designation criteria*

22. Decides that the measures contained in paragraphs 15 and 17 shall apply to the individuals and entities designated by the Committee, pursuant to paragraph 24 (b) and (c), respectively;

(a) Involved in or complicit in ordering, controlling, or otherwise directing, the commission of serious human rights abuses against persons in the Libyan Arab Jamahiriya, including by being involved in or complicit in planning, commanding, ordering or conducting attacks, in violation of international law, including aerial bombardments, on civilian populations and facilities; or

(b) Acting for or on behalf of or at the direction of individuals or entities identified in subparagraph (a).

23. Strongly encourages Member States to submit to the Committee names of individuals who meet the criteria set out in paragraph 22 above;

#### *New Sanctions Committee*

24. Decides to establish, in accordance with rule 28 of its provisional rules of procedure, a Committee of the Security Council consisting of all the members of the Council (herein "the Committee"), to undertake to following tasks:

(a) To monitor implementation of the measures imposed in paragraphs 9, 10, 15, and 17;

(b) To designate those individuals subject to the measures imposed by paragraphs 15 and to consider requests for exemptions in accordance with paragraph 16 above;

(c) To designate those individuals subject to the measures imposed by paragraph 17 above and to consider requests for exemptions in accordance with paragraphs 19 and 20 above;

(d) To establish such guidelines as may be necessary to facilitate the implementation of the measures imposed above;

(e) To report within thirty days to the Security Council on its work for the first report and thereafter to report as deemed necessary by the Committee;

(f) To encourage a dialogue between the Committee and interested Member States, in particular those in the region, including by inviting representatives of such States to meet with the Committee to discuss implementation of the measures;

(g) To seek from all States whatever information it may consider useful regarding the actions taken by them to implement effectively the measures imposed above;

(h) To examine and take appropriate action on information regarding alleged violations or non-compliance with the measures contained in this resolution;

25. Calls upon all Member States to report to the Committee within 120 days of the adoption of this resolution on the steps they have taken with a view to implementing effectively paragraphs 9, 10, 15 and 17 above;

*Humanitarian assistance*

26. *Calls upon* all Member States, working together and acting in cooperation with the Secretary General, to facilitate and support the return of humanitarian agencies and make available humanitarian and related assistance in the Libyan Arab Jamahiriyah, and requests the States concerned to keep the Security Council regularly informed on the progress of actions undertaken pursuant to this paragraph, and expresses its readiness to consider taking additional appropriate measures, as necessary, to achieve this;

*Commitment to review*

27. *Affirms* that it shall keep the Libyan authorities' actions under continuous review and that it shall be prepared to review the appropriateness of the measures contained in this resolution, including the strengthening, modification, suspension or lifting of the measures, as may be needed at any time in light of the Libyan authorities' compliance with relevant provisions of this resolution;

28. *Decides* to remain actively seized of the matter.

**Travel ban**

1. Al-Baghdadi, Dr Abdulqader Mohammed  
Passport number: B010574. Date of birth: 01/07/1950.  
Head of the Liaison Office of the Revolutionary Committees. Revolutionary Committees involved in violence against demonstrators.
2. Dibri, Abdulqader Yusef  
Date of birth: 1946. Place of birth: Houn, Libya.  
Head of Muammar Qadhafi's personal security. Responsibility for regime security. History of directing violence against dissidents.
3. Dorda, Abu Zayd Umar  
Director, External Security Organisation. Regime loyalist. Head of external intelligence agency.
4. Jabir, Major General Abu Bakr Yunis  
Date of birth: 1952. Place of birth: Jalo, Libya.  
Defence Minister. Overall responsibility for actions of armed forces.
5. Matuq, Matuq Mohammed  
Date of birth: 1956. Place of birth: Khoms.  
Secretary for Utilities. Senior member of regime. Involvement with Revolutionary Committees. Past history of involvement in suppression of dissent and violence.
6. Qadhaf Al-dam, Sayyid Mohammed  
Date of birth: 1948. Place of birth: Sirte, Libya.  
Cousin of Muammar Qadhafi. In the 1980s, Sayyid was involved in the dissident assassination campaign and allegedly responsible for several deaths in Europe. He is also thought to have been involved in arms procurement.
7. Qadhafi, Aisha Muammar  
Date of birth: 1978. Place of birth: Tripoli, Libya.  
Daughter of Muammar Qadhafi. Closeness of association with regime.
8. Qadhafi, Hannibal Muammar  
Passport number: B/002210. Date of birth: 20/09/1975. Place of birth: Tripoli, Libya. Son of Muammar Qadhafi. Closeness of association with regime.
9. Qadhafi, Khamis Muammar  
Date of birth: 1978. Place of birth: Tripoli, Libya.  
Son of Muammar Qadhafi. Closeness of association with regime. Command of military units involved in repression of demonstrations.

10. Qadhafi, Mohammed Muammar

Date of birth: 1970. Place of birth: Tripoli, Libya.

Son of Muammar Qadhafi. Closeness of association with regime.

11. Qadhafi, Muammar Mohammed Abu Minyar

Date of birth: 1942. Place of birth: Sirte, Libya.

Leader of the Revolution, Supreme Commander of Armed Forces.

Responsibility for ordering repression of demonstrations, human rights abuses.

12. Qadhafi, Mutassim

Date of birth: 1976. Place of birth: Tripoli, Libya.

National Security Adviser. Son of Muammar Qadhafi. Closeness of association with regime.

13. Qadhafi, Saadi

Passport number: 014797. Date of birth: 25/05/1973. Place of birth: Tripoli, Libya.

Commander Special Forces. Son of Muammar Qadhafi. Closeness of association with regime. Command of military units involved in repression of demonstrations.

14. Qadhafi, Saif al-Arab

Date of birth: 1982. Place of birth: Tripoli, Libya.

Son of Muammar Qadhafi. Closeness of association with regime.

15. Qadhafi, Saif al-Islam

Passport number: B014995. Date of birth: 25/06/1972. Place of birth: Tripoli, Libya.

Director, Qadhafi Foundation. Son of Muammar Qadhafi. Closeness of association with regime. Inflammatory public statements encouraging violence against demonstrators.

16. Al-Senussi, Colonel Abdullah

Date of birth: 1949. Place of birth: Sudan.

Director Military Intelligence. Military Intelligence involvement in suppression of demonstrations. Past history includes suspicion of involvement in Abu Selim prison massacre. Convicted in absentia for bombing of UTA flight. Brother-in-law of Muammar Qadhafi.

## Annex II

### Asset freeze

1. Qadhafi, Aisha Muammar

Date of birth: 1978. Place of birth: Tripoli, Libya.

Daughter of Muammar Qadhafi. Closeness of association with regime.

2. Qadhafi, Hannibal Muammar

Passport number: B/002210. Date of birth: 20/09/1975. Place of birth: Tripoli, Libya. Son of Muammar Qadhafi. Closeness of association with regime.

3. Qadhafi, Khamis Muammar

Date of birth: 1978. Place of birth: Tripoli, Libya.

Son of Muammar Qadhafi. Closeness of association with regime. Command of military units involved in repression of demonstrations.

4. Qadhafi, Muammar Mohammed Abu Minyar

Date of birth: 1942. Place of birth: Sirte, Libya.

Leader of the Revolution, Supreme Commander of Armed Forces.

Responsibility for ordering repression of demonstrations, human rights abuses.

5. Qadhafi, Mutassim

Date of birth: 1976. Place of birth: Tripoli, Libya.

National Security Adviser. Son of Muammar Qadhafi. Closeness of association with regime.

6. Qadhafi, Saif al-Islam

Passport number: B014995. Date of birth: 25/06/1972. Place of birth: Tripoli, Libya.

Director, Qadhafi Foundation. Son of Muammar Qadhafi. Closeness of association with regime. Inflammatory public statements encouraging violence against demonstrators.

**United Nations Security Council resolution 1973 (2011) of  
17 March 2011 (On the situation in the Libyan Arab  
Jamahiriya)**



## Security Council

Distr.: General  
17 March 2011

### Resolution 1973 (2011)

#### Adopted by the Security Council at its 6498th meeting, on 17 March 2011

*The Security Council,*

*Recalling* its resolution 1970 (2011) of 26 February 2011,

*Deploing* the failure of the Libyan authorities to comply with resolution 1970 (2011),

*Expressing* grave concern at the deteriorating situation, the escalation of violence, and the heavy civilian casualties,

*Reiterating* the responsibility of the Libyan authorities to protect the Libyan population and *reaffirming* that parties to armed conflicts bear the primary responsibility to take all feasible steps to ensure the protection of civilians,

*Condemning* the gross and systematic violation of human rights, including arbitrary detentions, enforced disappearances, torture and summary executions,

*Further condemning* acts of violence and intimidation committed by the Libyan authorities against journalists, media professionals and associated personnel and *urging* these authorities to comply with their obligations under international humanitarian law as outlined in resolution 1738 (2006),

*Considering* that the widespread and systematic attacks currently taking place in the Libyan Arab Jamahiriya against the civilian population may amount to crimes against humanity,

*Recalling* paragraph 26 of resolution 1970 (2011) in which the Council expressed its readiness to consider taking additional appropriate measures, as necessary, to facilitate and support the return of humanitarian agencies and make available humanitarian and related assistance in the Libyan Arab Jamahiriya,

*Expressing its determination* to ensure the protection of civilians and civilian populated areas and the rapid and unimpeded passage of humanitarian assistance and the safety of humanitarian personnel,

*Recalling* the condemnation by the League of Arab States, the African Union, and the Secretary General of the Organization of the Islamic Conference of the serious violations of human rights and international humanitarian law that have been and are being committed in the Libyan Arab Jamahiriya,

*Taking note* of the final communiqué of the Organisation of the Islamic Conference of 8 March 2011, and the communiqué of the Peace and Security Council of the African Union of 10 March 2011 which established an ad hoc High Level Committee on Libya,

*Taking note also* of the decision of the Council of the League of Arab States of 12 March 2011 to call for the imposition of a no-fly zone on Libyan military aviation, and to establish safe areas in places exposed to shelling as a precautionary measure that allows the protection of the Libyan people and foreign nationals residing in the Libyan Arab Jamahiriya,

*Taking note further* of the Secretary-General's call on 16 March 2011 for an immediate cease-fire,

*Recalling* its decision to refer the situation in the Libyan Arab Jamahiriya since 15 February 2011 to the Prosecutor of the International Criminal Court, and *stressing* that those responsible for or complicit in attacks targeting the civilian population, including aerial and naval attacks, must be held to account,

*Reiterating its concern* at the plight of refugees and foreign workers forced to flee the violence in the Libyan Arab Jamahiriya, *welcoming* the response of neighbouring States, in particular Tunisia and Egypt, to address the needs of those refugees and foreign workers, and *calling on* the international community to support those efforts,

*Deploing* the continuing use of mercenaries by the Libyan authorities,

*Considering* that the establishment of a ban on all flights in the airspace of the Libyan Arab Jamahiriya constitutes an important element for the protection of civilians as well as the safety of the delivery of humanitarian assistance and a decisive step for the cessation of hostilities in Libya,

*Expressing concern* also for the safety of foreign nationals and their rights in the Libyan Arab Jamahiriya,

*Welcoming* the appointment by the Secretary General of his Special Envoy to Libya, Mr. Abdel-Elah Mohamed Al-Khatib and supporting his efforts to find a sustainable and peaceful solution to the crisis in the Libyan Arab Jamahiriya,

*Reaffirming* its strong commitment to the sovereignty, independence, territorial integrity and national unity of the Libyan Arab Jamahiriya,

*Determining* that the situation in the Libyan Arab Jamahiriya continues to constitute a threat to international peace and security,

*Acting under Chapter VII of the Charter of the United Nations,*

1. *Demands* the immediate establishment of a cease-fire and a complete end to violence and all attacks against, and abuses of, civilians;
2. *Stresses* the need to intensify efforts to find a solution to the crisis which responds to the legitimate demands of the Libyan people and *notes* the decisions of the Secretary-General to send his Special Envoy to Libya and of the Peace and Security Council of the African Union to send its ad hoc High Level Committee to Libya with the aim of facilitating dialogue to lead to the political reforms necessary to find a peaceful and sustainable solution;

3. *Demands* that the Libyan authorities comply with their obligations under international law, including international humanitarian law, human rights and refugee law and take all measures to protect civilians and meet their basic needs, and to ensure the rapid and unimpeded passage of humanitarian assistance;

#### Protection of civilians

4. *Authorizes* Member States that have notified the Secretary-General, acting nationally or through regional organizations or arrangements, and acting in cooperation with the Secretary-General, to take all necessary measures, notwithstanding paragraph 9 of resolution 1970 (2011), to protect civilians and civilian populated areas under threat of attack in the Libyan Arab Jamahiriya, including Benghazi, while excluding a foreign occupation force of any form on any part of Libyan territory, and *requests* the Member States concerned to inform the Secretary-General immediately of the measures they take pursuant to the authorization conferred by this paragraph which shall be immediately reported to the Security Council;

5. *Recognizes* the important role of the League of Arab States in matters relating to the maintenance of international peace and security in the region, and bearing in mind Chapter VIII of the Charter of the United Nations, requests the Member States of the League of Arab States to cooperate with other Member States in the implementation of paragraph 4;

#### No Fly Zone

6. *Decides* to establish a ban on all flights in the airspace of the Libyan Arab Jamahiriya in order to help protect civilians;

7. *Decides further* that the ban imposed by paragraph 6 shall not apply to flights whose sole purpose is humanitarian, such as delivering or facilitating the delivery of assistance, including medical supplies, food, humanitarian workers and related assistance, or evacuating foreign nationals from the Libyan Arab Jamahiriya, nor shall it apply to flights authorised by paragraphs 4 or 8, nor other flights which are deemed necessary by States acting under the authorisation conferred in paragraph 8 to be for the benefit of the Libyan people, and that these flights shall be coordinated with any mechanism established under paragraph 8;

8. *Authorizes* Member States that have notified the Secretary-General and the Secretary-General of the League of Arab States, acting nationally or through regional organizations or arrangements, to take all necessary measures to enforce compliance with the ban on flights imposed by paragraph 6 above, as necessary, and *requests* the States concerned in cooperation with the League of Arab States to coordinate closely with the Secretary-General on the measures they are taking to implement this ban, including by establishing an appropriate mechanism for implementing the provisions of paragraphs 6 and 7 above;

9. *Calls upon* all Member States, acting nationally or through regional organizations or arrangements, to provide assistance, including any necessary over-flight approvals, for the purposes of implementing paragraphs 4, 6, 7 and 8 above;

10. *Requests* the Member States concerned to coordinate closely with each other and the Secretary-General on the measures they are taking to implement

paragraphs 4, 6, 7 and 8 above, including practical measures for the monitoring and approval of authorised humanitarian or evacuation flights;

11. *Decides* that the Member States concerned shall inform the Secretary-General and the Secretary-General of the League of Arab States immediately of measures taken in exercise of the authority conferred by paragraph 8 above, including to supply a concept of operations;

12. *Requests* the Secretary-General to inform the Council immediately of any actions taken by the Member States concerned in exercise of the authority conferred by paragraph 8 above and to report to the Council within 7 days and every month thereafter on the implementation of this resolution, including information on any violations of the flight ban imposed by paragraph 6 above;

#### Enforcement of the arms embargo

13. *Decides* that paragraph 11 of resolution 1970 (2011) shall be replaced by the following paragraph : "Calls upon all Member States, in particular States of the region, acting nationally or through regional organisations or arrangements, in order to ensure strict implementation of the arms embargo established by paragraphs 9 and 10 of resolution 1970 (2011), to inspect in their territory, including seaports and airports, and on the high seas, vessels and aircraft bound to or from the Libyan Arab Jamahiriya, if the State concerned has information that provides reasonable grounds to believe that the cargo contains items the supply, sale, transfer or export of which is prohibited by paragraphs 9 or 10 of resolution 1970 (2011) as modified by this resolution, including the provision of armed mercenary personnel, *calls upon* all flag States of such vessels and aircraft to cooperate with such inspections and authorises Member States to use all measures commensurate to the specific circumstances to carry out such inspections";

14. *Requests* Member States which are taking action under paragraph 13 above on the high seas to coordinate closely with each other and the Secretary-General and *further requests* the States concerned to inform the Secretary-General and the Committee established pursuant to paragraph 24 of resolution 1970 (2011) ("the Committee") immediately of measures taken in the exercise of the authority conferred by paragraph 13 above;

15. *Requires* any Member State whether acting nationally or through regional organisations or arrangements, when it undertakes an inspection pursuant to paragraph 13 above, to submit promptly an initial written report to the Committee containing, in particular, explanation of the grounds for the inspection, the results of such inspection, and whether or not cooperation was provided, and, if prohibited items for transfer are found, further requires such Member States to submit to the Committee, at a later stage, a subsequent written report containing relevant details on the inspection, seizure, and disposal, and relevant details of the transfer, including a description of the items, their origin and intended destination, if this information is not in the initial report;

16. *Deplores* the continuing flows of mercenaries into the Libyan Arab Jamahiriya and *calls upon* all Member States to comply strictly with their obligations under paragraph 9 of resolution 1970 (2011) to prevent the provision of armed mercenary personnel to the Libyan Arab Jamahiriya;

### Ban on flights

17. *Decides* that all States shall deny permission to any aircraft registered in the Libyan Arab Jamahiriya or owned or operated by Libyan nationals or companies to take off from, land in or overfly their territory unless the particular flight has been approved in advance by the Committee, or in the case of an emergency landing;

18. *Decides that* all States shall deny permission to any aircraft to take off from, land in or overfly their territory, if they have information that provides reasonable grounds to believe that the aircraft contains items the supply, sale, transfer, or export of which is prohibited by paragraphs 9 and 10 of resolution 1970 (2011) as modified by this resolution, including the provision of armed mercenary personnel, except in the case of an emergency landing;

### Asset freeze

19. *Decides* that the asset freeze imposed by paragraph 17, 19, 20 and 21 of resolution 1970 (2011) shall apply to all funds, other financial assets and economic resources which are on their territories, which are owned or controlled, directly or indirectly, by the Libyan authorities, as designated by the Committee, or by individuals or entities acting on their behalf or at their direction, or by entities owned or controlled by them, as designated by the Committee, and *decides further* that all States shall ensure that any funds, financial assets or economic resources are prevented from being made available by their nationals or by any individuals or entities within their territories, to or for the benefit of the Libyan authorities, as designated by the Committee, or individuals or entities acting on their behalf or at their direction, or entities owned or controlled by them, as designated by the Committee, and directs the Committee to designate such Libyan authorities, individuals or entities within 30 days of the date of the adoption of this resolution and as appropriate thereafter;

20. *Affirms* its determination to ensure that assets frozen pursuant to paragraph 17 of resolution 1970 (2011) shall, at a later stage, as soon as possible be made available to and for the benefit of the people of the Libyan Arab Jamahiriya;

21. *Decides* that all States shall require their nationals, persons subject to their jurisdiction and firms incorporated in their territory or subject to their jurisdiction to exercise vigilance when doing business with entities incorporated in the Libyan Arab Jamahiriya or subject to its jurisdiction, and any individuals or entities acting on their behalf or at their direction, and entities owned or controlled by them, if the States have information that provides reasonable grounds to believe that such business could contribute to violence and use of force against civilians;

### Designations

22. *Decides* that the individuals listed in Annex I shall be subject to the travel restrictions imposed in paragraphs 15 and 16 of resolution 1970 (2011), and *decides* further that the individuals and entities listed in Annex II shall be subject to the asset freeze imposed in paragraphs 17, 19, 20 and 21 of resolution 1970 (2011);

23. *Decides* that the measures specified in paragraphs 15, 16, 17, 19, 20 and 21 of resolution 1970 (2011) shall apply also to individuals and entities determined by the Council or the Committee to have violated the provisions of resolution 1970

(2011), particularly paragraphs 9 and 10 thereof, or to have assisted others in doing so;

### Panel of Experts

24. *Requies* the Secretary-General to create for an initial period of one year, in consultation with the Committee, a group of up to eight experts ("Panel of Experts"), under the direction of the Committee to carry out the following tasks:

(a) Assist the Committee in carrying out its mandate as specified in paragraph 24 of resolution 1970 (2011) and this resolution;

(b) Gather, examine and analyse information from States, relevant United Nations bodies, regional organisations and other interested parties regarding the implementation of the measures decided in resolution 1970 (2011) and this resolution, in particular incidents of non-compliance;

(c) Make recommendations on actions the Council, or the Committee or State, may consider to improve implementation of the relevant measures;

(d) Provide to the Council an interim report on its work no later than 90 days after the Panel's appointment, and a final report to the Council no later than 30 days prior to the termination of its mandate with its findings and recommendations;

25. *Urges* all States, relevant United Nations bodies and other interested parties, to cooperate fully with the Committee and the Panel of Experts, in particular by supplying any information at their disposal on the implementation of the measures decided in resolution 1970 (2011) and this resolution, in particular incidents of non-compliance;

26. *Decides* that the mandate of the Committee as set out in paragraph 24 of resolution 1970 (2011) shall also apply to the measures decided in this resolution;

27. *Decides* that all States, including the Libyan Arab Jamahiriya, shall take the necessary measures to ensure that no claim shall lie at the instance of the Libyan authorities, or of any person or body in the Libyan Arab Jamahiriya, or of any person claiming through or for the benefit of any such person or body, in connection with any contract or other transaction where its performance was affected by reason of the measures taken by the Security Council in resolution 1970 (2011), this resolution and related resolutions;

28. *Reaffirms* its intention to keep the actions of the Libyan authorities under continuous review and underlines its readiness to review at any time the measures imposed by this resolution and resolution 1970 (2011), including by strengthening, suspending or lifting those measures, as appropriate, based on compliance by the Libyan authorities with this resolution and resolution 1970 (2011).

29. *Decides* to remain actively seized of the matter.

**Libya: UNSCR proposed designations**

<i>Number</i>	<i>Name</i>	<i>Justification</i>	<i>Identifiers</i>
<b>Annex I: Travel Ban</b>			
1	QUREN SALIH QUREN AL QADHAFI	Libyan Ambassador to Chad. Has left Chad for Sabha. Involved directly in recruiting and coordinating mercenaries for the regime.	
2	Colonel AMID HUSAIN AL KUNI	Governor of Ghat (South Libya). Directly involved in recruiting mercenaries.	

<i>Number</i>	<i>Name</i>	<i>Justification</i>	<i>Identifiers</i>
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**Annex II: Asset Freeze**

1	Dorda, Abu Zayd Umar	Position: Director, External Security Organisation	
2	Jabir, Major General Abu Bakr Yunis	Position: Defence Minister	<b>Title:</b> Major General <b>DOB:</b> --/--/1952. <b>POB:</b> Jalo, Libya
3	Matuq, Matuq Mohammed	Position: Secretary for Utilities	<b>DOB:</b> --/--/1956. <b>POB:</b> Khoms
4	Qadhafi, Mohammed Muammar	Son of Muammar Qadhafi. Closeness of association with regime	<b>DOB:</b> --/--/1970. <b>POB:</b> Tripoli, Libya
5	Qadhafi, Saadi	Commander Special Forces. Son of Muammar Qadhafi. Closeness of association with regime. Command of military units involved in repression of demonstrations	<b>DOB:</b> 25/05/1973. <b>POB:</b> Tripoli, Libya
6	Qadhafi, Saif al-Arab	Son of Muammar Qadhafi. Closeness of association with regime	<b>DOB:</b> --/--/1982. <b>POB:</b> Tripoli, Libya
7	Al-Senussi, Colonel Abdullah	Position: Director Military Intelligence	<b>Title:</b> Colonel <b>DOB:</b> --/--/1949. <b>POB:</b> Sudan

**Entities**

1	Central Bank of Libya	Under control of Muammar Qadhafi and his family, and potential source of funding for his regime.
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<i>Number</i>	<i>Name</i>	<i>Justification</i>	<i>Identifiers</i>
2	Libyan Investment Authority	Under control of Muammar Qadhafi and his family, and potential source of funding for his regime.	<b>a.k.a:</b> Libyan Arab Foreign Investment Company (LAFICO) <b>Address:</b> 1 Fateh Tower Office, No 99 22nd Floor, Borgaida Street, Tripoli, Libya, 1103
3	Libyan Foreign Bank	Under control of Muammar Qadhafi and his family and a potential source of funding for his regime.	<b>Address:</b> Jamahiriya Street, LAP Building, PO Box 91330, Tripoli, Libya
4	Libyan Africa Investment Portfolio	Under control of Muammar Qadhafi and his family, and potential source of funding for his regime.	<b>Address:</b> Bashir Saadwi Street, Tripoli, Tarabulus, Libya
5	Libyan National Oil Corporation	Under control of Muammar Qadhafi and his family, and potential source of funding for his regime.	



**United Nations Security Council resolution 1975 (2011) of  
30 March 2011 (On targeted sanctions against individuals in  
Côte d'Ivoire)**



## Security Council

Distr.: General  
30 March 2011

*Condemning* unequivocally all provocative action and statements that constitute incitement to discrimination, hostility, hatred and violence made by any party,

*Condemning* the serious abuses and violations of international law in Côte d'Ivoire, including humanitarian, human rights and refugee law, *reaffirming* the primary responsibility of each State to protect civilians and *reiterating* that parties to armed conflicts bear the primary responsibility to take all feasible steps to ensure the protection of civilians and facilitate the rapid and unimpeded passage of humanitarian assistance and the safety of humanitarian personnel, *recalling* its resolutions 1325 (2000), 1820 (2008), 1888 (2009) and 1889 (2009) on women, peace and security, its resolution 1612 (2005) and 1882 (2009) on children and armed conflict and its resolution 1674 (2006) and 1894 (2009) on the protection of civilians in armed conflicts,

*Welcoming* the Human Rights Council resolution A/HRC/16/25 of 25 March 2011, including the decision to dispatch an independent international commission of inquiry to investigate the facts and circumstances surrounding the allegations of serious abuses and violations of human rights committed in Côte d'Ivoire following the presidential elections of 28 November 2010,

*Stressing* that those responsible for such serious abuses and violations, including by forces under their control, must be held accountable,

*Reaffirming* that it is the responsibility of Côte d'Ivoire to promote and protect all human rights and fundamental freedoms, to investigate alleged violations of human rights and international law and to bring to justice those responsible for such acts,

*Considering* that the attacks currently taking place in Côte d'Ivoire against the civilian population could amount to crimes against humanity and that perpetrators of such crimes must be held accountable under international law and noting that the International Criminal Court may decide on its jurisdiction over the situation in Côte d'Ivoire on the basis of article 12, paragraph 3 of the Rome Statute,

*Determining* that the situation in Côte d'Ivoire continues to constitute a threat to international peace and security,

*Acting* under Chapter VII of the Charter of the United Nations,

1. *Urges* all the Ivorian parties and other stakeholders to respect the will of the people and the election of Alassane Dramane Ouattara as President of Côte d'Ivoire, as recognized by ECOWAS, the African Union and the rest of the international community, *expresses* its concern at the recent escalation of violence and *demand*s an immediate end to the violence against civilians, including women, children and Internally Displaced Persons;

2. *Calls upon* all parties to pursue the overall political solution of the African Union and, in this regard, *welcomes* the decision of the African Union Peace and Security Council Summit of 10 March to appoint a High Representative for the implementation of the overall political solution and calls upon all parties to fully cooperate with him;

### Resolution 1975 (2011)

#### Adopted by the Security Council at its 6508th meeting, on 30 March 2011

##### *The Security Council,*

*Recalling* its previous resolutions, in particular resolutions 1572 (2004), 1893 (2009), 1911 (2010), 1924 (2010), 1933 (2010), 1942 (2010), 1946 (2010), 1951 (2010), 1962 (2010), 1967 (2011), 1968 (2011) and the statements of its President relating to the situation in Côte d'Ivoire, and resolution 1938 (2010) on the situation in Liberia,

*Reaffirming* its strong commitment to the sovereignty, independence, territorial integrity and unity of Côte d'Ivoire, and *recalling* the importance of the principles of good-neighbourliness, non-interference and regional cooperation,

*Reiterating* its strong desire that the post-electoral crisis in Côte d'Ivoire be resolved peacefully and require an overall political solution that preserves democracy and peace and promotes lasting reconciliation among Ivorians,

*Commending* the constructive efforts of the African Union High-level Panel for the resolution of the crisis in Côte d'Ivoire and *reiterating* its support to the African Union and the Economic Community of West African States (ECOWAS) for their commitment to resolve the crisis in Côte d'Ivoire,

*Welcoming* the decision of the Peace and Security Council of the African Union adopted at its 265th meeting at the level of Heads of State and Government, held on 10 March 2011 in Addis Ababa, which reaffirms all its previous decisions on the rapidly deteriorating post-electoral crisis facing Côte d'Ivoire since the second round of the presidential election, on 28 November 2010, which recognize the election of Mr Alassane Dramane Ouattara as the President of the Republic of Côte d'Ivoire,

*Welcoming* the political initiatives and noting the communiqué and the resolution on Côte d'Ivoire adopted by the Authority of Heads of State and Government of ECOWAS on 24 March 2011,

*Expressing* grave concern about the recent escalation of violence in Côte d'Ivoire and the risk of relapse into civil war and *urging* all parties to show utmost restraint to prevent such outcome and to resolve their differences peacefully,



3. *Condemns* the decision of Mr. Laurent Gbagbo not to accept the overall political solution proposed by the High-Level panel put in place by the African Union, and *urges* him to immediately step aside;
4. *Urges* all Ivorian State institutions, including the Defence and Security Forces of Côte d'Ivoire (FDSCI), to yield to the authority vested by the Ivorian people in President Alassane Dramane Ouattara, *condemns* the attacks, threats, acts of obstructions and violence perpetrated by FDSCI, militias and mercenaries against United Nations personnel, obstructing them from protecting civilians, monitoring and helping investigate human rights violations and abuses, *stresses* that those responsible for such crimes under international law must be held accountable and *calls upon* all parties, in particular Mr. Laurent Gbagbo's supporters and forces, to fully cooperate with the United Nations Operation in Côte d'Ivoire (UNOCI) and cease interfering with UNOCI's activities in implementation of its mandate;
5. *Reiterates* its firm condemnation of all violence committed against civilians, including women, children, internally displaced persons and foreign nationals, and other violations and abuses of human rights, in particular enforced disappearances, extrajudicial killings, killing and maiming of children and rapes and other forms of sexual violence;
6. *Recalls* its authorization and *stresses* its full support given to the UNOCI, while impartially implementing its mandate, to use all necessary means to carry out its mandate to protect civilians under imminent threat of physical violence, within its capabilities and its areas of deployment, including to prevent the use of heavy weapons against the civilian population and requests the Secretary-General to keep it urgently informed of measures taken and efforts made in this regard;
7. *Calls upon* all parties to cooperate fully in the operation of UNOCI and French forces which support it, in particular by guaranteeing their safety, security and freedom of movement with unhindered and immediate access throughout the territory of Côte d'Ivoire, to enable them to fully carry out their mandate;
8. *Calls upon* all parties to fully cooperate with the independent international commission of inquiry put in place by the Human Rights Council on 25 March 2011 to investigate the facts and circumstances surrounding the allegations of serious abuses and violations of human rights committed in Côte d'Ivoire following the presidential elections of 28 November 2010, and *requests* the Secretary-General to transmit this report to the Security Council and other relevant international bodies;
9. *Condemns* the use of Radiodiffusion Télévision Ivoirienne (RTI) and other media to incite discrimination, hostility, hatred and violence, including against UNOCI, as well as acts of intimidation and violence against journalists, and *calls for* the lifting of all restrictions placed on the exercise of the right of freedom of expression in Côte d'Ivoire;
10. *Expresses* deep concern about the increasing number of internally displaced persons and Ivorian refugees, especially in Liberia, caused by the crisis in Côte d'Ivoire, and *calls on* all Ivorian parties to cooperate fully with United Nations agencies and other actors working to enhance access to humanitarian aid to refugees and internally displaced persons;

11. *Reiterates* its longstanding demand that Mr. Laurent Gbagbo lift the siege of Golf Hotel without delay;

12. *Decides* to adopt targeted sanctions against those individuals who meet the criteria set out in resolution 1572 (2004) and subsequent resolutions, including those individuals who obstruct peace and reconciliation in Côte d'Ivoire, obstruct the work of UNOCI and other international actors in Côte d'Ivoire and commit serious violations of human rights and international humanitarian law, and therefore *decides* that the individuals listed in Annex I of this resolution shall be subject to the financial and travel measures imposed by paragraphs 9 to 11 of resolution 1572 (2004), and *reaffirms* its intention to consider further measures, as appropriate, including targeted sanctions against media actors who meet the relevant sanctions criteria, including by inciting publicly hatred and violence;

13. *Decides* to remain actively seized of the matter.

## Annex I

**Targeted sanctions**

1. Laurent Gbagbo  
Date of birth: 31 May 1945  
Place of birth: Gagnoa, Côte d'Ivoire  
Former President of Côte d'Ivoire: obstruction of the peace and reconciliation process, rejection of the results of the presidential election.
2. Simone Gbagbo  
Date of birth: 20 June 1949  
Place of birth: Moossou, Grand-Bassam, Côte d'Ivoire  
Chairperson of the Parliamentary Group of the Ivorian Popular Front (FPI): obstruction of the peace and reconciliation process, public incitement to hatred and violence.
3. Désiré Tagro  
Passport number: PD – AE 065FH08  
Date of birth: 27 January 1959  
Place of birth: Issia, Côte d'Ivoire  
Secretary-General in the so-called "presidency" of Mr. Gbagbo: participation in the illegitimate government of Mr. Gbagbo, obstruction of the peace and reconciliation process, rejection of the results of the presidential election, participation in violent repressions of popular movements.
4. Pascal Affi N'Guessan  
Passport number: PD-AE 09DD000013.  
Date of birth: 1 January 1953  
Place of birth: Bouadriko, Côte d'Ivoire  
Chairman of the Ivorian Popular Front (FPI): obstruction of the peace and reconciliation process, incitement to hatred and violence.
5. Alcide Djédjé  
Date of birth: 20 October 1956  
Place of birth: Abidjan, Côte d'Ivoire  
Close advisor to Mr. Gbagbo: participation in the illegitimate government of Mr. Gbagbo, obstruction of the peace and reconciliation process, public incitement to hatred and violence.

**Decision on the Operationalisation of the African Capacity for  
Immediate Response to Crises**

Assembly of the African Union, Assembly/AU/Dec.515 (XXII),  
January 2014

**DECISION ON THE OPERATIONALISATION OF THE AFRICAN CAPACITY FOR  
IMMEDIATE RESPONSE TO CRISES  
Doc. Assembly/AU/4(XXII)**

**The Assembly,**

1. **RECALLS** its Decision Assembly/AU/Dec.489(XXI) on the establishment of the African Capacity for Immediate Response to Crises (ACIRC), adopted by the 21st Ordinary Session of the Assembly of the Union, held in Addis Ababa, from 26 to 27 May 2013;
2. **TAKES NOTE** of the decision by the following African Union (AU) Member States to be the initial participating countries in the ACIRC: Algeria, Angola, Chad, Ethiopia, Guinea, Mauritania, Niger, South Africa, Senegal, Guinea, Sudan, Tanzania and Uganda, and **HEREBY OPERATIONALISES** the ACIRC as a transitional arrangement;
3. **FURTHER RECALLS** that the ACIRC is based on voluntarism and the capacities of the participating countries;
4. **FURTHER DECIDES** as follows:
  - (i) More Member States should be encouraged to volunteer capabilities to ACIRC in the spirit of inclusivity and solidarity;
  - (ii) Upon a request by AU Member State(s), the AU Peace and Security Council (PSC) shall authorize the deployment of a force in accordance with the provisions of the AU Constitutive Act, especially Articles 4(h) and 4(j);
  - (iii) The implementation of the mandate shall be coordinated by the PSC;
  - (iv) An Operations Co-ordination Strategic Centre shall be established at the AU Commission Headquarters in Addis Ababa under the leadership of the Peace and Security Department, to work on the modalities for activating ACIRC;
  - (v) An Operational Command Centre will be located in any of the participating countries near the Mission Area.

**E. de Wet**

***The Chapter VII Powers of the United Nations Security Council,*  
Hart Publishing, 2004, Chapter 5, pp. 178-216<sup>1</sup>**

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<sup>1</sup> Reprinted with the permission of Hart Publishing, Oxford.

military measures primarily flows from Article 42 of the Charter, the authority to adopt non-military coercive measures is predominantly anchored in Article 41.<sup>2</sup>

The nature and scope of the provisional measures that can be adopted under Article 40 of the Charter is the subject of some debate. These measures are intended to act as a "holding operation" or "cooling-off measures" without prejudice to the rights, claims or position of the parties concerned.<sup>3</sup> Since the object of these measures is to prevent an aggravation of the situation, they would typically have as their subject matter the suspension of hostilities, troop withdrawal, and the conclusion of or adherence to a truce.<sup>4</sup> For example, in Resolution 660 of 2 August 1990, the Security Council acted under Article 40 when demanding that Iraq withdraw immediately and unconditionally all its forces to the position in which they were located on 1 August 1990.

On the one hand, it seems clear that these measures presuppose an Article 39 determination and can be binding in nature. This is clearly supported by the systematic positioning of Article 40 in Chapter VII, as well as the situations in which the Security Council has explicitly resorted to Article 40.<sup>5</sup> On the other hand, it is not clear whether provisional measures could also include military measures. For example, some argue that peace-enforcement units for restoring and maintaining a cease-fire may find their basis in Article 40.<sup>6</sup> Others question this by claiming that it would evade Article 42, which exclusively regulates coercive military measures.<sup>7</sup>

Although this latter view seems to be more accurate, the scope of Article 40 will not be examined in any of the following chapters.

<sup>2</sup>Yoram Dinstein, "The Legal Lessons of the Gulf War", 48 *Austrian Journal of Public and International Law* 6 (1995).

<sup>3</sup>The *Prosecutor v Dusko Tadic*, Decision on the Defence Motion for Interlocutory Appeal and Jurisdiction, Case No IT-94-I-T, 2 October 1995, Appeals Chamber, at para 34, available at [www.un.org/icty](http://www.un.org/icty). Hereinafter referred to as the *Tadic* decision.

<sup>4</sup>See Jochen A Frowein, "Art 40", in Bruno Simma (ed), *The Charter of the United Nations. A Commentary* 618-19 (Oxford, Oxford University Press, 1994). In this context the function of the "without prejudice" clause would be, for example, to reassure parties that troop withdrawal from an occupied territory in response to provisional measures would not amount to a settlement of a territorial dispute regarding that territory. See Gaetano Arangio-Ruiz, "On the Security Council's 'Law-Making'", 83 *Rivista di Diritto Internazionale* 648-49 (2000).

<sup>5</sup>See also SC Res 598 of 20 July 1987, in which the Security Council adopted provisional measures in response to the breach of the peace between Iran and Iraq. For earlier examples, see SC Res 54 of 15 July 1948 and SC Res 62 of 16 November 1948 on Palestine. See Frowein (Art 40), above n 4, at 618-20. For a different opinion, see the Appeals Chamber of the ICTY in the *Tadic* decision, above n 3, at para 33. It questioned the mandatory character of the provisional measures and suggested that these measures were subjected to the limitation provided in Art 2(7) of the Charter. The ICTY based this assumption on the language of Art 40, in the phrase "before making the recommendations or deciding upon the measures provided for in Art 39".

<sup>6</sup>Secretary-General, *Ann Agenda for Peace*, S/24111 para 44 (1992).

<sup>7</sup>Frowein (Art 40), above n 4, at 619.

## 5

# *An Overview of the Substantive Limits to the Security Council's Discretion Under Articles 40, 41 and 42 of the Charter*

## 1. INTRODUCTION

**O**NCE THE SECURITY Council has legitimately determined that a threat to peace exists, the question arises whether there are limits to the Security Council's discretion in resorting to enforcement measures in order to restore or maintain international peace and security. The answer to this question is closely related to the nature of the enforcement measures under consideration. The following chapters will illustrate that different types of limitations are at play, depending on whether the Security Council is resorting to military enforcement measures or non-military enforcement measures.<sup>1</sup> Whereas the authority to resort to

<sup>1</sup>The relevant part of Chapter VII of the Charter reads as follows:

"Article 40

In order to prevent an aggravation of the situation, the Security Council may, before making recommendations or deciding upon the measures provided for in Art 39, call upon the parties concerned to comply with such provisional measures as it deems necessary or desirable. Such provisional measures shall be without prejudice to the rights, claims, or position of the parties concerned. The Security Council shall duly take account of failure to comply with such provisional measures."

"Article 41

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

"Article 42

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

Instead, they will focus on the nature of the limitations at stake when the Security Council resort to military measures on the one hand, and to non-military measures, on the other. Stated differently, they depart from the premise that the limitations applicable with respect to non-military enforcement measures will apply regardless of whether they stem from Article 40 or 41 of the Charter. Similarly, the limitations applicable to military enforcement measures will not be affected if they were to stem from Article 40 rather than from Article 42. The Security Council would thus not be able to go any further in terms of Article 40, than it would be able to under Article 41 or 42 of the Charter. The reason for this approach lies in the fact that the Security Council usually only refers to Chapter VII in general terms when resorting to enforcement action, without indicating the specific Article under which it is acting.<sup>8</sup> From a practical point of view it therefore seems more useful to identify the limitations to Security Council action in connection with the type of enforcement measure (military versus non-military) at stake, rather than in connection with the exact Article.

The current chapter concentrates on identifying substantive limitations to the discretion of the Security Council in choosing the type of enforcement measures for maintaining or restoring international peace and security. The term "substantive" is used to describe peremptory norms of international law (*ius cogens*), as well as those limits that flow from the purposes and principles of the Charter, notably fundamental human rights norms and basic norms of international humanitarian law (the law of armed conflict). These "substantive" limits can be distinguished from the "structural" limits inherent in the Charter and which affect, in particular, the power of the Security Council to delegate certain powers to sub-organs or other entities. The implications of these structural limits for the Security Council are examined as of chapter 7.

This chapter commences its analysis by inquiring whether the Charter intended the Security Council's broad discretion to be limited by substantive norms at all. After answering this question in the affirmative, it examines where these limitations can be found. It subsequently identifies the norms of *ius cogens*, as well as the purposes and principles of the Charter as the main substantive limits to the Security Council's discretion during enforcement action. In doing so, it pays particular attention to the limits flowing from the principle of good faith and its interaction with fundamental human rights norms and the basic norms of international humanitarian law. The analysis remains general in that it does not engage

<sup>8</sup>For example, among the 12 resolutions adopted after the Iraqi invasion of Kuwait and before the hostilities ended, only SC Res 660 of 2 August 1990 referred to specific provisions of Chapter VII, ie Art 39 and Art 40. Cf Ruth Lapidoth, "Some Reflections on the Law and Practice Concerning the Imposition of Sanctions by the Security Council", 30 *Archiv des Völkerrechts* 118 (1992).

in an application of any of the substantive limits identified in Security Council practice. Such an application is undertaken in chapters 6, 8 and 9 in particular (albeit not exclusively) in relation to the human rights limitations identified in this chapter. The current chapter thus constitutes the principled foundation on which the subsequent evaluation of the conformity of Security Council practice with substantive (human rights) limitations is based.

Although the current chapter also identifies the core elements of international humanitarian law to which the Security Council remains bound during military enforcement action, an evaluation of the extent to which United Nations (authorised) forces have acted in accordance with these norms falls outside the scope of this study.<sup>9</sup> Since this is the only chapter in the study dealing with the basic norms of international humanitarian law, some effort is made to identify the core content of these norms. In the case of fundamental human rights, the core content of the norms at stake is at issue in subsequent chapters and therefore is not explored in the current chapter.

Finally, when discussing the Security Council's broad discretion to adopt enforcement measures, one has to bear in mind that it remains controversial whether this competence extends to non-member states. According to chapter 3 at section 4.2., the argument that the Chapter VII enforcement mechanism is applicable against non-members by means of customary international law, is not completely convincing.<sup>10</sup> As a result, all references to states in the following paragraphs should be understood as referring to members of the United Nations only. Similarly, references to non-state entities relate to those located in member states. Even though these entities are not members of the United Nations themselves, they are subjected to its Chapter VII enforcement mechanism by means of their presence in a member state. The Chapter VII enforcement mechanism applies to member states in an all-inclusive manner, ie both with respect to their territory and those located in it. Since this entitles the Security Council to subject the entire state to enforcement measures, it seems only

<sup>9</sup>As will be indicated in s 4.3.1, a settled practice has developed by means of which troop-contributing countries take primary and direct responsibility for humanitarian law violations committed by their contingents. Cf Judith G Gardam, "Proportionality and Force in International Law", 87 *American Journal of International Law* 407 ff (1993), for a discussion of the potential eroding effect of high altitude bombing such as occurred in the (first) Gulf War on the proportionality principle. See also Natalia Lupi, "Report by the Inquiry Commission on the Behaviour of Italian Peace-Keeping Troops in Somalia", 1 *Yearbook of International Humanitarian Law* 375 ff (1998); Robert M Young & Maria Molina, "IHL and Peace Operations: Sharing Canada's lessons learned from Somalia", 1 *Yearbook of International Humanitarian Law* 362 ff (1998).

<sup>10</sup>This point will be taken up again when discussing the enforcement measures against (former) non-member states, ie North Korea, Southern Rhodesia, the Federal Republic of Yugoslavia and East Timor, respectively, in ch 6 and ch 7.

logical that it also entitles the Security Council to adopt more limited enforcement measures that only affect part of the member state's territory and/or certain entities located therein.<sup>11</sup>

## 2. THE NATURE OF THE SECURITY COUNCIL'S DISCRETION UNDER ARTICLE 5 40, 41 AND 42 OF THE CHARTER

That the Security Council has a wide discretion to deviate from customary international law or treaty law when resorting to enforcement measures already flows from the nature of these measures.<sup>12</sup> An enforcement measure such as a trade embargo, for example, will inevitably have an impact upon the legal rights of those states or entities against which the measures are directed, as well as other states which have any trade relations with them.<sup>13</sup> For example, it could have an impact on their use of rail, sea, air, postal telegraphic, radio and other means of international communication.<sup>14</sup> States and those on their territory would nonetheless be obliged to accept these infringements of their rights, if the enforcement measures are to have any effect at all. Without the ability to impose on these rights, the Security Council would not be able to act efficiently in the interests of international peace and security.<sup>15</sup>

<sup>11</sup> This is also in accordance with the general principle of a *maior ad minus*. See, for example, SC Res 864 of 15 September 1993, at para 19, which imposed an oil embargo against the UNITA rebel movement in Angola.

<sup>12</sup> Dapo Akande, "The International Court of Justice and the Security Council: is there Room for Judicial Control of Decisions of the Political Organs of the United Nations?", 46 *International and Comparative Law Quarterly* 320 (1997).

<sup>13</sup> Jochen A. Frowein, "Art 42", in Bruno Simma (ed), *The Charter of the United Nations. A Commentary* 633 (Oxford, Oxford University Press, 1994); TD Gill, "Legal and Some Political Limitations on the Power of the UN Security Council to Exercise its Enforcement Powers under Chapter VII of the Charter", 26 *Netherlands Yearbook of International Law* 62 (1995); Bernd Martenczuk, "The Security Council, the International Court and Judicial Review: What Lessons from Lockerbie?", 10 *European Journal of International Law* 546 (1999); Nigel White, "To Review or Not to Review? The Lockerbie Cases Before the World Court", 12 *Leiden Journal of International Law* 418 (1999).

<sup>14</sup> Arangio-Ruiz, above n 4, at 625.

<sup>15</sup> Akande, above n 12, at 318, 320; Gill, above n 13, at 62. See also Jochen A. Frowein, "Art 39", in Bruno Simma (ed), *The Charter of the United Nations. A Commentary* 615 (Oxford, Oxford University Press, 1994). He qualified this argument by submitting that deviations from obligations under international law would only be acceptable in so far as they result from binding enforcement measures under Art 40, Art 41 or Art 42. Where the Security Council merely recommends (non-binding) measures in the wake of an Art 39 determination, they would have to remain within the limits of international law. Anything else would unduly restrict the rights of the addressee state. This would mean that a non-mandatory trade embargo could only be enforced in so far as it did not violate trade agreements or norms of customary international law. One could counter this argument, however, by claiming that the decisive difference between binding and non-binding enforcement measures relates to their impact on the *implementing* states rather than the *addressee* states. Whereas binding Security Council decisions oblige the implementing states to give effect to the enforcement

This would not only relate to rights under customary international law, but also to rights enjoyed under treaty law. Article 103 of the Charter explicitly provides that obligations under the Charter prevail over any other international agreements. Since obligations of member states under the Charter include the obligation to accept and carry out binding decisions of the Security Council, obligations flowing from enforcement measures will prevail over treaty obligations.<sup>16</sup> Although Article 103 of the Charter only refers to "obligations" under the Charter prevailing over "obligations" under other treaties, the same principle must also apply to rights arising under other treaties. If a treaty obligation is extinguished or suspended by a binding Security Council decision, this will necessarily imply that the rights stemming from those obligations are extinguished or suspended as well.<sup>17</sup>

The other side of this coin is that the Security Council is not obliged to limit the enforcement measures to those states from which the threat to peace, breach of the peace or an act of aggression originates.<sup>18</sup> This would require the Security Council to do extensive fact-finding in each case before acting, which would prevent it from acting quickly and thus compromise its efficiency.<sup>19</sup> After all, the complexity of international relations and the political delicacies involved are often such that it is difficult to determine who is actually responsible for the threat to peace.<sup>20</sup> This also means that enforcement measures are not necessarily of a punitive nature, directed at states or entities who violated international law.<sup>21</sup> Although the situation causing a threat to peace will often entail an illegal act, the upholding of international law is not the Security Council's primary concern. Instead, it is the maintenance or restoration of international peace

measures—including those requiring a deviation from existing international law—non-binding recommendations merely permit this. This permission nonetheless implies that the addressee state has to accept a limitation of its rights under international law, to the extent that the implementing state decides to give effect to the Security Council recommendation. If this were not the case, the non-binding Security Council measures would have no added value and would therefore be pointless.

<sup>16</sup> Akande, above n 12, at 319; Gill, above n 13, at 63; Christopher Greenwood, "The Impact of Decisions and Resolutions of the Security Council on the International Court of Justice", in Wybo P. Heere, *International Law and The Hague's 750th Anniversary* 84 (The Hague, TMC Asser, 1999); Gabriel H. Oosthuizen, "Playing the Devil's Advocate: the United Nations Security Council is Unbound by Law", 12 *Leiden Journal of International Law* 521 (1999).

<sup>17</sup> Greenwood (in Heere), above n 16, at 84.

<sup>18</sup> Martin Lailach, *Die Wahrung des Weltfriedens und der internationalen Sicherheit als Aufgabe des Sicherheitsrates der Vereinten Nationen* (Berlin, Duncker & Humblot, 1998); Frowein (Art 40), above n 4, at 620; Barbara Lorinser, *Bindende Resolutionen des Sicherheitsrates* 49 (Baden-Baden, Nomos, 1996).

<sup>19</sup> Lorinser, above n 18, at 54. See also Bernd Martenczuk, *Rechtsbindung und Rechtskontrolle des Sicherheitsrates* 214 (Berlin, Duncker & Humblot, 1996).

<sup>20</sup> Lorinser, above n 18, at 55.

<sup>21</sup> Arangio-Ruiz, above n 4, at 630; Lailach, above n 18, at 191.

and security, which is not necessarily synonymous with the maintenance of international law.<sup>22</sup>

The need for efficient action further implies that the Security Council has a wide discretion in deciding how to make use of the enforcement measures provided for in Chapters VI and VII of the Charter. On the one hand, it is not obliged to adopt any enforcement measures after having determined that an Article 39 situation exists, as Articles 40, 41 and 42 are merely of a permissive nature. On the other hand, if the Security Council does decide to resort to enforcement measures, it does not have to exhaust the mechanisms for the peaceful settlement of disputes provided for in Chapter VI, before adopting coercive measures under Chapter VII. Once it has made a determination in terms of Article 39, it can immediately resort to the measures provided for in Articles 40, 41 and 42 of the Charter.<sup>23</sup>

The Security Council also does not have to adopt the measures in Articles 40, 41 and 42 in any particular order, even though the measures listed there are in themselves graduated.<sup>24</sup> In other words, the Security Council is not required to postpone military action for a prolonged period of time in order to convince itself that provisional measures or sanctions have no possibility of achieving the desired objective. If this were the case, the Security Council could be forced to wait for months or even years before resorting to military enforcement measures.<sup>25</sup> This would rob the enforcement provisions in Chapter VII of their effectiveness and undermine the entire purpose of the collective security system provided for in the Charter.<sup>26</sup>

This freedom of the Security Council to choose a (combination of) measures under Chapters VI and/ or VII to be adopted for the maintenance of international peace and security already indicates that it is not bound by a

general principle of proportionality.<sup>27</sup> This principle requires that there be a rational link between the means and the end pursued and that the damage inflicted by the means should not be disproportionate to that end.<sup>28</sup> This usually implies that the end should be achieved by the least restrictive means.<sup>29</sup> However, applying this principle to the Security Council would force it to exhaust all non-binding or non-military enforcement measures before authorising the use of force. As was indicated above, this would not be reconcilable with the flexibility that the Security Council needs in order to engage in quick and efficient action. It also does not pay due consideration to the interest of the world community in preventing war, or the uncertainty as to how those states or entities subjected to enforcement measures will react.<sup>30</sup>

In essence therefore the question is not so much whether the Security Council can impinge on existing international law when adopting enforcement measures, but to what extent it can do so. Some authors claim that the Security Council's discretion in this regard is unlimited and that it does not have to pay any regard to international law when acting to maintain or restore international peace and security.<sup>31</sup> They find support for this argument in the omission of any reference to "justice or international law" in the first part of Article 1(1) of the Charter.<sup>32</sup> Whereas the Article explicitly refers to "justice and international law" in its second part, in connection with the settlement of international disputes, it contains no such reference when referring to collective measures for the prevention and removal of threats to the peace, and for the suppression of acts of aggression or other breaches of the peace.<sup>33</sup> They submit that this was a

<sup>27</sup> Lorinser, above n 18, at 53; Oosthuizen, above n 16, at 555.

<sup>28</sup> In international law the principle of proportionality was recognised first in the customary international law of reprisal and self-defence. See Jost Delbrück, "Proportionality", III *Encyclopedia of Public International Law* 1141 (1994).

<sup>29</sup> Martenczuk, above n 19, at 276, 279; Matthias Herdegen, *Die Befugnisse des UN-Sicherheitsrates: aufgekärter Absolutismus im Völkerrecht?* 30-31 (Heidelberg, Müller, 1998), submitted that the differentiation between military and non-military measures implied a proportionality principle. He nonetheless conceded that the broad discretion of the Security Council watered it down considerably. Similarly, Nicolas Angelet, "International Law Limits to the Security Council", in Vera Gowlland-Debbas (ed), *United Nations Sanctions and International Law* 73 (The Hague, Kluwer, 2001).

<sup>30</sup> Martenczuk (Rechtskontrolle), above n 19, at 280; Lorinser, above n 18, at 53; Gowlland-Debbas (State Responsibility), above n 23, at 62.

<sup>31</sup> Notably Hans Kelsen, *The Law of the United Nations* 294 (London, Stevens, 1950); see Akande, above n 12, at 318.

<sup>32</sup> Art 1(1) of the Charter reads: "[The Purposes of the United Nations are:] To maintain international peace and security, and to that end: to take effective collective measures for the prevention and removal of threats to peace, and for the suppression of acts of aggression, or other breaches of the peace, and to bring about by peaceful means, and in conformity with the principles of justice in international law, adjustment or settlement of international disputes or situations which might lead to a breach of the peace; ..."

<sup>33</sup> Kelsen, above n 31, at 294. See also Akande, above n 12, at 318; Martenczuk, above n 13, at 545.

<sup>22</sup> Gill, above n 13, at 46; Martenczuk (Rechtskontrolle), above n 19, at 217-18. See also Lailach, above n 18, at 192-93. If the Security Council had only adopted measures against states that violated international law, it would have acted as a criminal tribunal as opposed to a political organ.

<sup>23</sup> The Security Council could also combine Chapter VII measures with non-binding recommendations in terms of Chapter VI. See Martenczuk (Rechtskontrolle), above n 19, at 234; Vera Gowlland-Debbas, "Security Council Enforcement Action and Issues of State Responsibility", 43 *International and Comparative Law Quarterly* 62 (1994).

<sup>24</sup> SC Res 661 of 6 August 1990 and SC Res 665 of 25 August 1990 were examples of a combination of the enforcement measures provided for in Art 41 and Art 42 of the Charter. Whereas the former resolution imposed sanctions against Iraq after its invasion of Kuwait, the latter permitted countries cooperating with Kuwait to adopt the necessary measures to halt inward and outward maritime shipping, in order to ensure strict implementation of the sanctions. See Dinstein, above n 2, at 7-8; see also Derek Bowett, "The Impact of Security Council Decisions on Dispute Settlement Procedures", 5 *European Journal of International Law* 94 (1994); Frowein (Art 42), above n 13, at 631; Gill, above n 13, at 48; Gowlland-Debbas (State Responsibility), above n 23, at 62; Lapidot, above n 8, at 117; Lorinser, above n 18, at 55.

<sup>25</sup> Gill, above n 13, at 53.

<sup>26</sup> *Ibid.*, at 51 ff.

deliberate omission on the part of the drafters at San Francisco, since the committee charged with preparatory work on the preamble, purposes and principles of the Charter rejected all proposed amendments which aimed at subjecting the exercise of collective enforcement measures to the principles of international law.<sup>34</sup> This would be a clear indication that the drafters of the Charter did not intend to curtail the relevant powers of the Security Council when adopting measures to restore or maintain international peace and security.<sup>35</sup>

However, these submissions do not give a full picture of the discussion at San Francisco, as the issue also arose in the committee on the structure and procedure of the Security Council.<sup>36</sup> In that committee, Norway had proposed an amendment which would have required that no solution should be imposed upon a state that would impair its confidence in its future security or welfare. This proposal resulted from its belief that the phrase "justice and international law" in Article 1(1) of the Charter only applied to the pacific settlement of disputes, as opposed to coercive action.<sup>37</sup> The United Kingdom and the United States then indicated that the reference to "justice and international law" did indeed bind the Security Council, as a result of which the Norwegian proposal was unnecessary.<sup>38</sup>

The only way in which to reconcile these two seemingly opposing views, is to interpret the omission of the terms "justice and international law" in the first part of Article 1(1) as a mechanism for enabling the Security Council to deviate to some extent from international law when acting in the interest of peace and security. This deviation would not be possible if the phrase "international law and justice" had been explicitly included. At the same time, however, it was not meant to free the Security

<sup>34</sup> See 6 *United Nations Conference on International Organisation* 1 ff (1945). During the debates, the delegates in favour of the amendments made frequent references to the dangers of smaller nations being sacrificed in the context of expediency or appeasement—with references to the fate of Czechoslovakia in 1938—and the necessity of peace being based on justice and international law. The delegates opposed to the amendments all pointed to the necessity of providing the Security Council with maximum flexibility and power in the application of collective enforcement measures. They also stressed the potential pitfalls of conditioning such action on considerations of international law or "justice". These terms were considered to be too open-ended and capable of conflicting interpretation. See also Gill, above n 13, at 66; Akande, above n 12, at 315.

<sup>35</sup> Oosthuizen, above n 16, at 552–53. See also the dissenting opinion of Judge Schwebel in *Case Concerning Questions of Interpretation and Application of the 1971 Montreal Convention Arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v United States)*, Preliminary Objections, 37 *International Legal Materials* 627 (1998).

<sup>36</sup> 11 *United Nations Conference on International Organisation* 378 (1945).

<sup>37</sup> *Ibid.*, Akande, above n 12, at 319.

<sup>38</sup> 11 *United Nations Conference on International Organisation* 378 (1945). See Akande, above n 12, at 319. Also see Martenczuk (Rechtskontrolle), above n 19, at 270, who acknowledged these statements, even though he claimed that the purposes and principles did not provide any workable limits to the Security Council's discretion.

Council completely from the obligation to respect international law when adopting enforcement measures under Chapter VII.<sup>39</sup> Stated differently, the explicit inclusion of the phrase "international law and justice" in the second part of Article 1(1) is merely meant to reaffirm that no deviation from international law is possible when the Security Council is involved in the settlement of disputes. It is not, however, meant to affirm that no *adherence* to international law is required when the Security Council takes enforcement measures in the interest of peace and security. That some adherence is indeed required, will be illuminated in the following passages. They will illustrate that collective enforcement measures are subjected to the norms of justice and international law to the extent that they constitute norms of *ius cogens* and/or core elements of the principles and purposes of the United Nations.

### 3. *IUS COGENS* AS A SUBSTANTIVE LIMIT TO SECURITY COUNCIL DISCRETION

Although the Security Council may impinge on customary international law or treaty law when maintaining international peace and security, most authors agree that these impingements find their limits in peremptory norms of international law, otherwise known as *ius cogens*.<sup>40</sup> The first question that comes to mind is whether this approach would result in an over-extension of the role and purpose of the notion of *ius cogens*, which was initially developed in the context of treaty law.<sup>41</sup>

<sup>39</sup> See Arangio-Ruiz, above n 4, at 644; Akande, above n 12, at 320; Heike Gading, *Der Schutz grundlegender Menschenrechte durch militärische Massnahmen des Sicherheitsrates—das Ende staatlicher Souveränität?* 48 (Berlin, Duncker & Humblot, 1996).

<sup>40</sup> Akande, above n 12, at 323; Dinstein, above n 2, at 9; Michael Fraas, *Sicherheitsrat der Vereinten Nationen und Internationaler Gerichtshof* 77–78 (Peter Lang, Frankfurt a/M, 1998); Thomas M Franck, "The Political and the Judicial Empires: Must there be a Conflict over Conflict-Resolution?", in Najeeb Al-Naumi & Richard Meese, *International Legal Issues Arising under the United Nations Decade of International Law* 662 (The Hague, Martinus Nijhoff, 1995); Lorinser, above n 18, at 53; Dorothee Starck, *Die Rechtsmässigkeit von UNO-Wirtschaftsanktionen in Anbetracht ihrer Auswirkungen auf die Zivilbevölkerung* 222–23 (Berlin, Duncker & Humblot, 2000); Geoffrey S Watson, "Constitutionalism, Judicial Review, and the World Court", 34 *Harvard International Law Journal* 38 (1993); White, above n 13, at 418.

<sup>41</sup> Art 5 of the Vienna Convention on the Law of Treaties of 1969, reprinted in 8 *International Legal Materials* (1969) 679 ff. Hereinafter referred to as the Vienna Convention. See Andreas Zimmermann, "Sovereign Immunity and Violations of International Law Cogens—Some Critical Remarks", 16 *Michigan Journal of International Law* 438 (1995). He noted that during the preparatory discussion of the International Law Commission (ILC) leading to the Vienna Convention, no attempts were made to extend this notion beyond the invalidation of incompatible treaties. However, it is doubtful that any conclusion could be drawn from this fact alone, since the mandate of the drafters of the Vienna Convention was limited to issues of treaty law. It could thus not have been expected of them to deliberate on the possible role of *ius cogens* outside the treaty context.

In accordance with the principles of treaty law, a treaty is null and void if it is concluded in conflict with a peremptory norm of general international law (ie *ius cogens*).<sup>42</sup> States parties have to eliminate as far as possible the consequences of acts performed in reliance on provisions in conflict with the peremptory norm, and should bring their mutual relations in conformity with the peremptory norm.<sup>43</sup> If one were to use the prohibition against torture as an example, it would mean that any treaty that provides for the transfer of detainees from one country to another in order to facilitate torture practices during questioning, would be null and void.<sup>44</sup> Where a treaty itself does not violate a *ius cogens* norm, but the execution of certain obligations under the treaty would have such effect, the state is relieved from giving effect to the obligation in question. The treaty itself would, however, remain valid. Thus, the obligations existing under an extradition treaty would fall away if it resulted in the extradition of a person to a country where he or she faced torture. The treaty itself would nonetheless remain intact.<sup>45</sup>

As the Charter also is a treaty, it seems logical that a similar rational should apply. Thus, where the execution of an obligation under the Charter such as a binding Security Council decision would result in a violation of a *ius cogens* norm, member states would be relieved from giving effect to the obligation in question. The fact that the Charter is also the constitutive document of an international organisation with separate legal personality would not justify a deviation from this conclusion. The mere fact that the organisation itself can act independently from the member states does not change the fact that the obligations imposed by the organisation result from a treaty and may therefore not conflict with the norm of *ius cogens*. Any other conclusion would effectively allow states to

<sup>42</sup> Art 53 of the Vienna Convention, above n 41.

<sup>43</sup> Art 71 of the Vienna Convention, above n 41; see also AJJ de Hoogh, "The Relationship between *Ius Cogens*, Obligations *Erga Omnes* and International Crimes: Peremptory Norms in Perspective", 42 *Österreichische Zeitschrift für öffentliches Recht und Völkerrecht* 190 (1991).

<sup>44</sup> After the terrorist attacks in the United States on 11 September 2001, the United States were accused of sending detainees suspected of involvement with the Al-Qauida network to countries in the Middle-East, where they were tortured during questioning. See Jan Ross, "Daumenschrauben gefällig?", *Die Zeit*, 27 February 2003, at 8; see also Amnesty International Report, AMR 51/170/2001, available at [www.amnesty.org](http://www.amnesty.org).

<sup>45</sup> A series of decisions of the Swiss Federal Supreme Court may be illuminating in this regard. In the first of these decisions in 1982 (BGE 108 Ib 412), the Court refused to give effect to an extradition request by Argentina, despite an existing extradition agreement between the two countries, for fear that the persons affected might be subjected to torture or inhumane or degrading treatment. Although mainly relying on Art 3 of the European Convention of Human Rights and Fundamental Freedoms of 1950, it also described the prohibition of torture as a "general principle of law" that had to be taken into account during extradition proceedings. By 1985 (BGE 111 Ib 142) when considering an extradition request by Tunisia, the Federal Supreme Court explicitly stated that the prohibition of torture and *refoulement* constituted elements of the *ordre public international*, which is a synonym for *ius cogens*. See also Eva Kornicker, *Ius Cogens und Untertätigkeitsrecht* 105 (1997).

circumvent their most fundamental international obligations by creating an international organisation. This, in turn, would undermine the logic that states cannot confer more powers to organs of international organisations than they can exercise themselves. For if states may not conclude an agreement in accordance with which they can deviate from peremptory norms of international law themselves, they would also not be able to conclude an agreement that invests an international organisation with the power to do so.

This line of argument does, however, presuppose that the delegation of powers by member states to the organisation is not a once-only event that coincides with its creation. Instead, it is an ongoing interaction as a result of which the powers delegated to the organisation are afterwards limited by the development of *ius cogens*.<sup>46</sup> An organ such as the Security Council therefore has to take into account the evolution of new *ius cogens* norms when adopting enforcement measures.<sup>47</sup> If the delegation of powers consisted of a single action that did not provide for any ongoing interaction (ie "progressive limitation"), the Security Council would not be bound to those *ius cogens* norms which developed after the entering into force of the Charter. These norms would only limit the powers of member states when acting individually and would not affect the powers previously conferred on the Security Council.

Since the concept of *ius cogens* was only introduced in the Vienna Convention in 1969, it would effectively mean that none of the *ius cogens* norms that are currently recognised under international law would be applicable to the Security Council. As a result, states could instrumentalise the collective security system in order to engage in slavery, apartheid or even genocide, provided that the requisite majority in

<sup>46</sup> According to Jost Delbrück, "Art 24", in Bruno Simma (ed), *The Charter of the United Nations. A Commentary* 404 (Oxford, Oxford University Press, 1994), one cannot describe the conferral of powers on the Security Council as a "delegation" of powers. The Security Council is an organ of the United Nations which acts on behalf of the organisation and not on behalf of the member states. Its actions and decisions are attributed to the United Nations organisation as a whole and not to individual members, such as the members of the Security Council. However, even if one accepted this argument, it would not alter the fact that the member states vested powers in the Security Council by means of a treaty. The Charter can neither grant the Security Council more powers than the member states intended it to have, nor can it enable the Security Council to do anything which the member states cannot do themselves. See Gill, above n 13, at 68; See Danesh Sorooshi, *The United Nations and the Development of Collective Security* 27 (Oxford, Oxford University Press, 1999). See also Legality of the Use by a State of Nuclear Weapons in Armed Conflict, ICJ Rep 1996, at 9; *Tadic* decision, above n 3, at para 29; Franck (International Legal Issues), above n 40, at 662.

<sup>47</sup> See Vera Gowlland-Debbas, *Judicial Insights into Fundamental Values and Interests of the International Community*, in Alexander S Muller et al (eds), *The International Court of Justice. Its Future Role after Fifty Years* 363 (The Hague, Martinus Nijhoff, 1997). *Ius cogens* is a dynamic concept, the content of which evolves in accordance with the changing requirements of the international community.

the Security Council can be secured.<sup>48</sup> In order to avoid such a clearly unacceptable situation, the conferral of powers on the Security Council has to be regarded as an ongoing interaction, to the extent that these powers are afterwards limited by the development of *ius cogens*.<sup>49</sup>

Although most authors agree that *ius cogens* binds states acting individually (unorganised) as well as collectively within the United Nations, some have submitted that the latter is not the case.<sup>50</sup> According to this line of argument the Security Council, if bound by *ius cogens*, would have to intervene against a party responsible for the violation of a *ius cogens* norm. This, in turn, implies that the Security Council would have to allocate responsibility for the violations of a *ius cogens* norm before resorting to enforcement measures. Such an obligation would run counter to the flexibility inherent to Chapter VII of the Charter, which does not require a legal evaluation of the positions of the parties by the Security Council before taking action.<sup>51</sup> This argument is flawed in that it focuses on *ius cogens* in connection with the *subjects* against which Security Council action is taken, instead of the *type* of action to be undertaken by the Security Council. Section 2 of this chapter has already outlined that the Security Council neither has to resort to enforcement measures, nor does it—where it does decide to adopt such measures—first have to determine

the substantive legal position of the parties, or limit the enforcement measures to those parties responsible for violations of international law. This does not change the fact, however, that in choosing the *type* of enforcement measures for maintaining or restoring international peace, the Security Council is bound by the norms of *ius cogens*.<sup>52</sup>

Although there is no clarity as to all the norms that would belong to *ius cogens*,<sup>53</sup> a core of such norms has been identified by authors. It includes the prohibition of the unilateral use of force, the right to self-defence, the prohibition of genocide, the prohibition of the violation of basic norms of international humanitarian law, the prohibition of racial discrimination and slavery, and the right to self-determination.<sup>54</sup> Chapter 6 at section 2.2. and chapter 9 at section 2.1.2., respectively, will argue that the right to life and the right to a fair trial during criminal proceedings (due process) can now also be considered as elements of *ius cogens*.<sup>55</sup>

#### 4. THE PURPOSES AND PRINCIPLES OF THE CHARTER AS A SUBSTANTIVE LIMIT TO SECURITY COUNCIL DISCRETION

A separate but closely related category of limits to the discretion of the Security Council when adopting enforcement measures flows from the purposes and principles of the United Nations, as contained in Articles 1 and 2 of the Charter.<sup>56</sup> This follows from Article 24(2), which explicitly states that the Security Council shall act in accordance with the purposes

<sup>48</sup> Akande, above n 12, at 320; Fraas, above n 40, at 78; Jochen Herbst, *Rechtskontrolle des UN-Sicherheitsrates* 377 (Frankfurt a/M, Peter Lang, 1999); Lorinser, above n 18, at 53.

<sup>49</sup> This conclusion would also be in line with the growing recognition of the normative superior quality of *ius cogens* in other areas of international law that even extend beyond the treaty context. An illuminating example of state practice of this type is The Swiss Federal Constitution of 1999. According to Art 139(3), Art 193(4) and Art 194(2) a People's Initiative (*Volksinitiative*) aimed at constitutional amendment may not be in conflict with *ius cogens*. Any initiative that is in violation of *ius cogens* has to be invalidated by the Swiss authorities. This approach echoes the *obiter dictum* statement of the ICJ, according to which a peremptory norm of international law serves to de-legitimise any conflicting legislative, administrative or judicial act. See the *Prosecutor v Anto Furundzija*, Case No IT-95-17/1-T10, Judgment, 10 December 1998, Trial Chamber, at para 155, available at www.icty.org. Another example is that of *John Doe I v Unocal Corporation*, 2002 US App 9th Cir 2002) Lexis 19263, which was initiated under the United States Alien Tort Claims Act (28 USC § 1350) and involved, inter alia, allegations of forced labour. In deciding the law to be applied to the cause of action, the Court determined that in light of the *ius cogens* nature of the alleged violations, it would be preferable to apply international law rather than the law of any particular state. The superior normative quality of *ius cogens* norms was also, in principle, recognised in a variety of cases dealing with sovereign immunity. See *Prinz v The Federal Republic of Germany*, 26 F 3d 1168 (DC Cir 1994); *Siderman v De Blake*, 965 F 2d 715 (9th Cir 1992); *Federal Republic of Germany v Prefecture of Voïotia*, Judgment, Greek Supreme Court, 20 January 2001, discussed in Bernhard Kempen, "Der Fall Distomo: griechische Reparationsforderungen gegen die Bundesrepublik Deutschland", in Hans-Joachim Cremer et al (eds), *Tradition und Weltoffenheit des Rechts. Festschrift für Helmut Steinberger* 179 (Berlin, Springer, 2002); *Germany v Murgellos*, Case No 6/17-9-2002, Greek Special Supreme Court, Judgment, 17 September 2002, at para 14; *Al-Adsani v United Kingdom*, European Court of Human Rights, Judgment, 21 November 2001, at para 3, available at www.coe.int.

<sup>50</sup> In particular Martenczuk (Rechtskontrolle), above n 19, at 272; *ibid*, above n 12, at 546.

<sup>51</sup> Martenczuk (Rechtskontrolle), above n 19, at 272.

<sup>52</sup> *Ibid*, at 281–82, acknowledges that the Security Council is obliged to respect humanitarian law and very basic human rights such as the right to life. Since these norms form elements of *ius cogens*, he seems to contradict his own argument.

<sup>53</sup> As is underlined by Oosthuizen, above n 16, at 559, who argued that at this stage in the development of international law, *ius cogens* did not present a limit to the Security Council's enforcement powers.

<sup>54</sup> Akande, above n 12, at 320, 322; Karel Doehring, "Self-Determination", in Bruno Simma (ed), *The Charter of the United Nations. A Commentary* 70 (Oxford, Oxford University Press, 1994); Lailach, above n 18, at 230; White, above n 13, at 421. See also Ian D Seiderman, Hierarchy in International Law: The Human Rights Dimension 86 (Antwerp, Intersentia, 2001). Note also the separate opinion of Judge *ad hoc* Eihü Lauterpacht in *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Yugoslavia (Serbia and Montenegro))*, Further Request for the Indication of Provisional Measures, ICJ Rep 1993, at 440–44. Hereinafter referred to as *Bosnia and Herzegovina v Serbia and Montenegro*, provisional measures II. He stated that the prohibition of genocide has long been accepted as a norm of *ius cogens*.

<sup>55</sup> See also Seiderman, above n 54, at 85.

<sup>56</sup> Akande, above n 12, at 317; Angelet, above n 29, at 75; Herbst, above n 48, at 298; Gill, above n 13, at 41; Starck, above n 40 at 141 ff; See also Doehring (in Simma), above n 54, at 57, who stated that the purposes of the organisation were directly applicable law and not a non-binding, political prescription. See also David Schweigman, *The Authority of the Security Council under Chapter VII of the United Nations Charter* 167–68 (The Hague, Kluwer, 2001); Mary Ellen O'Connell, "Debating the Law of Sanctions", 13 *European Journal of International Law* 70–71 (2002).

and principles of the organisation when discharging its duties.<sup>57</sup> In addition to the primary goal of peace and security,<sup>58</sup> the purposes include respect for the self-determination of peoples,<sup>59</sup> the solving of socio-economic and humanitarian problems and the promotion of human rights.<sup>60</sup> The principles of the United Nations include the sovereign equality of member states<sup>61</sup>; the obligation to act in good faith<sup>62</sup>; the obligation of members to settle disputes peacefully<sup>63</sup>; the prohibition of the unilateral threat or use of force by member states<sup>64</sup>; the obligation of members to assist the United Nations in action it takes in accordance with the Charter<sup>65</sup>; the obligation of the organisation to ensure that non-members act in accordance with the purposes and principles of the United Nations<sup>66</sup>; and the obligation of the organisation not to intervene in the domestic jurisdiction of members.<sup>67</sup>

Since these purposes and principles are broad and vague, several authors question their utility in serving as limits to the Security Council's enforcement powers. It has been argued that Article 24(2) refers to the purposes and principles of the organisation collectively, as a result of which the behaviour of the Security Council would only violate them if it does not correspond to any one of these purposes and principles.<sup>68</sup> This seems unlikely in the light of their breadth, as well as the fact that they are not static, but should reflect the changes which have taken place in the international legal order since 1945.<sup>69</sup> A reliance on the purposes and principles would therefore broaden the powers of the Security Council, rather than limit them.<sup>70</sup>

These arguments are not convincing. The collective reference to the purposes and principles in Article 24(2) relates to the fact that they are

listed individually in Articles 1 and 2 of the Charter, which would make any repetition unnecessary. Acting in accordance with the purposes and principles would therefore mean that the Security Council may not maintain peace and security at the complete expense of any of them. The Security Council has to balance the realisation of its primary goal with the realisation of the secondary goals contained in the Charter. This is a typical feature of constitutional interpretation, as constitutions often contain a variety of different goals which can only be harmonised by a balancing of the different interests involved. Although this implies a limitation of the secondary goals contained in the Charter, it may not lead to an erosion of their core content.

Similarly, such a complete negation of the core content of the Charter purposes and principles could also not be justified on the basis of the Security Council's implied powers. The implied powers enable the Security Council to take measures which were not specifically provided for in the Charter, but which are necessary to carry out its primary responsibility for the maintenance of peace and security.<sup>71</sup> Thus, where the Charter leaves gaps in providing for specific Security Council authority it may rely on its implied powers. The implied powers do not, however, enable the Security Council to override specific limitations provided for in the Charter as such an open-ended power would effectively make every other Charter principle redundant.<sup>72</sup>

As far as the purposes of the Charter in Article 1 is concerned, enforcement measures under Chapter VII may thus not undermine the essence of self-determination, basic human rights or norms of international humanitarian law.<sup>73</sup> In addition, it may not result in the imposition of a settlement on parties, as Article 1(1) clearly states that international

<sup>57</sup> See also the dissenting opinion of Judge Weeramantry in *Case Concerning Questions of Interpretation and Application of the 1971 Montreal Convention Arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v United States of America)*, Provisional Measures, ICJ Rep 1992, at 171. He noted that the duty of the Security Council to act in accordance with the purposes and principles of the United Nations was imperative and categorical. Similarly, the separate opinion of Judge *ad hoc* Lauterpacht in *Bosnia and Herzegovina v Serbia and Montenegro*, provisional measures II, above n 54, at 440.

<sup>58</sup> Art 1(1).

<sup>59</sup> Art 1(2).

<sup>60</sup> Art 1(3).

<sup>61</sup> Art 2(1).

<sup>62</sup> Art 2(2).

<sup>63</sup> Art 2(3).

<sup>64</sup> Art 2(4).

<sup>65</sup> Art 2(5).

<sup>66</sup> Art 2(6).

<sup>67</sup> Art 2(7).

<sup>68</sup> Martenczuk (Rechtskontrolle), above n 19, at 208. For a similar concern, see Matthew Craven, "Humanitarianism and the Quest for Smarter Sanctions", 13 *European Journal of International Law* 51 (2002).

<sup>69</sup> Gowlland-Debbas (State Responsibility), above n 23, at 91.

<sup>70</sup> Oosthuizen, above n 16, at 562.

<sup>71</sup> See Fraas, above n 40, at 51. He explained that it was not very helpful to look at Art 24(2) when examining whether Art 24(1) would provide for implied powers, since the latter did not contain the complete set of competencies of the Security Council. The chapters mentioned there, ie VI, VII, VIII and XII, are not the only ones that convey powers on the Security Council. Chapter VI (in Art 26) and Chapter XIV (in Art 94(2)), for example, also attribute certain competencies to it. See also Delbrück (in Simma), above n 46, at 403–04; Kelsen, above n 31, at 292.

<sup>72</sup> Arangio-Ruiz, above n 4, at 653–54; Gill, above n 13, at 72; Fraas, above n 40, at 52; Delbrück (in Simma), above n 46, at 403, 410. See also Krzystof Skubiszewski, "Implied Powers of International organisations", in Yoram Dinstein (ed), *International Law at a Time of Perplexity. Essays in Honour of Shabtai Rosenne* 856 ff (Dordrecht, Martinus Nijhoff, 1989).

<sup>73</sup> During the debates of the Committee on the Structure and Procedure of the Security Council at San Francisco, the delegate of the United States, in particular, stressed that the principles of equal rights, self-determination and the promotion and encouragement of respect for human rights and fundamental freedoms for all without respect to race, language, religion or sex, constituted the highest rules of conduct. If the Security Council violated the principles and purposes of the Charter it would be acting *ultra vires*. See 11 *United Nations Conference on International Organisation* 378 (1945); see also, Akande, above n 12, at 319; Lorinser, above n 18, at 54; Starck, above n 40, at 169 ff.

disputes have to be settled in accordance with the principles of justice and international law.<sup>74</sup>

With respect to the principles contained in Article 2 of the Charter, the main limitations for Security Council action flow from Articles 2(1), 2(2) and 2(7).<sup>75</sup> As far as Article 2(1) and 2(7) are concerned,<sup>76</sup> it is well recognised that the respect for state sovereignty commanded by these Articles can be limited by enforcement measures under Chapter VII of the Charter. This is not only inherent in the nature of the enforcement measures provided for in that chapter, but is also explicitly provided for in the last part of Article 2(7). In addition, the notions of state sovereignty and domestic jurisdiction have decreased as the organisation's jurisdiction has steadily increased in the years since its foundation.<sup>77</sup> For example, it was illustrated in chapter 4 that grave and systematic violations of human rights and international humanitarian law cannot be regarded as purely internal matters anymore. As a result, some authors submit that the concept of sovereignty contained in Article 2(1) is without significance and would not pose a limitation to Security Council action.<sup>78</sup>

This interpretation comes across as too extreme, if one considers that the concept of the sovereign equality of member states still forms a cornerstone of the United Nations and international relations in general.<sup>79</sup> The Security Council will therefore have to respect the core elements of state

sovereignty when resorting to enforcement measures.<sup>80</sup> These would typically include territorial sovereignty, in the sense that the Security Council may not change the borders of a state against its will, or transfer one part of a state territory to another.<sup>81</sup>

#### 4.1. The Meaning of the Principle of Good Faith

Article 2(2) obliges members to fulfil their obligations under the Charter in good faith.<sup>82</sup> At first glance it seems as if this obligation is addressed to the individual member states rather than the organisation.<sup>83</sup> However, when one reads it together with the first sentence of Article 2,<sup>84</sup> it becomes clear that the members have to act in good faith both when acting individually and as an organ of the United Nations.<sup>85</sup> This introductory sentence explicitly states that the organisation and its members shall act in accordance with the principles contained in that Article.<sup>86</sup>

In the United Nations system the obligation of the organisation to act in good faith is closely related to the concept of equitable (promissory) estoppel, which had initially been developed in inter-state relations. Equitable estoppel implies that where one party has reason to believe, based on the actions or words of another party, that a situation or occurrence would or would not in future change in a particular manner, the other party may not change the situation in that manner.<sup>87</sup> It is an important outgrowth of the doctrine of good faith, as it protects the belief of the party invoking estoppel. In this sense equitable estoppel attributes an objective character to good faith, as it implies that the belief in question

<sup>74</sup> This is not affected by the fact that Art 94(2) of the Charter authorises the Security Council to enforce a decision of the ICJ, where any of the parties to the dispute fails to comply with the ICJ's judgment. This (in practice never utilised) power of the Security Council does not in itself bring about any modification of the rights or obligations of the states involved in the dispute. Instead, the modification is brought about by a binding judgment, which resulted from a judicial settlement procedure which the parties consented to. The Security Council can merely enforce this modification if and to the extent that it is required by the binding judgment. See Arango-Ruiz, above n 4, at 624.

<sup>75</sup> The nature of the remaining obligations contained in Art 2(3), Art 2(4) and Art 2(5) are such that they can only be fulfilled by the individual member states, rather than the organs of the United Nations. Although Art 2(6) is directed at the organisation, it is difficult to see how it could serve as a limitation to Security Council action, apart from the fact that it does not facilitate the application of the Chapter VII enforcement mechanism against non-member states. See also ch 3, at s 4.2.

<sup>76</sup> Art 2(1) reads as follows: "The organisation is based on the principle of the sovereign equality of all its Members". Art 2(7) determines that: "Nothing contained in the present Charter shall authorise the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state or shall require the Members to submit such matters to settlement under the present Charter; but this principle shall not prejudice the application of enforcement measures under Chapter VII."

<sup>77</sup> Ruth Gordon, "United Nations Intervention in Internal Conflicts: Iraq, Somalia, and Beyond", 15 *Michigan Journal of International Law* 524 (1993); see Martenczuk (Rechtskontrolle), above n 19, at 212.

<sup>78</sup> Martenczuk (Rechtskontrolle), above n 19, at 210; Oosthuizen, above n 16, at 553.

<sup>79</sup> Félix Ermacora, "Art 2(7)", in Bruno Simma (ed), *The Charter of the United Nations. A Commentary* 142 (Oxford, Oxford University, 1994); Albrecht Randelzhofer, "Art 2", *ibid*, at 73; Gadding, above n 39, at 190.

<sup>80</sup> Doehring (in Simma), above n 54, at 57; see also Schweigman, above n 56, at 173.

<sup>81</sup> Bowett, above n 24, at 93; Gill, above n 13, at 70.

<sup>82</sup> Art 2(2) of the Charter reads as follows: "All members, in order to ensure to all of them the rights and benefits resulting from membership, shall fulfil in good faith the obligations assumed by them in accordance with the Charter."

<sup>83</sup> As is argued by Martenczuk (Rechtskontrolle), above n 19, at 210; Oosthuizen, above n 16, at 560.

<sup>84</sup> The first sentence of Art 2 determines that: "The organisation and its Members, in pursuit of the Purposes stated in Art 1, shall act in accordance with the following Principles:"

<sup>85</sup> *Conditions of Admission of States to Membership in the United Nations*, Advisory Opinion, ICJ Rep 1948, at 57; see also Herbst, above n 48, at 359-61; Jörg P Müller, "Art 2(3)", in Bruno Simma (ed), *The Charter of the United Nations* 96 (Oxford, Oxford University Press, 1994); Randelzhofer, above n 79, at 73; Frederic L Kirgis, "Security Council Governance of Post Conflict Societies: A Plea for Good Faith and Informed Decision Making", 95 *American Journal of International Law* 581 (2001); Schweigman, above n 56, at 174; Starck, above n 40, at 176. See also Elisabeth Zoller, *La bonne foi en droit international public* 190 ff (Paris, Pedonne, 1977).

<sup>87</sup> Thomas Cottier & Krista N Scheffer, "Good Faith and the Protection of Legitimate Expectations in the WTO", in Marco Bronckers & Reinhard Quick (eds), *New Directions in International Economic Law* 172 (The Hague, Kluwer, 2000); Christopher Brown, "A Comparative and Critical Assessment of Estoppel in International Law", 50 *University of Miami Law Review* 381 (1996).

has to be fair, honest and reasonable.<sup>88</sup> From the presence of good faith in the form of a legitimate expectation on the part of the party invoking estoppel, one could simultaneously deduce the absence of good faith on the part of the party creating the expectation. As a result, the non-realisation of a legitimate expectation would amount to an act of bad faith.<sup>89</sup>

A more controversial question is whether the legitimate expectation created, must have resulted in detriment or advantage to one of the parties, as the case may be.<sup>90</sup> According to one (narrower) line of international jurisprudence, equitable estoppel is based on the law's desire to vindicate those who rely upon others to their own detriment. This element generally requires that the promisee suffers a detriment or loss as a result of the expectation created, or that that the promisor gains an advantage from it.<sup>91</sup> At the same time, however, another (broader) line of international jurisprudence merely focuses on the reliance on the expectation created, without examining whether any detriment was suffered.<sup>92</sup>

This line of argument culminated in the *Nuclear Test* case, in which the ICJ regarded the unilateral declaration by France that it would terminate its nuclear testing program in Polynesia, as legally binding.<sup>93</sup> The ICJ

effectively accepted a promissory estoppel claim without requiring that the party invoking it suffer any detriment or harm.<sup>94</sup> It was motivated by the fact that one of the basic principles governing the creation and performance of legal obligations, whatever their source, is the principle of good faith.<sup>95</sup> This principle implied the protection of the confidence and trust which are essential for the stability of international relations, in particular in relation to expectations created *erga omnes*.<sup>96</sup> The ICJ thus seemed to regard the consistency in the behaviour of international actors and the stability resulting from it as worthy of legal protection, to the extent that it could be reasonably expected.<sup>97</sup>

Although the concept of equitable estoppel mainly applies to interstate relations, it is a general principle of law and can as such also be used to bind organs of international organisations to the legitimate expectations created by their actions.<sup>98</sup> As in the case of inter-state relations, it would imply an objective assessment of whether an organ of the United Nations acted in accordance with a legitimate expectation it had created and, in turn, whether the organ acted in accordance with the meaning and spirit of good faith.<sup>99</sup> It is further submitted that within the United Nations it would be justifiable to adhere to the broader notion of equitable estoppel,

<sup>88</sup>JF O'Connor, *Good Faith in International Law* 110 (Aldershot, Dartmouth, 1991); Cottier & Scheffer, above n 87, at 50–51; Robert Kolb, "Aperçus sur la bonne foi en droit international public", 54 *Revue Hellenique de Droit International* 38–39 (2001).

<sup>89</sup>But see Zoller, above n 86, at 294–95. Whilst accepting that estoppel protects the good faith of the promisee, she rejected the notion that it sanctioned the absence of good faith of the promisor. The latter's good faith would not enter into play, as it is being held responsible for the consequences of its acts, regardless of whether those consequences were intended or accompanied by bad faith motives. Similarly, Brown, above n 87, at 382.

<sup>90</sup>Ian Sinclair, "Estoppel and acquiescence", in Vaughan Lowe & Malgosa Fitzmaurice (eds), *Fifty Years of the International Court of Justice. Essays in Honour of Sir Robert Jennings* 106 (Cambridge, Cambridge University Press, 1996); Jörg Paul Müller & Thomas Cottier, "Estoppel", II *Encyclopedia of Public International Law* 119 (1994).

<sup>91</sup>See *Payment of Various Serbian Loans Issued in France (Serbia v France)*, Judgment, PCIJ 1929 (Series A) Nos 20/21, at 38. *Tinoco (UK v Costa Rica)*, Arbitration, 18 *American Journal of International Law* 149 (1923); *Barcelona Traction, Light & Power Co (Belgium v Spain)*, ICJ Rep 1964, at 24; *North Sea Continental Shelf (Federal Republic of Germany v The Netherlands)*, ICJ Rep 1969, at 25; *Land, Island and Maritime Frontier Dispute (El Salvador v Honduras)*, ICJ Rep 1990, at 118. See also Bin Cheng, *General Principles of Law as Applied by International Courts and Tribunals* 143–44 (London, Stevens, 1953).

<sup>92</sup>See *Legal Status of Eastern Greenland*, PCIJ 1933 (Series A/B), No 53, at 62. The reliance of Denmark on the Norwegian (Ihlen) declaration that recognised Danish sovereignty over Greenland sufficed for the purposes of invoking equitable estoppel by Denmark. No indication of detriment suffered by Denmark because of such reliance was required or demonstrated. A comparable example is that of the *Temple of Preah Vihear (Cambodia v Thailand)*, ICJ Rep 1962, at 6. Thailand (Siam) was precluded from disputing the validity of the map that was used for drawing up the border between Cambodia and Siam, as it had never questioned its validity during the period that expired between the time it was drawn up and the time the dispute arose. As noted in the dissenting opinion of Judge Spender, *ibid* at 144, there was no discussion or indication of the detriment suffered by Cambodia in reliance upon Thailand's acceptance of the purported border. See also Brown, above n 87, at 396–97; O'Connor, above n 88, at 92.

<sup>93</sup>*Nuclear Tests (Australia v France)*, Judgment, ICJ Rep 1974, at 26.

<sup>94</sup>Brown, above n 87, at 409; Kolb, above n 88, at 39. See also International Law Commission, *Report on the work of its fifty-first session* para 532 (1999), available at [www.un.org](http://www.un.org).

<sup>95</sup>*Nuclear Test* case, above n 93, at 268.

<sup>96</sup>See the *Nuclear Test* case, above n 93, at 269; see also Kolb, above n 88, at 39–40.

<sup>97</sup>For a different opinion see Brown, above n 87, at 410. He claimed that this broad interpretation might undermine the very stability it seeks to create. It would allow for wild fluctuations in legal rulings depending on the whims of the parties and judges in a given dispute. See also Zoller, above n 86, at 341 ff; See also the dissenting opinion of Judge Barwick and Judge De Castro, in the *Nuclear Test* case, above n 93, at 268 and 374–75, respectively, who questioned the legal character of the French unilateral declarations.

<sup>98</sup>See Jörg P Müller, *Vertrauensschutz im Völkerrecht* 228 (Cologne, Heymann, 1971); Herbst, above n 48, at 363. Cf International Law Commission, *Report on the work of its fifty-first session* para 530 (1999), available at [www.un.org](http://www.un.org); *ibid*, *Report on its fifty-second session* paras 541 ff (2000).

<sup>99</sup>Müller (in Simma), above n 85, at 93; Müller (Vertrauensschutz), above n 98, at 229–30. Contra White, above n 13, at 419. He argued that a lack of good faith would only be a justifiable limit to Security Council action if it can be explained why all its members went along with the resolution, in spite of them being aware that it was in bad faith. This argument cannot be accepted, since determining the subjective motives for state action is a virtually impossible task based on speculation. See also the cautious approach of Herbst, above n 48, at 363. He observed that the principle was applied restrictively in that it did not protect a future expectation of an abstract nature. For example, in para 2 of SC Res 984 of 11 April 1995, the Security Council stated that its permanent members which were in possession of the nuclear weapons would act immediately in accordance with the relevant provisions of the Charter, in the event that non-nuclear weapon states, who were parties to the Treaty on the Non-Proliferation of Nuclear Weapons, were the victim of an act of aggression in which nuclear weapons were used. One could be tempted to read this as a self-imposed, binding obligation to intervene in the case of a nuclear attack on a non-nuclear state. However, Herbst suggested that due to the general and abstract nature of the declaration, it was unlikely that states could rely on the estoppel principle if the Security Council refrained from intervening under the circumstances so described.

which would not depend on the demonstration of detriment suffered or advantage gained, as the case may be.<sup>100</sup> This relates to the need for ensuring consistency with regard to the actions of an organisation which, whilst effectively having *erga omnes* effect, could only be subjected to judicial review with great difficulty.<sup>101</sup> Without such consistency the trust and confidence of member states in the organisation responsible for the maintenance of international peace would be eroded, with detrimental effects for its long term efficiency and the stability of international relations in general.<sup>102</sup>

The relevance of equitable estoppel as a concretisation of good faith in serving as a limit to the enforcement powers of the Security Council gains significance when one examines the interaction between this principle and the obligation of the Security Council to respect fundamental human rights norms and basic norms of international humanitarian law.

#### 4.2. The Interaction between the Principle of Good Faith and Respect for Fundamental Human Rights

As pointed out above in section 4, the Security Council's obligation to respect the core content of fundamental human rights when resorting to enforcement measures already follows from Article 1(3) of the Charter. The type of enforcement measures that are bound by the core content of human rights norms concerns non-military enforcement measures, for example economic sanctions. When the Security Council resorts to military measures, the limits to its powers are primarily provided by the

basic norms of the law of armed conflict,<sup>103</sup> which are elaborated on in section 4.3.

In spite of the broad language of Article 1(3) of the Charter, the core content of the human rights norms at stake can be drawn from the human rights instruments developed under the auspices of the organisation.<sup>104</sup> Although the Security Council is not a party to these treaties by means of ratification, they represent an elaboration upon the Charter's original vision of human rights found in Article 1(3) and Articles 55 and 56.<sup>105</sup> The human rights contained in these documents thus constitute the human rights that, under Article 1(3), the United Nations have to promote and respect.

The obligation to promote and respect human rights is strengthened by the interaction between Article 1(3) and the principle of good faith (equitable estoppel) contained in Article 2(2) of the Charter. This principle implies that the United Nations have to conform to the human rights standards developed within the framework of the organisation. In this context one has to bear in mind that the organisation created an extensive system for monitoring the implementation of the human rights instruments developed by it.<sup>106</sup> By promoting human rights in this manner,

<sup>103</sup> This is not to be interpreted as implying that the protection granted by human rights norms are automatically suspended by the outbreak of armed conflict. After all, in the preamble of SC Res 237 of 14 June 1967, the Security Council itself stated that essential and inalienable human rights should be respected even during the vicissitudes of war. However, to the extent that there are differences between human rights standards and standards of humanitarian law, the latter will be determinative during an armed conflict, as it constitutes the *lex specialis*. The different standards gain particular importance with respect to the legality of the deprivation of life, as will be illustrated in ch 6. See also *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, ICJ Rep 1996, at 230. Hereinafter referred to as *Nuclear Weapons* opinion; Human Rights Committee, *General Comment No 29, State of Emergency* para 3 (2001); Theodor Meron, "The Humanization of Humanitarian Law", 94 *American Journal of International Law* 266 (2000).

<sup>104</sup> These include the Universal Declaration of Human Rights of 10 December 1948; the International Covenant on Civil and Political Rights of 16 December 1966 and the Protocols thereto; the International Covenant on Economic, Social and Cultural Rights of 16 December 1966; the Convention on the Elimination of All Forms of Racial Discrimination of 21 December 1965; the Convention on Elimination of All Forms of Discrimination Against Women of 17 December 1979; the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment of 17 December 1984; and the International Convention on the Rights of the Child of 20 December 1989. The text of these and all other United Nations human rights documents cited in this chapter, are available at [www.unhcr.ch/](http://www.unhcr.ch/).

<sup>105</sup> See also Roger Normand, "A Human Rights Assessment of Sanctions: The Case of Iraq, 1990-1997", in Willem JM van Genugten & Gerard A de Groot (eds), *United Nations Sanctions, Effectiveness and Effects, Especially in the Field of Human Rights. A Multi-disciplinary Approach* 23 (Antwerp, Intersentia, 1999); Hans-Peter Gasser, "Collective Economic Sanctions and International Humanitarian Law", 56 *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* 880 (1996); Andrew K Fishman, "Between Iraq and a Hard Place: The Use of Economic Sanctions and Threat to International Peace and Security", 13 *Emory International Law Review* 712 (1999).

<sup>106</sup> Fraas, above n 40, at 82-83; See Akande, above n 12, at 324.

<sup>100</sup> However, even if one adhered to the narrower concept of equitable estoppel, it is arguable that the Security Council would be estopped from violating fundamental human rights. For by doing so, it would be securing a benefit in the form of an aggrandisement of its powers, in contradiction of Art 1(3) of the Charter.

<sup>101</sup> See ch 2 and ch 3.

<sup>102</sup> It is noteworthy that equitable estoppel in the European Community (EC) is still strongly linked to the notion of unreasonable (non-foreseeable) economic damage. See, for example, Case 344/85, *Ferriere San Carlo SpA v Commission*, [1987] ECR 4435; Case 120/86, *Mulder v Minister van Landbouw en Visserij*, [1988] ECR 2321; Case 170/86, *Von Datzien v HZA Hamburg-Jonas*, 1988 [ECR] 2355; Case 203/86, *Spain v Council* [1998] ECR 4563; Case T-203/96, *Embassy Limousines v Parliament* [1998], at para 75-para 76. This can be explained by the fact that the EC system of trade liberalisation is inherently linked to rapidly changing economic conditions and "hard business luck". This factor combined with the legal certainty provided by a centralised judiciary in the form of the ECJ, would justify adherence to the more restrictive concept of equitable estoppel in the EC context. Cf John Temple Lang, "Legal Certainty and Legitimate Expectations as General Principles of Law", in Ulif Beunitz & Joakim Nergelius (eds), *General Principles of European Community Law* 170 ff (Kluwer, The Hague, 2000); Eleanor Sharpston, "European Community Law and the Doctrine of Legitimate Expectations: How Legitimate and for Whom?", 11 *Northwestern Journal of International Law & Business* 90-91 (1990). For a discussion of the emerging doctrine of equitable estoppel in the World Trade Organisation (WTO), see Cottier & Scheffer, above n 87, at 60 ff.

the United Nations created the expectation of respect for these rights on the part of the organisation itself. The obligation to act in good faith obliges member states, when acting in the context of an organ of the United Nations, to fulfil legally relevant expectations that are raised by their conduct with regard to human rights standards accepted in the framework of the organisation.<sup>107</sup>

On the basis of the principle of good faith, one can therefore argue that organs of the United Nations, including the Security Council, will be estopped from behaviour that violates the essence of the rights protected in these treaties, as this would constitute an act of bad faith on the part of the organisation. The flip-side of this argument would imply that those members of the United Nations which have not yet ratified the major United Nations human rights instruments would nonetheless be bound to the core content (essence) of the rights contained in these instruments when serving as a member of the Security Council. When participating in the decision-making process of an organ of the United Nations, these members will have to act in accordance with those obligations that the majority of members created for the organisation as a whole.

The following chapters (notably chapters 6, 8 and 9) will be mostly concerned with the implications of the "expectation of respect" for certain human rights standards contained in the International Covenant on Civil and Political Rights of 1966 (ICCPR) and the International Covenant on Economic, Social and Cultural Rights of 1966 (ICESCR). Together with the United Nations Declaration of Human Rights of 1948 (UDHR), these covenants form the Universal Bill of Human Rights, which constitute the foundation of the United Nations system for the protection of human rights. This implies that these treaties serve as the primary point of departure when analysing the Security Council's good faith obligation to respect human rights standards. The implications of a similar "expectation of respect" in relation to the norms contained in the other United Nations human rights treaties are only referred to in passing, or in a supplementary fashion.

#### 4.2.1. *The Limitation of Human Rights by the Security Council*

The next question that springs to mind is whether the Security Council would be allowed to limit human rights when adopting non-military enforcement measures under Article 41 of the Charter. In answering this question one has to distinguish between non-derogable rights, and those

human rights that can be subjected to limitation. Article 4(2) of the ICCPR contains the non-derogable human rights which have to be respected by states even in times of emergency. The non-derogable rights include the right to life<sup>108</sup>; the prohibition of torture or cruel and degrading treatment<sup>109</sup>; the prohibition of slavery and *servitudo*<sup>110</sup> or civil imprisonment<sup>111</sup>; the impermissibility of retroactive punishment<sup>112</sup>; the right of recognition before the law<sup>113</sup>; and freedom of thought, religion and conscience.<sup>114</sup>

The protected status of these rights implies that the obligation on the part of the Security Council to act in good faith towards human rights norms would be stronger in relation to the non-derogable rights and that it may not limit these rights when adopting enforcement measures under Article 41 of the Charter. In addition, most of the non-derogable human rights have arguably gained *ius cogens* status, which constitutes a separate reason why the Security Council may not limit these rights when adopting enforcement measures,<sup>115</sup> regardless of whether (all of its) members have actually ratified the ICCPR.

As far as the derogable rights in the ICCPR are concerned, Article 4(1) allows states to derogate from their obligations in times of emergency. This derogation is, however, subjected to a strict principle of proportionality, since states may only derogate from their obligations to the extent strictly required by the exigencies of the situation.<sup>116</sup> That states are also allowed to limit the rights in the ICESCR follows from states parties' obligation to take steps, to the maximum of their available resources, to achieve progressively the full realisation of the rights in the ICESCR.<sup>117</sup> This formulation acknowledges limits to economic, social and cultural rights necessitated by limited resources.<sup>118</sup> However, although this is a flexible criteria for limitation, it does not relieve states parties from a minimum core obligation with respect to each right. Even in times of

<sup>108</sup> Art 6(1) ICCPR. An exception is provided for in relation to the death penalty in Art 6(2).

<sup>109</sup> Art 7 ICCPR.

<sup>110</sup> Art 8(1) and (2) ICCPR.

<sup>111</sup> Art 11 ICCPR.

<sup>112</sup> Art 15 ICCPR.

<sup>113</sup> Art 16 ICCPR.

<sup>114</sup> Art 18(1) ICCPR.

<sup>115</sup> See *General Comment No 29*, above n 103, at para 11, which described the proclamation of certain rights as being of a non-derogable nature as a recognition, in part, of their peremptory nature.

<sup>116</sup> Art 4(1) ICCPR. See also Human Rights Committee, *General Comment No 5, Derogation of Rights* para 3 (1981). It opined that measures taken under Art 4 were of an exceptional and temporary nature. They may only last as long as the life of the nation concerned is threatened. Also, in times of emergency the protection of human rights becomes all the more important, particularly those rights from which no derogation can be made. This was reaffirmed in *General Comment No 29*, above n 103, at para 2 and para 4.

<sup>117</sup> Art 2(1) ICESCR.

<sup>118</sup> See Committee on Economic, Social and Cultural Rights, *General Comment No 3, The Nature of States Parties Obligations* para 1 and para 9 (1990).

<sup>107</sup> Fraas, above n 40, at 82. See Akande, above n 12, at 323. He claimed that it would be anachronistic if an organ of the United Nations were itself empowered to violate human rights, when the whole tenor of the Charter is to promote the protection of human rights by and with in states.

economic hardship minimum essential levels of each of the rights are incumbent upon every state party.<sup>119</sup>

The question that arises is what the right of derogation in Article 4(1) of the ICCPR and the flexible nature of the rights in the ICESCR imply for enforcement measures imposed by the Security Council. Since the situations in which the Security Council resorts to Article 41 of the Charter would amount to an emergency, it should have the right to limit the derogable rights protected by the ICCPR.<sup>120</sup> Moreover, in order for economic sanctions to achieve their objections, they will almost always have a significant impact on economic, social and cultural rights.<sup>121</sup> It therefore seems logical that the Security Council has the right to limit the rights protected by the ICESCR.

This still leaves unanswered whether the Security Council would be subjected to a proportionality principle when limiting the derogable rights in the ICCPR and the rights in the ICESCR and if so, what the nature of this proportionality principle should be. After all, the Security Council is a unique institution with authority and responsibilities that differ from those of individual states.<sup>122</sup> When responding to a threat to international peace and security, the Security Council is reacting to situations that threaten international peace as opposed to the security of one single state. The gravity of the situation coupled with the Security Council's need to act efficiently may therefore question whether it should be subjected to a (strict) proportionality principle when limiting human rights in terms of Articles 41 of the Charter.<sup>123</sup>

As will be illustrated in chapter 6, this question gains particular significance with respect to economic and social rights, since they are the most likely to be affected by economic sanctions. Certain statements of the Committee on Economic, Social and Cultural Rights (hereinafter the Committee), lead to the conclusion that the Security Council has to respect some notion of proportionality when limiting human rights in the context of an economic embargo. According to the Committee, the provisions of the ICESCR cannot be considered to be inoperative or in

any way inapplicable, solely because a decision has been taken that considerations of international peace and security warrant the imposition of economic sanctions.<sup>124</sup> The state targeted with sanctions and the international community itself must do everything possible to protect at least the core content of the economic, social and cultural rights of the peoples of that state.<sup>125</sup>

The Committee derives this obligation from the commitment in the Charter to promote respect for all human rights.<sup>126</sup> This conclusion of the Committee can be interpreted as a reaffirmation of the expectation that the Security Council will act in accordance with the core content of human rights norms that were developed within the framework of the United Nations. It also implies that the leeway granted to the Security Council to limit economic, social and cultural rights may not be interpreted as an authorisation to suspend these rights and that some notion of proportionality needs to be maintained. For the same reason coercive measures under Article 41 of the Charter may also not suspend the derogable rights in the ICCPR or limit them beyond any proportion.<sup>127</sup>

In chapters 6, 8 and 9 the leeway of the Security Council in limiting human rights, as well as the type of proportionality principle applicable when doing so, will be developed in more detail. As will be illuminated in those chapters, these questions are closely related to the nature of the right at stake (eg the right to health, the right to a fair hearing) and the nature of the enforcement measures (eg broad economic sanctions, quasi-judicial measures etc) involved.

These chapters will also illustrate that the Security Council's obligation to act in good faith towards human rights norms further implies the obligation to monitor the impact of enforcement measures on the civilian population on a regular basis. This follows from the fact that the regular monitoring of human rights forms a central obligation of states parties to the

<sup>124</sup> *General Comment No 8*, above n 121, at para 7.

<sup>125</sup> *Ibid.*, at para 7. At para 10 it stressed that the imposition of sanctions did not in any way nullify or diminish the relevant obligations of that state party. While sanctions will inevitably diminish the capacity of the affected state to fund or support some of the necessary measures, the affected state remains under an obligation to ensure the absence of discrimination in relation to the enjoyment of these rights, and to resort to all possible measures, including negotiations with other states and the international community, to reduce to a minimum the negative impact upon the rights of vulnerable groups within the society. See also Human Rights Committee, *General Comment No 12, The right to adequate food* para 28 (1999). Even where a state faces severe resource constraints, whether caused by a process of economic adjustment, economic recession, climatic conditions or other factors, measures should be undertaken to ensure that the right to adequate food is especially fulfilled for vulnerable population groups and individuals.

<sup>126</sup> *General Comment No 8*, above n 121, at para 8. It also underlined that every permanent member of the Security Council has signed the ICESCR, although China and the United States have yet to ratify it, and that most of the non-permanent members at any given time are parties to the ICESCR.

<sup>127</sup> Cf Seiderman, above n 54, at 84.

<sup>119</sup> *Ibid.*, at para 10. It continues by stating that a state party in which any significant number of individuals is deprived of essential foodstuffs, or essential primary health care, or basic shelter and housing, or of the most basic forms of education is, *prima facie*, failing to discharge its obligations under the Covenant.

<sup>120</sup> Fraas, above n 40, at 83.

<sup>121</sup> Human Rights Committee, *General Comment 8, Right to liberty and security of persons* para 3 (1982). For example, sanctions often cause significant disruption in the distribution of food, pharmaceuticals and sanitation supplies. They also jeopardise the quality of food and the availability of clean drinking water, severely interfere with the functioning of basic health and education systems and undermine the right to work. See also Anna Segall, "Economic sanctions: legal and policy constraints", 81 *International Review of the Red Cross* 37 (1999).

<sup>122</sup> Normand, above n 105, at 28.

<sup>123</sup> See Normand, above n 105, at 28, who stated that the Security Council moved in a grey area between war and peace.

ICCPR and ICESCR.<sup>128</sup> In the process they have to pay special attention to any worse-off regions or areas and to any specific groups or sub-groups which appear to be particularly vulnerable or disadvantaged. This is to ensure that states parties are aware of the extent to which the various rights are enjoyed by all individuals within its territory or under its jurisdiction.<sup>129</sup> By emphasising the importance of monitoring in such a fashion, the United Nations has created the legitimate expectation that it would monitor the impact of its own actions on human rights as well, notably when these rights are limited by Security Council enforcement action.

#### 4.3. The Interaction between the Principle of Good Faith and Respect for Basic Norms of International Humanitarian Law

In addition to the promotion of respect for human rights norms, Article 1(3) of the Charter also outlines the solving of international problems of a humanitarian character through international cooperation as a purpose of the United Nations.<sup>130</sup> From this it follows that the basic rules of international humanitarian law, otherwise known as the law of armed conflict, constitutes a further limitation on the enforcement powers of the Security Council under Chapter VII of the Charter. For it is difficult to see how the United Nations could realise this aim if its own forces did not respect the basic rules of international humanitarian law in situations of armed conflict.<sup>131</sup>

This conclusion is also underpinned by the United Nations' own behaviour. During peace-keeping operations the organisation has consistently requested troop contributing countries to ensure that their respective

contingents respect the four 1949 Geneva Conventions,<sup>132</sup> and has itself requested these forces to respect the "principles and spirit" of these Conventions.<sup>133</sup> It has followed this practice with respect to enforcement operations authorised under Chapter VII of the Charter, as well as (classic) peace-keeping operations where the United Nations forces could become involved in hostilities in self-defence.<sup>134</sup> For example, in the Korean conflict, the Unified Command announced that it would be guided by the humanitarian principles of the 1949 Geneva Conventions and, in particular, the principles in common Article 3.<sup>135</sup> During the (first) Gulf War, the United Nations authorised forces also left no doubt as to the applicability of international humanitarian law to the military operations.<sup>136</sup>

A clause stating that the United Nations force shall observe the "principles and spirit" of the general international conventions applicable to the conduct of military personnel was also included in the regulations for UNEF and ONUC, as well as the United Nations Forces in Cyprus (UNFICYP).<sup>137</sup> By 1991, a similar clause was included in the model status-of-forces agreement for peace-keeping operations, which codified customary practices and principles applicable to United Nations peace-keeping operations.<sup>138</sup> In accordance with this clause, the United Nations

<sup>132</sup>The conventions in question concern the Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field of 12 August 1949; the Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea of 12 August 1949; the Geneva Convention Relative to the Treatment of Prisoners of War of 12 August 1949; the Geneva Convention Relative to the Protection of Civilian Persons in Time of War of 12 August 1949, available at [www.icrc.org](http://www.icrc.org).

<sup>133</sup>Legal Opinion of the Secretariat of the United Nations, "Question of the Possible Accession of Intergovernmental Organisations to the Geneva Conventions for the Protection of War Victims", *United Nations Juridical Yearbook* 153–54 (1972). Hereinafter referred to as *Legal Opinion*.

<sup>134</sup>The Rules for United Nations (authorised) forces are developed for each specific force. The specific rights and responsibilities for contingents are agreed upon between the United Nations and troop-contributing states in participation agreements. The relation with the host state is regulated in a status of forces agreement (SOFA). Where no such agreements have been concluded, it may be assumed that informal agreements referring to established practice exists. Most of this practice is contained in the model agreements drafted by the Secretary-General. See Marten Zwanenburg, "Compromise or Commitment: Human Rights and International Humanitarian Law Obligations for UN Peace Forces", in 11 *Leiden Journal of International Law* 238 (1998).

<sup>135</sup>S/233 (1951); Le Comité international de la Croix Rouge et le conflit de Corée, 1 *Recueil des documents* 8–11 (1952); Finn Seyfersted, *United Nations Forces in the Law of Peace and War* 183–84 (Leyden, Stijhoff, 1966); see also Christopher Greenwood, "International Humanitarian Law and United Nations Military Operations", 1 *Yearbook of Humanitarian Law* 18–19 (1998).

<sup>136</sup>See United States Department of Defence, "Report to Congress on Conduct of Persian Gulf War", 31 *International Legal Materials* 612 (1992); Akande, above n 12, at 324.

<sup>137</sup>ST/SGB/UNEF/1 Reg. 44 (1957); ST/SGB/ONUC/1 Reg. 43 (1963); UNFICYP, ST/SGB/UNFICYP/1 Reg. 40 (1964). See also: JG Fleury, "The Plea of Ignorance", *War, Peace and Security WWW Server*, at [www.cfsc.dnd.ca/nc/amsc/amsc1/011.html](http://www.cfsc.dnd.ca/nc/amsc/amsc1/011.html).

<sup>138</sup>Fleury, above n 137.

<sup>128</sup>Committee on Economic, Social and Cultural Rights, *General Comment No 1, Reporting by States Parties* para 3 (1989). General Comment No 12, above n 125, at para 31; Human Rights Committee, *Consolidated Guidelines for State Reports under the ICCPR* para D (1999).

<sup>129</sup>*General Comment No 1*, above n 128, at para 3.

<sup>130</sup>Art 1(3) of the Charter; Casser, above n 105, at 880. This can also be concluded from the *Legal Consequence for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970)*, advisory opinion, ICJ Rep 1971, at 55–56. The ICJ affirmed that Resolution 276 (1970) obliged states to refrain from entering treaties with South Africa, where the latter acted on behalf of Namibia. However, this obligation did not extend to treaties of a humanitarian character, the non-respect of which would have negative consequences for the people of Namibia. See Herbst, above n 48, at 381; Gowlard-Debbas (State Responsibility), above n 23, at 92; Gill, above n 13, at 83.

<sup>131</sup>Richard D Glick, "Lip Service to the Law of War: Humanitarian Law and United Nations Armed Forces", in 17 *Michigan Journal of International Law* 62 (1995). See also Starck, above n 40, at 157 ff. She underlined that human rights and the norms of humanitarian law are two sides of the same coin, as both categories of norms are underpinned by the necessity of respect for and protection of the dignity of the human person. See also Andreas Stein, *Der Sicherheitsrat der Vereinten Nationen und die Rule of Law* 6 (Baden-Baden, Nomos, 1999).

has to observe and respect the "principles and spirit" of the four Geneva Conventions of 12 August 1949, the Additional Protocols of 8 June 1977<sup>139</sup> and the UNESCO Convention of 14 May 1954 on the Protection of Cultural Property in the event of armed conflict during peace-keeping operations.<sup>140</sup>

By expressing its support in this manner, the United Nations created the expectation of respect for core humanitarian principles on the part of the organisation itself. One can therefore argue that the organs of the United Nations, including the Security Council, would be estopped from behaviour that violated core principles of international humanitarian law, as this would constitute an act of bad faith on the part of the organisation. The good faith obligation to respect basic norms of international humanitarian law has been significantly reinforced by the United Nations' own contribution to the development and concretisation of the core elements of international humanitarian law. This has been effected, in particular, by the Secretary-General's Bulletin of 6 August 1999,<sup>141</sup> which sets out the fundamental principles and rules of international humanitarian law applicable to forces under United Nations command and control.<sup>142</sup>

<sup>139</sup>le Protocol, Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts of 8 June 1977 (hereinafter referred to as Additional Protocol I); Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts of 8 June 1977 (hereinafter referred to as Additional Protocol II), available at [www.icrc.org](http://www.icrc.org).

<sup>140</sup>A/46/185 para 28 (1991). This clause has subsequently been included, *inter alia*, in the Agreement between the United Nations and the Government of the Republic of Rwanda on the Status of the United Nations Assistance Mission for Rwanda (UNAMIR) of 5 November 1993. See S/26927 para 7 (1997); see also Greenwood, above n 135, at 21; Fleury, above n 137.

<sup>141</sup>ST/SGB/1999/13. Hereinafter referred to as the Bulletin.

<sup>142</sup>The Bulletin is applicable to United Nations forces conducting peace-keeping and peace enforcement operations under United Nations command and control, but not to forces authorised but not commanded by the United Nations. See ST/SGB/1999/13, at s 1.1. It is therefore narrower in scope than the Safety Convention, above n 153, which would also apply to forces under national command and control that were authorised by the United Nations to become involved in an internal armed conflict. However, this should not be interpreted to mean that the latter category would not be bound by the core principles of humanitarian law. Art 20(a) of the Safety Convention determines that "nothing in the Convention shall affect the applicability of international humanitarian law and universally recognised standards of human rights as contained in international instruments in relation to the protection of United Nations operations and United Nations associated personnel or the responsibility of such personnel to respect such laws and standards." (Emphasis added). This clearly implies that the protection granted to United Nations (authorised) forces by the Safety Convention does not free them from their responsibility to respect core elements of humanitarian law. For further discussion see Daphna Shraga, "UN Peace-keeping Operations: Applicability of International Humanitarian Law and Responsibility for Operations-Related Damage", 94 *American Journal of International Law* 408 (2000); Paolo Benvenuti, "Le Respect du Droit International Humanitaire par les Forces des Nations Unies: La Circulaire du Secrétaire Général", 105 *Revue Générale de Droit International* 361 (2001); Marten Zwanenburg, "The Secretary-General's Bulletin on Observance by United Nations Forces of International Humanitarian Law: Some Preliminary Observations", in 5 *International Peace-keeping* 137 (1999).

In spite of any ambiguities concerning its official legal status,<sup>143</sup> this Bulletin creates a clear expectation that United Nations forces will act in accordance with the principles concretised therein.<sup>144</sup>

The same applies to the jurisprudence of the International Criminal Tribunal for the former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR), which have significantly contributed to the clarification of core humanitarian standards since the mid 1990s. Although their decisions are not formally binding on the United Nations itself, it would not be in accordance with the principle of good faith if the Security Council authorised military forces to deviate from core humanitarian principles concretised by its very own sub-organs. The combined effect of the Bulletin and the ICTY/ICTR jurisprudence—which shows a clear overlap in their concretisation of the core elements of international humanitarian law, as will be indicated in section 4.3.2—therefore clearly strengthens the expectation that the United Nations (including the Security Council) would observe and respect these norms under all circumstances.

#### 4.3.1. *The Limitation of International Humanitarian Law by the Security Council*

The question that now has to be answered is how to deal with the organisation's own, official point of view that it is not bound by the 1949 Geneva Conventions.<sup>145</sup> It has supported this position with the argument that some of the obligations contained therein can only be discharged by the exercise of judicial and administrative powers which the organisation does not possess. This includes, in particular, the authority to exercise criminal jurisdiction over members of the forces who act in violation of international humanitarian law.<sup>146</sup> This factor, combined with the

<sup>143</sup>One could, for example, argue that the Bulletin—being an internal administrative issuance—would not be strictly binding on the members of the national contingents, as they do not constitute members of the United Nations secretariat. For a discussion, see Zwanenburg, above n 142, at 135.

<sup>144</sup>The Bulletin was the result of several attempts to give greater content to the undertaking to respect the principles and spirit of the international humanitarian conventions. In 1995 the United Nations Special Committee on Peace-keeping Operations requested the Secretary-General to draw up a code of conduct for peace-keeping personnel consistent with applicable international humanitarian law, so as to ensure the highest standards of conduct (A/50/230 (1995)). The ICRC took the lead in the discussion that ensued and in 1996 submitted to the Secretary-General a set of draft guidelines, which ultimately resulted in the current Bulletin (ST/SGB/1997/1). See also International Committee of the Red Cross, Report of a Meeting of Experts on the Applicability of International Humanitarian Law to United Nations Forces (Geneva, ICRC, 1995); Greenwood, above n 135, at 29; Benvenuti, above n 142, at 356 ff. Cf Linos-Alexandre Siclianos, "L'autorisation par le Conseil de Sécurité de Recourir à la Force: Une Tentative d'Évaluation", 106 *Revue Générale de Droit International Public* 34 ff (2002).

<sup>145</sup>Legal Opinion, above n 133, at 153; see also Zwanenburg, above n 142, at 134.

<sup>146</sup>Legal Opinion, above n 133, at 153.

settled practice of troop-contributing states to take primary and direct responsibility for international humanitarian law violations committed by their contingents,<sup>147</sup> has been used to substantiate the position that the international humanitarian law obligations of contributing states would relieve the United Nations from any obligations in this regard.<sup>148</sup>

It is submitted that in light of the analysis in section 4.3., the United Nations' own position cannot be understood as meaning that it is not bound by the norms of the 1949 Geneva Convention at all. It could only be understood as meaning that it is not bound by these norms in exactly the same manner as states and that the Security Council may authorise some limitation of the norms of international humanitarian law if the circumstances so require.<sup>149</sup> This follows not only from the nature of some of the obligations at stake (eg those concerning the exercise of criminal jurisdiction), but also from the special role of the United Nations—and the Security Council in particular—in maintaining and restoring international peace and security.

For example, it has been suggested that a Security Council authorised operation, including a military offensive in terms of Chapter VII of the Charter, would constitute an act of law enforcement on behalf of the entire international community and would therefore not possess the character of war. Consequently, the United Nations could not be regarded as a beligerent for the purposes of international humanitarian law.<sup>150</sup> This argument is closely linked to the notion that the need for impartiality during a United Nations (authorised) operation would prevent it from becoming a party to an armed conflict.<sup>151</sup> These factors may explain why neither the

<sup>147</sup> See, for example, UNMIK/REG/2000/47, at s 2.4., available at [www.un.org/peace/kosovo](http://www.un.org/peace/kosovo). This regulation subjected the KFOR personnel to the exclusive criminal jurisdiction of their respective sending states. John Cerone, "Minding the Gap: Outlining KFOR Accountability in Post-Conflict Kosovo", 12 *European Journal of International Law* 486 (2001); see also ch 8, at s 3.1.

<sup>148</sup> *Glick*, above n 131, at 96.

<sup>149</sup> The general view amongst authors is that the United Nations, as a subject of international law, is subject to the norms of humanitarian law when engaged in a situation of armed conflict, to the extent that they constitute customary international law. However, as explained above, at s 2, the Security Council may deviate from customary law. The norms which have acquired customary status include the four 1949 Geneva Conventions, above n 132; The Hague Convention (IV) Respecting the Laws and Customs of War on Land and the Regulations annexed thereto of 18 October 1907; as well as certain parts of the two Additional Protocols to the 1949 Geneva Conventions, above n 139. See S/25704 para 35 (1993); *Nuclear Weapons* opinion, above n 103, at 257; *Greenwood*, above n 135 at 16–17. See also the conclusions of the Institut de Droit International, "Conditions of Application of Humanitarian Rules of Armed Conflict to Hostilities in which the United Nations Forces may Be Engaged", 54 (II) *Annuaire de l'Institut de Droit International* 465 ff (1971); *Benvenuti*, above n 142 at 360; *Luigi Conforti*, "La Compatibilità des Sanctions du Conseil de Sécurité avec le Droit International Humanitaire—Commentaire", in Vera Gowlland-Debbas, *United Nations Sanctions and International Law* 236–37 (The Hague, Kluwer, 2001).

<sup>150</sup> *Greenwood*, above n 135, at 14.

<sup>151</sup> See also *Glick*, above n 131, at 70.

United Nations, nor the states involved in the NATO operations in Bosnia-Herzegovina, regarded themselves as parties to an armed conflict, despite the NATO air attacks during 1994 and 1995 and UNPROFOR's increasingly severe bouts of fighting with the Bosnian Serbs.<sup>152</sup>

Moreover, in the context of international armed conflicts the matter is complicated by the Convention on the Safety of United Nations and Associated Personnel of 9 December 1994,<sup>153</sup> which treats the terms of this convention and those of the law of international armed conflict as mutually exclusive regimes. The Safety Convention, which criminalises attacks on United Nations and associated personnel, applies to all operations established by the Security Council and conducted under United Nations authority and control.<sup>154</sup> The only exception concerns a United Nations operation authorised by the Security Council as an enforcement action under Chapter VII of the Charter, in which any of the personnel of a United Nations force are engaged as combatants against organised armed forces and to which the law of international armed conflict applies.<sup>155</sup> This means that the threshold for the application of the law of international armed conflict becomes the ceiling for the application of the Safety Convention.<sup>156</sup>

The Safety Convention has been regarded as an important and necessary step in increasing the protection afforded to peace-keepers. Therefore it is to be expected that the United Nations and those states which contribute large numbers of personnel to United Nations operations will be extremely reluctant to accept that United Nations forces have become parties to an international armed conflict and thereby forfeited the protection granted by the Safety Convention.<sup>157</sup> It is most likely that only those Chapter VII operations under unified command and control which relate to conflicts with a clear international character, such as Korea and the (first) Gulf War, would be excluded from the scope of the Safety Convention. Chapter VII operations under national command and control conducted in a context of an internal armed conflict, such as those undertaken in Somalia, Rwanda, Haiti and possibly even the NATO operations in Bosnia-Herzegovina and Kosovo, would still fall under the

<sup>152</sup> *Greenwood*, above n 135, at 24; Evan T Bloom, "Protection of Peace-keepers: The Convention on the Safety of United Nations and Associated Personnel", 89 *American Journal of International Law* 625 (1995).

<sup>153</sup> A/49/742 (1994). Hereinafter referred to as the Safety Convention. It has entered into force on 15 January 1999.

<sup>154</sup> *Ibid.*, at Art 1(c)(i); *Bloom*, above n 152, at 622–23.

<sup>155</sup> Art 2(2) of the Safety Convention, above n 153; *Greenwood*, above n 135, at 25.

<sup>156</sup> *Greenwood*, above n 135, at 25; see also *ibid.*, "Protection of Peace-keepers: The Legal Regime", 7 *Duke Journal of Comparative & International Law* 199 ff (1996); *Bloom*, above n 152, at 625 ff.

<sup>157</sup> *Greenwood*, above n 135, at 25; see also *Bloom*, above n 152, at 624.

protective regime of the Safety Convention.<sup>158</sup> This conclusion is supported by the fact that Article 1 of the Safety Convention covers operations under United Nations "authority and control",<sup>159</sup> which is broad enough to include the latter type of operations.<sup>160</sup>

These examples illustrate that some deviation from well established international humanitarian law principles may be called for during United Nations (authorised) operations. However, this should not be interpreted as meaning that forces acting under the authority of the United Nations could also deviate from the core obligation of international humanitarian law. After all, the question whether the United Nations could become a party to an armed conflict in the formal sense cannot be the only determinative factor in deciding whether the norms of international humanitarian law are applicable. From the perspective of those affected by the armed conflict, the triggering of the rules of international humanitarian law will rather depend on whether hostilities are occurring, as the legal character of the force's mandate is hardly likely to mitigate the effect of its actual participation in an armed conflict.<sup>161</sup> In addition, and as is illuminated above in section 4.3., a negation of the core norms of international humanitarian law would also violate the expectations to respect these norms resulting from Article 1(3) in combination with Article 2(2) of the Charter.

Consequently, the Security Council does not have the competence to authorise the United Nations command to deviate from the core norms of international humanitarian law, nor is it allowed to authorise member states (acting under unified command and control) or regional organisations to do so during a military offensive. One could even argue that the Security Council would not be allowed to delegate a military mandate to member states or a regional organisation, unless it has the assurance that they would respect the basic norms of international humanitarian law during a military offensive. If this were not the case, the organisation

could circumvent its obligations under international law by delegating its enforcement powers to member states. However, since a presumption of legality is attached to Security Council resolutions, one will then have to assume that this assurance has been given unless evidence to the contrary is provided.

As has been mentioned above, the supervision of respect for international humanitarian law by United Nations (authorised) forces primarily rests with the national authorities<sup>162</sup> and an analysis of the extent to which they have given effect to this duty falls outside the scope of this study. It is nonetheless worth noting that the United Nations' obligation to observe core principles of international humanitarian law carries with it the expectation that the organisation would also provide its own monitoring mechanism. Although the United Nations Secretariat has started tracking individual cases of misconduct and inquired about follow-up actions at the national level, it has thus far refrained from institutionalising these procedures by, for example, creating a humanitarian Ombudsperson.<sup>163</sup>

One could attempt to justify this absence of an institutionalised monitoring mechanism with the argument that the main applicable treaties, namely the 1949 Geneva Conventions and their Additional Protocols, were not developed under the auspices of the United Nations. The organisation would therefore not fulfil the same oversight role as it does with respect to human rights treaties such as the ICCPR and the ICESCR. As a result, it would also not be under a similar obligation to monitor its own adherence to international humanitarian law. On the other hand, one has to bear in mind that the progressive involvement of the United Nations in the concretisation of core humanitarian principles combined with its own commitment to respect these norms, can indeed result in an expectation that the organisation will provide its own mechanism for monitoring their observance by United Nations (authorised) forces. The creation of such a mechanism would also increase the political legitimacy of peace enforcement mandates.

#### 4.3.2. *Core Elements of International Humanitarian Law*

The core elements of international humanitarian law that are applicable to all forms of armed conflict<sup>164</sup> concern the rules designed to protect the

<sup>162</sup> This well established practice is also reaffirmed in ST/SGB/1999/13, at s 4, which subjects members of the military personnel of a United Nations force to prosecution in their national courts in case of violations of humanitarian law.

<sup>163</sup> See Zwanenburg, above n 142, at 139.

<sup>164</sup> An international armed conflict exists where there are hostilities involving the use of armed force between two or more states. An internal armed conflict is constituted by protracted armed violence between governmental authorities and organised groups, or between such groups within a state. The internal armed conflict distinguishes itself from cases of civil unrest or terrorist activities (to which international humanitarian law does not apply),

<sup>158</sup> Daphna Shraga, "The United Nations as an Actor Bound by International Humanitarian Law", 5 *International Peace-keeping* 76 (1998).

<sup>159</sup> As opposed to "Command and Control".

<sup>160</sup> See Shraga, above n 158, at 76; Greenwood, above n 135, at 25. In Somalia, for example, the United Nations and the United States characterised their involvement in the conflict against rebel groups and dissident factions as internal. Although the Safety Convention was not yet in force at the time, the example illustrates that the submission that any third-party intervention in an internal conflict would internationalise the conflict, would not be consistent with United Nations practice. Cf *Her Majesty the Queen v Private D J Brocklebank*, Court Martial Appeal Court of Canada, Court File No CMAC-383; 2 April 1996, at [www.cdnad.ca/](http://www.cdnad.ca/). The Court, *inter alia*, determined that neither the 1949 Geneva Conventions nor Additional Protocol II applied to the Canadian Force in Somalia. It found that there was no evidence of an armed conflict in Somalia and that the Geneva Conventions and Additional Protocols did not apply to peace operations. For criticism of this decision, see Young & Molina, above n 9, at 365 ff.

<sup>161</sup> Zwanenburg (Compromise), above n 134, at 239; see also Greenwood, above n 135, at 17, 22.

civilian population as well as the rules governing means and methods of warfare.<sup>165</sup> The essence of these rules is personified by common Article 3 of the 1949 Geneva Conventions, which aims to protect persons taking no active part in hostilities. These include civilians, members of the armed forces who have laid down their arms, and those placed *hors de combat* by sickness, wounds, detention, or any other cause.<sup>166</sup> The International Court of Justice (ICJ), ICTY and ICTR considered this Article to represent the minimum humanitarian standards applicable to all forms of armed conflict.<sup>167</sup>

by means of the protracted nature of the armed violence and the extent of organisation of the parties involved. See *Prosecutor v Zejnil Delalic, Hazim Delic, Esad Landžo and Zdravko Mucic*, Judgment, Case No IT-96-21, 16 November 1998, Trial Chamber, at para 184. Hereinafter referred to as the *Celebici* judgment; *Prosecutor v Dusko Tadic*, Opinion and Judgment, Case No IT-94-1-I, 7 May 1997, Trial Chamber, at para 561 ff; *Prosecutor v Alfred Musena*, Judgment, Case No ICTR-96-13, 27 January 2000, Trial Chamber, at para 257 ff. See also E/CN4/1998/87, at para 70; Sonja Boelaert-Suominen, "The Yugoslavia Tribunal and the Common Core of Humanitarian Law Applicable to all Armed Conflicts", 13 *Leiden Journal of International Law* 632 ff (2000); Meron, above n 103, at 260.

<sup>165</sup> *Nuclear Weapons* opinion, above n 103, at 257; *Prosecutor v Milan Martić*, Review of the Indictment Pursuant to Rule 61, Case No IT-95-11-R61, 8 March 1996, Trial Chamber, at para 12. Hereinafter referred to as *Martić* Rule 61 proceeding; *Prosecutor v Dario Kordić & Mario Čerkez*, Motion to Dismiss the Amended Indictment for lack of Jurisdiction based on the Limited Jurisdictional Reach of Art 2 and Art 3, Case No IT-95-14/2-PT, 2 March 1999, Trial Chamber, at para 30; Boelaert-Suominen, above n 164, at 644.

<sup>166</sup> Common Art 3 reads as follows: 'In the case of armed conflict not of an international character occurring in the territory of one of the High Contracting Parties, each Party to the conflict shall be bound to apply, as a minimum, the following provisions:

- (1) Persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed *hors de combat* by sickness, wounds, detention, or any other cause, shall in all circumstances be treated humanely, without any adverse distinction founded on race, colour, religion or faith, sex, birth or wealth, or any other similar criteria. To this end, the following acts are and shall remain prohibited at any time and in any place whatsoever with respect to the above-mentioned persons:
  - (a) violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture;
  - (b) taking of hostages;
  - (c) outrages upon personal dignity, in particular humiliating and degrading treatment;
  - (d) the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples.
- (2) The wounded and sick shall be collected and cared for.
 

An impartial body, such as the International Committee of the Red Cross, may offer its services to the Parties to the conflict.

The Parties to the Conflict should further endeavour to bring into force, by means of special agreements, all or part of the other provisions of the present Convention.

The application of the preceding provisions shall not affect the legal status of the Parties to the conflict.<sup>167</sup>

<sup>167</sup> *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America)*, Merits, ICJ Rep 1986, at 113-1; *Tadic* decision, above n 3, at para 102; *Prosecutor v*

In accordance with these standards, parties may never make civilians the object of attack<sup>168</sup> and may consequently never use weapons that are incapable of distinguishing between civilian and military targets.<sup>169</sup> In the area of operation military forces have to avoid, to the extent feasible, locating military objectives within or near densely populated areas. They also have to take all necessary precautions to protect the civilian population, individual civilians and civilian objects against the dangers resulting from military operations.<sup>170</sup> The absolute prohibition of unlawful attacks on civilians also outlaws reprisals, even if they were a response proportionate to a similar violation perpetrated by the other party.<sup>171</sup>

The distinction between combatants and civilians also implies that the collateral damage to civilians caused by a military offensive has to be proportional, in that it may not cause damage and harm to the civilian population disproportionate to the concrete and direct military advantage anticipated.<sup>172</sup> The military forces thus have to take all feasible precautions to avoid and minimise incidental loss of civilian life, injury to

*Zejnil Delalic, Hazim Delic, Esad Landžo and Zdravko Mucic*, Judgment, Case No IT-96-21, 20 February 2001, Appeals Chamber, at para 143; *Prosecutor v Jean Paul Akayeshu*, Judgment, Case No ICTR-96-4, 1 June 2001, Appeals Chamber, at para 442. See also the *Prosecutor v Tihomir Blaskic*, Judgment, Case No IT-95-14, 2 March 2000, Trial Chamber, at para 170. The Trial Chamber stated that the provisions of Additional Protocol 1 and Additional Protocol 2 prohibiting attacks against civilians were sufficiently covered by common Art 3 of the Geneva Conventions. See Boelaert-Suominen above n 164, at 620.

<sup>168</sup> The prohibition concerns attacks on the civilian population as such, as well as individual circumstances. See *Martić* Rule 61 proceeding, above n 165, at para 12.

<sup>169</sup> *Nuclear Weapons* opinion, above n 103, at 257; ST/SGB/1999/13, at s 5.1. See the Report of the Special Rapporteur on the Situation of Human Rights in Kuwait under Iraqi Occupation, E/CN 4/1992/26, at para 36, that also based these principles on the so-called Martens Clause. A modern form of this clause (which dates from 1899) can be found in Art 1(2) of Additional Protocol 1 to the 1949 Geneva Conventions, above n 139. It states that in cases not covered by this protocol, or by other international agreements, civilians and combatants remain under the protection and authority of the principles of international law derived from established custom, from the principles of humanity and from dictates of public conscience. See also Theodor Meron, "The Martens Clause, Principles of Humanity, and Dictates of Public Conscience", 94 *American Journal of International Law* 82-83 (2000); Zwanenburg, above n 142, at 137.

<sup>170</sup> ST/SGB/1999/13, at s 5.4. Military installations and equipment of peace-keeping operations, as such, shall not be considered military objectives. This is a deviation from Art 58(b) and Art 58 (c) of Additional Protocol I, above n 139, that do not include this exception for United Nations installations and equipment. See Zwanenburg, above n 142, at 137; Benvenuti, above n 142, at 363.

<sup>171</sup> *Prosecutor v Zoran Kupreskic, Mirjan Kupreskic, Vlatko Kupreskic, Drago Josipovic and Vindimir Santic*, Judgment, Case No IT-95-16, 14 January 2000, Trial Chamber, at paras 521 ff; *Martić* Rule 61 proceeding, above n 165, at para 15; ST/SGB/1999/13, at s 5.6; see also Meron (Martens Clause), above n 169, at 82.

<sup>172</sup> See the *Nuclear Weapons* opinion, above n 103, at 257; *Martić* Rule 61 proceeding, above n 165, at para 18; ST/SGB/1999/13, at s 5.5; Boelaert-Suominen, above n 164, at 649. See also William J Fenwick, "Targeting and Proportionality during the NATO Bombing Campaign against Yugoslavia", in 12 *European Journal of International Law* 498 (2001); Delbrück, above n 28, at 1142.

civilians or damage to civilian property. These include attacks which employ a method or means of combat which cannot be directed at a specific military objective.<sup>173</sup>

Persons no longer taking part in military operations, including civilians, members of armed forces who have laid down their weapons and persons placed *hors de combat* by reasons of sickness, wounds or detention, shall in all circumstances be treated humanely without any adverse distinction based on race, sex, religious convictions or any other ground.<sup>174</sup> Acts such as violence to life or physical integrity; murder as well as cruel treatment such as torture, mutilation or any form of corporal punishment; collective punishment; the taking of hostages; rape (of both male and female victims); enforced prostitution; any form of sexual assault and humiliation and degrading treatment; enslavement and pillage against any of the above mentioned persons are prohibited at any time and in any place.<sup>175</sup>

As far as an offensive against legitimate military targets are concerned, parties are not permitted to use weapons that cause superfluous injury or unnecessary suffering to combatants.<sup>176</sup> These include, in particular, the prohibition of the use of asphyxiating, poisonous or other gases and biological methods of warfare; bullets which explode, expand or flatten easily in the human body and certain explosive projectiles. The use of certain conventional weapons, such as non-detectable fragments, anti-personnel mines, booby traps and incendiary weapons, is also prohibited.<sup>177</sup>

The provision declaring that the protections guaranteed under common Article 3 are to be applied at all times and all places,<sup>178</sup> regardless of whether the conflict is of an international character, constitutes strong evidence for considering these norms to be of a *jus cogens* nature.<sup>179</sup> This conclusion is strengthened by the fact that both the Bulletin as well as the ICTY and ICTR jurisprudence refer to these norms as fundamental and

<sup>173</sup> ST/SGB/1999/13, at s 5.3; see *Marric* Rule 61 proceeding, above n 165, at para 18. See also Gardam, above n 9, at 407. In accordance with state practice during the Gulf War, this criteria will be violated where there was negligent behaviour in ascertaining the nature of a target or the conduct of the attack itself, so as to amount to the direct targeting of civilians.

<sup>174</sup> ST/SGB/1999/13, at s 7.1. ff. S 8 explicitly refers to the humane treatment of detainees, whilst s 9.1. provides that the sick and wounded shall be treated humanely and receive the medical care and attention required by their condition.

<sup>175</sup> ST/SGB/1999/13, at s 7.2; *Furudžija* judgment, above n 49, at paras 143 ff and para 476; See *Celibici* case, above n 164, at paras 442 ff. See also Boelaert-Suominen, above n 164, at 638; Zwanenburg, above n 142; Benvenuti, above n 142, at 367.

<sup>176</sup> *Nuclear Weapons* opinion, above n 103, at 257. ST/SGB/1999/13, at s 6.4; see also Benvenuti, above n 142, at 364–65.

<sup>178</sup> Common Art 1 determines that: The High Contracting Parties undertake to respect and to ensure respect for the present Convention in all circumstances.

<sup>179</sup> Seiderman, above n 54, at 96. Note that in the *Celibici* case, above n 164, at paras 442 ff, the Trial Chamber explicitly referred to the prohibition of torture as a norm of *jus cogens*.

constituting the core principles of international humanitarian law.<sup>180</sup> The ICJ, for its part, explicitly refrained from determining that the fundamental rules of international humanitarian law would constitute elements of *jus cogens*.<sup>181</sup> Yet, at the same time, it did refer to these norms as “intransgressible principles of international customary law”.<sup>182</sup> This would arguably come very close to a determination that one is dealing with *jus cogens*, as the term “intransgressible” does indicate that no circumstance would justify any deviation.<sup>183</sup>

In essence therefore, the United Nations and its organs are bound by the core principles of international humanitarian law for three separate, albeit closely related reasons. First, it concerns norms which constitute elements of the purposes of the United Nations. In addition, the United Nations has committed itself to these norms in a fashion that has created a legal expectation that it will honour them when authorising a military operation for the restoration or maintenance of international peace and security. Any behaviour to the contrary would violate the principle of good faith to which the organisation is bound in terms of Article 2(2) of the Charter. Finally, one could also argue that these norms now concern elements of *jus cogens* which have to be respected by states and organs of the United Nations alike.

## 5. CONCLUSION

The foregoing analysis reflect that the Security Council’s powers to adopt enforcement measures are limited by two categories of norms which are closely related. First, the norms of *jus cogens* prevent the Security Council from adopting measures that would result in genocide, or that would violate the right to self-defence, the right to self-determination, or certain basic norms of human rights and international humanitarian law. The principles and purposes of the United Nations, for their part, oblige the Security Council to refrain from imposing a settlement on parties and to respect the core elements of self-determination, human rights, international humanitarian law and state sovereignty. It also requires the Security Council to act in good faith and to fulfil legal expectations previously created by its own actions, when resorting to enforcement measures under Chapter VII.

<sup>180</sup> In the *Alajateshu* case, above, n 167, at para 442, the ICTR even described common Art 3 as the “quintessence” of humanitarian law.

<sup>181</sup> *Nuclear Weapons* opinion, above n 103, at 258.  
<sup>182</sup> *Ibid.*, at 257.

<sup>183</sup> Conforti, above n 149, at 238. For the Security Council’s obligation to respect norms of *jus cogens*, see ch 5, at s 3.

These two categories thus overlap with respect to certain purposes of the United Nations, notably the right to self-determination and basic norms of human rights and international humanitarian law. This does not mean, however, that the contents of these two categories are identical in as far as the overlap is concerned. The following chapters will illuminate that, on the one hand, those human rights norms which constitute elements of *ius cogens* also form part of the purposes of the United Nations. At the same time, however, not all human rights norms that qualify as core elements of the purposes of the United Nations constitute *ius cogens*. This relates to the fact that the activities of the United Nations in recent decades, in particular in the field of human rights, have contributed to the evolution of the core contents of these norms. This, in turn, has led to an expansion of the core content of the purposes of the organisation.

The following chapters will further examine the consequences for Security Council enforcement measures of the inter-action between the purpose to promote human rights in Article 1(3) of the Charter and the principle of good faith in Article 2(2). The interaction between socio-economic rights and the principle of good faith forms a focal point of the analysis of the Security Council's power to impose economic sanctions in chapter 6. This chapter will also illustrate how the right to self-defence can limit the power of the Security Council to impose an arms-embargo in a situation of inter-state armed conflict.

The role of self-determination as a limitation on Security Council enforcement measures is illuminated in chapter 8, in connection with the competence of the Security Council to authorise the civil administration of a territory. Chapter 9 examines whether the Security Council has respected the principles of justice and international law (including the principle of the right to a fair trial) when adopting quasi-judicial measures as a mechanism for restoring or maintaining international peace and security. This analysis will also illustrate how the imposition of a settlement on parties can violate the territorial integrity of a state.

As indicated above in section 1, chapter 7 identifies additional, structural limitations to the Security Council's enforcement powers. It concerns member states or regional organisations of the Security Council to authorise will illustrate that the Security Council's ability to delegate military powers is limited by the structure of the Charter as a whole, rather than by any particular purpose, principle or norm of *ius cogens*. Although chapters 7 is exclusively concerned with the delegation of military powers, chapters 8 and 9 will build on this delegation model when examining situations in which the Security Council delegated its power to take binding decisions to the Secretary-General and judicial sub-organs, respectively.

## 6

## Limits to the Security Council's Discretion to Impose Economic Sanctions

### 1. INTRODUCTION

IN CHAPTER 5 at Section 4 it was determined that the Security Council's powers to adopt enforcement measures can be limited by basic human rights norms, as they constitute core elements of the purposes of the United Nations and to some extent even norms of *ius cogens*. The purpose of the current chapter is to identify in a more concrete fashion the extent to which human rights norms can limit the Security Council's discretion to impose non-military measures in the form of economic sanctions. In addition, it will analyse the limitations following from the right to self-defence—which was also identified as an outer limit for Security Council enforcement action—for economic sanctions in inter-state armed conflicts.

The chapter commences by elaborating on the nature of the particular human rights which pose a limitation to economic enforcement measures. In doing so, it concentrates on the (non-derogable) right to life and the (derogable) right to health, as practice has shown that these rights are the most likely to be affected by broad economic embargoes. The chapter also underlines the importance of an effective monitoring mechanism for determining the impact of the sanctions regime on civilians.

The yardsticks identified during this inquiry are then applied to the three most controversial economic sanctions regimes which the Security Council has adopted during the existence of the United Nations. These include the economic embargoes against Iraq, former Yugoslavia, and Haiti, respectively. The only other comprehensive economic embargoes in the history of the United Nations were those against Southern Rhodesia after its unilateral declaration of independence in 1965, and Libya after its refusal to extradite the *Lockerbie* suspects in 1992. In both instances, however, the human rights impact was much less severe.



**D. Tladi and G. Taylor**

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# On the Al Qaida/Taliban Sanctions Regime: Due Process and Sunseting

Dire Tladi\* and Gillian Taylor\*\*

## Abstract

The Al Qaida/Taliban sanctions regime established under Resolution 1267 of the UN Security Council has been under severe strain due to lack of adherence to due process standards. Over the years, the Security Council has incrementally adopted measures to try to alleviate some of the concerns, including through the creation of an ombudsperson to receive petitions from listed individuals requesting to be de-listed. In June 2011, the Security Council adopted two resolutions further strengthening the due process standards. This paper considers whether the new measures adopted are sufficient to respond to some of the concerns raised. While the new initiatives are a significant improvement, as a matter of law, the due process objections remain.

## I. Background

1. While the death of Osama bin Laden on 1 May 2011 was greeted with joy and celebration from most quarters of the world,<sup>1</sup> the fight against terrorism is far from over. The attacks in Pakistan a week following the killing of bin Laden are evidence of the threat posed by Al Qaida even after the death of bin Laden.

\* BLC LLB (Pretoria), LL.M (Connecticut), PhD (Rotterdam). Legal Adviser, South African Permanent Mission to the United Nations (email: tladi@dirco.gov.za). Extraordinary Professor, University of Stellenbosch. The views expressed herein are not to be attributed to the Government of the Republic of South Africa. This paper was completed on 18 October 2011. The websites cited were current as of this date, unless otherwise noted.

\*\* BA LLB (University of the Witwatersrand, Johannesburg), LL.M (St. John's University, New York) (email: gillian.dupont@gmail.com).

1 The Security Council even adopted a Presidential Statement welcoming the fact that "Osama bin Laden will never again be able to perpetrate such acts of terrorism...". See SC Presidential Statement 9 (2011), para.3. The pre-final draft of this Presidential Statement actually welcomed "the killing" of bin Laden.

2. Part of the United Nations' response to the threat posed by Al Qaida is the regime established under UN Security Council Resolution 1267 (hereinafter the "1267 regime" or "Al Qaida/Taliban sanctions regime").<sup>2</sup> The 1267 regime is innovative in many ways. UN sanctions regimes, for example, are generally of limited geographical scope.<sup>3</sup> The 1267 regime is, neither in terms of application or purpose, limited to any one territory. Because of their geographically limited scope, UN sanctions regimes also tend to be implicitly time-limited. This is to say, once a situation in a specific country ceases to be a threat to international peace and security, it can be accepted that the regime should cease to be relevant and should thus fall away. However, since it may be assumed that international terrorism will *always* be a threat to international peace and security, it is difficult to imagine the 1267 regime becoming obsolete.

3. The Al Qaida/Taliban sanctions regime has, however, come under severe criticism (and consequently strain) for its lack of fairness, especially with regard to its listing and de-listing procedures. The criticism has come from different quarters, including Member States of the United Nations and academic writers.<sup>4</sup> Even more important, the regime has been faced with legal challenges in the courts of different States and regional organizations.<sup>5</sup> Needless to say, such legal challenges, unlike academic criticism, have an impact on the effectiveness of the 1267 regime. In recent years, in response to the criticism and legal challenges, the Security

2 The term "1267 regime" is used here to indicate the sanctions regime established by Resolution 1267, prior to the recent adoption of Security Council Resolutions 1988 and 1989, on 17 June 2011. While the 1267 regime was established in Resolution 1267, the nuts and bolts of the regime have been built over time and can be found in a number of resolutions including, most importantly, SC Res 1267 (1999); SC Res 1333 (2000); SC Res 1390 (2002); SC Res 1455 (2003); SC Res 1526 (2004); SC Res 1617 (2005); SC Res 1735 (2006); SC Res 1822 (2008) and SC Res 1904 (2009).

3 SC Res 733 (1992), para.5, "for the purposes of establishing peace and stability in Somalia", imposes an embargo on "deliveries of weapons and military equipment to Somalia". See also, e.g., SC Res 1521 (2003) on Liberia. For a more recent example of the Security Council's country-specific approach, see generally the provisions of SC Res 1970 (2011) on Libya.

4 See, e.g., Albert Posch, *The Kadi Case: Rethinking the Relationship between EU Law and International Law?* 15 Columbia JEL (2009), Online 1; and Johannes Reich, *Due Process and Sanctions Targeted against Individuals Pursuant to Resolution 1267 (1999)*, 33 Yale JIL (2008), 505. See also *The United Nations Global Counter Terrorism Strategy*, GA Res 288 (2006), para.15, Annex II.

5 See, e.g., Case T-315/01, *Kadi v. Council & Comm'n*, 2005 E.C.R. II-3649, Joined Cases C-402/05 P & C-415/05 P, *Kadi & Al Barakat v. Council of the European Union*, [2008] E.C.R. I-6351 (hereinafter "Kadi I"), Case T- 85/09 *Kadi v. Commission*, 2010 (hereinafter "Kadi II") and joined cases C-584/10 P, C-593/10 P and C-595/10 P, judgment currently pending. See also *Nada v. SECO, Bundesgericht*, 14 November 2007, 133 *Entscheidungen des Schweizerischen Bundesgerichts II* 450 (Switzerland), and *Nada v. Switzerland*, Eur.Ct.H.R., Application no. 10593/08, hearing held on 23 March 2011, decision pending (hereinafter "Nada"); and *Nabil Sayadi and Patricia Vinck v. Belgium*, CCPR/C/94/D/1472/2006 (29 December 2008) (hereinafter "Sayadi").

Council has adopted a number of measures to try to make the sanctions regime more compatible with fairness requirements. The Council's most recent opportunity to address some of the challenges against the regime came with the negotiation and adoption of Security Council Resolutions 1988 and 1989 of 2011.<sup>6</sup>

4. The purpose of this paper is to consider the extent to which these newly adopted resolutions address the fairness and due process challenges directed at the 1267 regime. The focus of the paper falls squarely on the question of whether Resolutions 1988 and 1989 are adequate to address some of the criticisms levelled against the Al Qaida/Taliban sanctions regime. Thus, questions relating to the legal limits of the powers of the Council fall outside the scope of this paper.<sup>7</sup> Closely linked to the question of the limits of the powers of the Security Council is the institutional issue of whether the decisions of the Council can be reviewed by courts.<sup>8</sup> Similarly, given the critical role that European Union courts have played in the discourse, it is tempting to focus attention on the institutional question of the relationship between EU law and UN law.<sup>9</sup> While we will refer to recent EU jurisprudence in order to highlight and to categorize some of the challenges faced by the 1267 regime (and to which the Security Council was attempting to respond), the discussion of such institutional issues falls outside the focus of the analysis in this paper. In Section II, we examine the context within which these two new resolutions were adopted. In particular, we describe the nuts and bolts that make up the 1267 regime as well as some of the criticism and legal challenges facing the regime. In Section III, we provide an evaluation of the two new resolutions, including an examination

6 SC Res 1988 (2011), and SC Res 1989 (2011) (reissued for technical reasons on 1 July 2011).

7 A number of academic publications on the 1267 sanctions regime and which are cited herein undertake a detailed consideration of the legal validity of the Council's counter-terrorism measures and in particular whether there are any legal constraints on the powers of the Council. For a broader consideration of the limits of the powers of the Security Council, see Erika de Wet, *The Chapter VII Powers of the Security Council* (2004); Dire Tladi, *Reflections on the Rule of Law in International Law: The Security Council, International Law and the Limits of Power*, 31 *South African YJL* (2006), 231; and Daniel Halberstam and Eric Stein, *The United Nations, the European Union and the King of Sweden: Economic Sanctions and Individual Rights in Plural World Order*, 46 *Common Market LR* (2009), 13.

8 See Jose Alvarez, *Judging the Security Council*, 90 *American JIL* (1996), 8; Bernd Marrenz, *The Security Council, the International Court and Judicial Review: What Lessons from Lockerbie*, 10 *European JIL* (1999), 520. A related question is whether domestic (or even regional) courts can review the decisions of the Council, although this is concerned with vertical review.

9 This has been the focus of many academic publications to date. For a detailed discussion of this topic, see, e.g., Daniel Halberstam and Eric Stein, above n.7; Gráinne de Búrca, *The EU, the European Court of Justice and the International Legal Order after Kadi*, 51 *Harvard ILJ* (2010), 1; and P. Takis Tridimas and Jose A. Gutierrez-Fons, *EU Law, International Law and Economic Sanctions against Terrorism: The Judiciary in Distress?* 32 *Fordham ILJ* (2009), 901.

of issues arising during the negotiation process. Finally, in Section IV, we offer some concluding remarks.

## II. A regime at odds with general international law

### II.A. An overview of the 1267 regime

5. The 1267 regime is a UN Security Council sanctions regime obliging UN Member States to impose certain specified sanctions against the Taliban, Al Qaida and individuals and entities associated with them. The 1267 regime is predicated on the assumption that terrorism is a threat to international peace and security and thus requires the UN Security Council to respond under Chapter VII of the Charter of the United Nations.

6. The Al Qaida/Taliban sanctions regime is established under a series of Security Council resolutions, including Resolution 1267 from which the regime takes its name.<sup>10</sup> The context of the regime is set forth in the preamble of Resolution 1267, which, *inter alia*, reaffirms Afghanistan's territorial integrity and sovereignty, while at the same time expressing concerns relating to terrorism in that part of the world. This quite clearly is meant to justify the Al Qaida and the Taliban linkage. Another contextual aspect necessary to understand the regime and tensions reflected in the various resolutions under the regime is the affirmation that terrorism needs to be combated "by all means, in accordance with the Charter of the United Nations and international law, including applicable international human rights, refugee and humanitarian law".<sup>11</sup> Quite clearly, this text balances the need to take action with the recognition of limitations that may be imposed by other provisions of international law.

7. The regime imposes, and requires States to implement, three measures against Al Qaida, the Taliban and individuals and entities associated with them, namely, an assets freeze, a travel ban and a prohibition on the supply of arms. The sanctions are administered with reference to a list (hereinafter the "Consolidated List") that is regulated by a Committee of the Security Council (hereinafter the "1267 Committee" or the "Committee") established by the founding resolution and composed of all members of the Security Council.<sup>12</sup> The 1267 Committee is broadly tasked with

10 Other resolutions that are integral to the 1267 regime include: SC Res 1333, above n.2; SC Res 1363 (2001); SC Res 1390, above n.2; SC Res 1452 (2002); SC Res 1526, above n.2; SC Res 1617, above n.2; SC Res 1699 (2006); SC Res 1735, above n.2; SC Res 1822, above n.2 and SC Res 1904, above n.2.

11 While many of the Security Council resolutions mentioned in notes 2 and 7 above express respect for humanitarian concerns, including SC Res 1267, above n.2, paras.4 and 6; SC Res 1333, above n.2, paras.6 and 12; and SC Res 1452, above n.7, this specific wording can be found in the more recent resolutions in the 1267 regime: see SC Res 1822, above n.2, preambular para.3 and SC Res 1904, above n.2, preambular para.3.

12 SC Res 1267, above n.2, para.6.

seeking and considering information from Member States regarding implementation of the measures to be imposed via this resolution, reporting to the Security Council its findings in that regard, identifying humanitarian exceptions to those measures as well as considering requests for exemption from the measures to be imposed.<sup>13</sup>

8. An important function of the Committee is the consideration of the requests to add individuals and entities to the Consolidated List. The Committee also considers the possible de-listing of individuals and entities who purportedly no longer meet the requirements for listing. Through this process, the Committee exercises a significant amount of power. The process of listing and de-listing bestows on each member of the Committee a *de facto* veto. Thus, any proposal to list an individual or entity will be defeated if it is objected to by a single member. Similarly, a proposal or request for de-listing which is objected to by a single member of the Committee will not be successful.

9. The “Analytical Support and Sanctions Monitoring Team” (hereinafter the “Monitoring Team”) was established for an initial period of 18 months<sup>14</sup> to provide support to the Committee. The Monitoring Team’s core functions include: to report on and make recommendations regarding implementation of the measures; to engage in case studies and to conduct in-depth explorations of issues as required by the 1267 Committee; to submit a programme of work to the 1267 Committee and to travel to States as approved; to report to the 1267 Committee regularly and to assist the Committee in preparing its reports to the Security Council.

## II.B. The 1267 regime under scrutiny

10. The major criticism of the 1267 regime has been the discord it strikes with human rights standards. A number of authors frame the question in terms of the “legality” of the sanctions regime in the light of its potential inconsistency with human rights law.<sup>15</sup> Such an approach to the analysis invariably leads to a discussion of the limits of the powers of the Council—what Uruena refers to as the “dichotomic approach”.<sup>16</sup> It is by now a well-established principle that the Council’s power

13 *Ibid.*

14 SC Res 1526, above n.2, paras.6 and 7, with responsibilities enumerated in the Annex thereto.

15 See Andrew Hudson, Not a Great Asset: The UN Security Council’s Counter-terrorism Regime: Violating Human Rights, 25 Berkeley JIL (2007), 101; Daniel Halberstam and Eric Stein, above n.7; Craig Forsee and Kent Roach, Limping into the Future: The UN 1267 Terrorism Listing Process at the Crossroads, 42 George Washington ILR (2010), 217.

16 Rene Uruena, International Law as Administration: The UN’s 1267 Sanctions Committee and the Making of the War on Terror, 4 International Organisations LR (2007), 321. An approach which she states “leads nowhere useful”, at 328. For further discussion regarding the possible limits to the powers of the Security Council, see, among others, Andrea Bianchi, Assessing the Effectiveness of the UN Security Council’s Anti-terrorism Measures: The Quest for Legitimacy and Cohesion, 5 European JIL (2007), 881, particularly at note 19 thereof.

can be limited by the principles and purposes of the UN as provided for in the Charter<sup>17</sup> and *jus cogens*—although the precise practical implications of this principle are not particularly clear or concrete.<sup>18</sup> With reference to either the concept of *jus cogens* or the purposes and principles of the United Nations, writers often extract an obligation on the Council to respect human rights, including due process rights.<sup>19</sup> Whether the assertion that the Council is bound by due process is legally correct is, at least, open to question.<sup>20</sup> In any event, academic discussion of the fact that the 1267 regime exceeds the mandate of the Council because of the due process deficit, assuming this to be the case, is unlikely to have a direct impact on the Council. Rather, what the Council has been responding to when adopting improvements to the 1267 regime has been the legal challenges and their adverse effects, as these have the potential to disrupt the effectiveness of the regime, i.e. the effectiveness of the regime would be seriously threatened if countries were unable to implement the regime due to domestic legal challenges.<sup>21</sup>

11. As it is principally the legal challenges that the Council was responding to, and not the potential illegality of the 1267 regime, our analysis deals with the legal challenges faced by the regime and examines whether the resolutions adopted on 17 June have adequately addressed those challenges. In summary, the

17 The purposes and principles of the United Nations are outlined in Articles 1 and 2 of the Charter of the United Nations, respectively, and Article 24(2) of the Charter of the United Nations requires that the Security Council act in accordance with such purposes and principles when discharging its duties in the maintenance of peace and security. This line of reasoning is expounded by Daniel Halberstam and Eric Stein, above n.7, at 4.

18 See, e.g., de Wet, above n.7; Tladi, above n.7, 234–236.

19 See generally sources cited in note 15 above; and Grant L. Willis, Security Council Targeted Sanctions, Due Process and the 1267 Ombudsperson, 42 Georgetown JIL (2011), 673, at 730, Part III, Section G, where he advances some conclusions regarding the “[p]ossible legal bases for an obligation on the Security Council to comply with due process”.

20 See, e.g., Johannes Reich, above n.4, at 510, where he questions whether a European Court of Human Rights finding to the effect that it would only uphold national acts implementing Security Council resolutions if such mechanisms met certain standards under the European Convention was “consistent with the ‘supremacy clause’ of the UN”. While Reich was concerned here more with the vertical coherence (i.e. review of Security Council decisions by regional courts), the argument applies equally to horizontal coherence (i.e. invalidation of Council decisions on the basis of international human rights standards). See also Forsee and Roach, above n.15, at 235, who concede that “the applicability of human rights due process norms to the Security Council remains an uncertain area”; and Willis, above n.19.

21 This was a constant theme raised by some delegations pressing for improvements in the 1267 regime while negotiating Resolutions 1988 and 1989. The explanation of vote by the French delegation on the adoption of this resolution was explicit: “The improvements made to and the guarantees included in the sanctions regime against Al Qaida allow us to respond to and criticism that have been made, including by the judicial authorities in Europe and elsewhere.” See, Security Council Document, S/PV.6557, 4. Forsee and Roach, above n.15, at 261, have referred to the potential “national-level repudiation of the 1267 system”. If such a “national-level repudiation” is sufficiently widespread, the system would more than likely not be able to survive.

1267 regime has been criticized for, and the judicial challenges against it have been based on, its lack of adherence to due process. Again, because our primary objective is to test whether Resolutions 1988 and 1989 have adequately addressed these challenges, our limited intention in this section is to distill the core elements of the challenges and criticisms.

12. The 1267 regime and its conformity with international human rights standards have been under scrutiny for some time. In particular, questions have been asked about the compatibility of the regime with human rights standards and due process. The demands for due process stem from the invasive nature of the measures which could, potentially, result in the violation of numerous human rights, including freedom of movement, the right to property and the right to dignity, among others.<sup>22</sup> Given the 1267 regime's invasiveness and potential to violate an array of human rights, the call for due process protection becomes even more urgent.<sup>23</sup> As Forcese and Roach have observed, "listing has a consequence for the individual that, while short of being truly penal, is dire in its economic impact and the stigma it imparts."<sup>24</sup>

22 See, e.g., *Nada v. Switzerland*, Eur.Ct.H.R., Application no. 10593/08, above n.5. See also the ECJ's judgment in *Kadi*, joined cases C-402/05 P and C-415/05 P, above n.5, at para.371, where the Court finds "the plea raised by Mr Kadi that his fundamental right to respect for property has been infringed [ ] well founded". Machiko Kanetake, *Enhancing Community Accountability of the Security Council through Pluralistic Structure: The Case of the 1267 Committee*, 12 *Max Planck YUNL* (2008), 113, notes that an assets freeze has a significant impact on the listed individual's rights, including their right to property, their right not to be subjected to arbitrary or unlawful interference and their right to dignity.

23 Erika de Wet, *Human Rights Considerations and the Enforcement of Targeted Sanctions in Europe: The Emergence of Core Standards of Judicial Review*, in: Bardo Fassbender (ed.), *Securing Human Rights? Achievements and Challenges of the UN Security Council* (forthcoming, on file with author), who stresses that (under European Law) "the right to fair hearing applies to all decisions that can culminate in a measure adversely affecting" a person.

24 Forcese and Roach, above n.15, at 237. In a similar vein, Uruena, above n.16, at 327, observes that the regime has "the power to negatively affect lives in ways that were formerly available only to national police powers, which were subject to strict due process regulations. It is, therefore, dangerous for individuals' rights for [the organs of the regime] to lack appropriate limits, such as those protected by international human rights law". See also Bardo Fassbender, *Targeted Sanctions and Due Process: The Responsibility of the UN Security Council to Ensure that Fair and Clear Procedures Are Made Available to Individuals and Entities Targeted with Sanctions under Chapter VII of the UN Charter*, 20 March 2006 ([untreaty.un.org/ola/media/info\\_from\\_lc/Fassbender\\_study.pdf](http://untreaty.un.org/ola/media/info_from_lc/Fassbender_study.pdf)). This study was commissioned by the Office of Legal Affairs, in response to the World Summit Outcome Document (GA Res 1 (2005), para.109), which "call[ed] upon the Security Council with the support of the Secretary-General to ensure that fair and clear procedures exist for placing individuals and entities on sanctions lists and for removing them, as well as for granting humanitarian exemptions". Fassbender says, at page 6, that "a trend can be perceived widening the scope of customary law in regard to due process to include direct 'governmental' action of international organizations vis-à-vis individuals", i.e. when international institutions pursue actions formerly reserved for governmental bodies, they would subject themselves to review in terms of due process standards.

13. The calls for due process standards to be built into the regime include calls for greater information and transparency and the opportunity for those listed to have their cause heard—both of these, important elements of the basic due process rule, *audi alteram partem*. De Wet, in her study on the core standards of protection necessary for the 1267 regime, identifies a number of factors that have emerged as necessary.<sup>25</sup> She argues that the right to a hearing, in principle, requires that the listed individual or entity is notified of the evidence against them, provided with a statement of reasons for the decision to list and provided with an opportunity to state their case.<sup>26</sup> The standards identified by de Wet correspond to a 2010 report of the European Centre for Constitutional and Human Rights (hereinafter "the ECCHR").<sup>27</sup> Clear from both de Wet and the ECCHR report is the absolute necessity of providing the listed individual with sufficient information to be able to adequately state their case.

14. The right to review and for effective remedies also features prominently in the literature.<sup>28</sup> The Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms While Countering Terrorism, Martin Scheinin, as recently as December 2010 raised concerns about the compatibility of counter-terrorism measures with international human rights standards. Among other issues, the Special Rapporteur's report proclaims that it is vital that listed individuals have access to effective remedies by being able to bring "a complaint to a court or oversight institution".<sup>29</sup> Similarly, the General Assembly in 2006 called upon the 1267 Committee to "to ensure, as a matter of priority, that fair and transparent procedures exist for placing individuals and entities on its lists, for removing them and for granting humanitarian exceptions".<sup>30</sup> In her analysis, Uruena bluntly but correctly states that the "factual issue

25 De Wet, above n.23.

26 Ibid. These rights can also be gleaned from a myriad of international instruments including The Universal Declaration of Human Rights (art. 10), and The International Covenant on Civil and Political Rights (art. 14).

27 Gavin Sullivan and Ben Hayes, *Blacklisted: Targeted Sanctions, Preemptive Security and Human Rights* (2000), 27, declare that "at a minimum", the rights to be accorded to an individual should include the right to be informed, the right to be heard and the right to judicial review and an effective remedy. See also Hudson above n.15, at 102.

28 De Wet, above n.23; Sullivan and Hayes, above n.27, at 31. These rights are guaranteed under Article 28 of The Universal Declaration of Human Rights and Article 2 of The International Covenant on Civil and Political Rights.

29 Martin Scheinin, *Report of the Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms while Countering Terrorism*, para.20, delivered to the Human Rights Council of the General Assembly, GA HRC 51 (2010). He lists as examples of such oversight mechanisms ombudspersons and human rights commissions or other human rights institutions.

30 The United Nations Global Counter Terrorism Strategy, above n.4.

here is fairly straightforward: it is clear that the Committee is not providing an effective remedy, and it is clear that it should".<sup>31</sup>

15. Sullivan and Hayes are of the opinion that the right to an effective remedy can be satisfied by a non-judicial body such as an Ombudsperson.<sup>32</sup> To be effective, the relevant body must contain due process safeguards (opportunity to present case and provision of sufficient information), and importantly, the body must possess the power to grant appropriate relief.<sup>33</sup>

16. The principles elucidated above have been gleaned from cases in international, regional and domestic tribunals.<sup>34</sup> Of course, the most famous case is a complaint brought in the Courts of the European Union, *Kadi v. Council and Commission*.<sup>35</sup> *Kadi* has assumed a seminal importance in the literature, not only because it was far-reaching, but also because it threatened (and still does) to shake the effectiveness of the system through what Forcese and Roach referred to as "national-level repudiation", and it is this concern over "national-level repudiation" that has led the Security Council to respond.<sup>36</sup> The larger-than-life status of *Kadi* has resulted in a plethora of publications dedicated to its study. Many of these publications have focused on the implications of *Kadi* for the relationship between European courts (both domestic and EU courts) and the Security Council.<sup>37</sup> For our purposes, it is sufficient only to illuminate the normative issues relating to due process as identified in the *Kadi* decisions.

17. The facts in *Kadi* are now well known—Kadi alleged that European Union legislation implementing the 1267 regime measures was a violation of his right to be heard, his property rights and his right to effective judicial review.<sup>38</sup> The Court of First Instance decided that it had no authority to review the lawfulness of Security Council Resolutions,<sup>39</sup> that appropriate avenues did exist for redress within the

United Nations System<sup>40</sup> and that the rights alleged to have been violated did not rise to a violation of a *jus cogens* norm,<sup>41</sup> and consequently dismissed the action. As is now common knowledge, this decision was set aside on appeal and the Community Regulation implementing the 1267 sanctions regime was annulled.<sup>42</sup> The ECJ, on appeal, found that the implementing legislation violated the right to be heard of those listed in that, under the scheme, listed individuals were not afforded the opportunity to present their side of the case in a meaningful way.<sup>43</sup> The Court also expressed concern about the fact that under the regime the Committee is not obliged to provide "reasons and evidence" or relevant information. The General Court in *Kadi II* similarly ruled that the system did not allow a listed individual to effectively challenge allegations against him.<sup>44</sup> Key to the General Court's decision was the lack of sufficient information available to the listed person which the Court described as "general, unsubstantiated, vague and unparticularised".<sup>45</sup>

18. While the ECJ decision in *Kadi* received critical acclaim, the Human Rights Committee decision in *Sayadi v. Belgium* was regarded as slightly disappointing.<sup>46</sup> In that communication, the applicants claimed that their listing constituted violations of several of their rights. While the Committee did emphasize the need to respect human rights in the fight against international terrorism, Marko Milanovic severely criticizes the Human Rights Committee's approach, in particular for the dearth in reasoning, describing it as a "missed opportunity".<sup>47</sup> Also expressing disappointment with *Sayadi*, was de Wet, noting that the Human Rights Committee "passed up on the opportunity" to contribute to the body of jurisprudence, especially insofar as it relates to the Covenant on Civil and Political Rights.<sup>48</sup>

19. These are only a sample of the cases and literature on the compatibility of the 1267 regime with human rights standards in general, and due process requirements in particular.<sup>49</sup> The Security Council has not been oblivious to these calls and has, with time, introduced refinements in response to the criticisms.

40 Ibid. paras.262–265.

41 Ibid. paras.237–238, 242–243 and 285–286.

42 Joined Cases C-402/05 P & C-415/05 P, Kadi & Al Barakaat v. Council of the European Union, above n.5.

43 Ibid. para.334.

44 Kadi II, above n.5, para.174.

45 Ibid., para.157

46 Sayadi, above n.5.

47 Marko Milanovic, The Human Rights Committee's Views in *Sayadi v. Belgium: A Missed Opportunity*, 3 Goettingen JIL (2009), 519 (srn.com/abstract=1525806).

48 De Wet, above n.23.

49 For a consideration of further cases in Europe and other jurisdictions, including Pakistan, the United Kingdom and the United States, see The Eleventh Report of the Analytical Support and Sanctions Implementation Monitoring Team established pursuant to Security Council Resolution 1526 (2004) and extended by resolution 1904 (2009), UN Doc S/2011/245

31 Uruena, above n.15, at 327.

32 Sullivan and Hayes, above n.27, at 32.

33 Ibid.

34 See cases referred to above n.5.

35 Kadi, above n.5; see most importantly the judgment of the General Court of the European Union, Seventh Chamber, in *Kadi II*, above n.5. The Court of First Instance of the European Union has recently become known as the General Court or the "EGC" for "European General Court"—we refer to it throughout as the "Court of First Instance" or the "CFI".

36 Forcese and Roach, above n.15, at 261. For an explanation, see above n.21.

37 See, e.g., Halberstam and Stein, above n.7; de Wet, above n.23; Kanetake, above n.22.

38 Council Regulation 881/2002, imposing certain specific restrictive measures directed against certain persons and entities associated with Usama bin Laden, the Al-Qaida network and the Taliban, and repealing Council Regulation (EC) No. 467/2001 prohibiting the export of certain goods and services to Afghanistan, strengthening the flight ban and extending the freeze of funds and other financial resources in respect of the Taliban of Afghanistan, 2002, O.J. (L 139) 9.

39 Case T-315/01, *Kadi v. Council & Comm'n*, above n.5, paras.221–225.

20. An important refinement to the 1267 regime came in Resolution 1617 (2005), which required States proposing names to provide a “statement of case” indicating the reasons for the proposal of such names.<sup>50</sup> The resolution further required States to inform listed individuals of listing and de-listing procedures.<sup>51</sup> The obligation to provide a “statement of case” is consistent with a gradual emphasis on transparency.<sup>52</sup> It has to be emphasized that statements of case remain vague, at best, amounting to sets of allegations without any proof of actual involvement in terrorist activities. To justify the lack of proof required, the resolutions adopted under the 1267 regime continue to reiterate the preventative nature of the regime and the inapplicability of criminal standards.<sup>53</sup> Moreover, the requirement to provide information is never obligatory. The criticisms in terms of lack of due process, thus, remain relevant.

21. Without question, the most significant advancements have come in the process for de-listing. The first step in the direction of improving the de-listing process came in December 2006, when the Security Council adopted Resolution 1730,<sup>54</sup> outside the 1267 regime, on “General Issues Relating to Sanctions” in which the Secretary-General is requested to establish a Focal Point within the secretariat to receive de-listing requests in connection with Security Council sanctions regimes including the 1267 regime. For the most part, the institution of the Focal Point amounted to little more than the creation of a post office which did little to change the decision-making process in the Committee. The Focal Point would receive requests for de-listing and simply transmit these to the respective sanctions committees. The ECJ in the *Kadi* appeal made a statement in passing to the effect that the Focal Point innovation would not be sufficient to relieve the regime of the challenges against it as the process remains “in essence diplomatic and intergovernmental” and the listed persons remain, essentially, without an avenue for asserting their rights.<sup>55</sup>

(2011) ([www.un.org/sc/committees/1267/monitoringteam.shtml](http://www.un.org/sc/committees/1267/monitoringteam.shtml)), especially the Annex thereto.

50 SC Res 1617, above n.2, para.4.

51 *Ibid.* para.5.

52 Regarding the requirement to provide background information and the increasing importance placed on the transparency of the 1267 regime, see these Security Council resolutions: SC Res 1526, above n.2, para.17; SC Res 1617, above n.2, paras.4 and 5; SC Res 1735, above n.2, paras.9–11; SC Res 1822, above n.2, paras.13 and 24–26; and SC Res 1904, above n.2, preambular para.9.

53 See SC Res 1735, above n.2, preambular para.10; SC Res 1822, above n.2, preambular para.13; and SC Res 1904, above n.2, preambular para.10.

54 SC Res 1730 (2006).

55 *Joined Cases C-402/05 P & C-415/05 P, Kadi & Al Barakaat v. Council of the European Union*, above n.5.

22. Perhaps, the biggest refinement to the 1267 regime was the institution of the Ombudsperson in Resolution 1904 of 2009 to replace the Focal Point with respect to the 1267 regime.<sup>56</sup> Under the 1904 framework, the Ombudsperson is empowered to receive petitions from individuals listed in the 1267 Consolidated List and collect information necessary to assist the Committee to reach its decision. The Ombudsperson does this by receiving information from petitioners and relevant States, analysing the information and providing “observations” to the Committee to enable the Committee to make a decision on listing and de-listing. The Ombudsperson innovation would, taking into account the remarks in passing by the Court in the *Kadi* appeal about the Focal Point process being essentially diplomatic, not be sufficient. Even after the introduction of the Ombudsperson, the ultimate decision for de-listing remains essentially “diplomatic and intergovernmental” and the listed person or entity remains without an “opportunity to assert their rights”. As the General Court noted in relation to the Ombudsperson, the decision-making process is still not one of “an independent and impartial body” for determining the facts and law in respect of the listing of an individual.<sup>57</sup> From this remark in passing, it is not clear that anything short of a “full and rigorous judicial review” would be sufficient to placate the European Courts.<sup>58</sup>

### III. The latest Al Qaida and Taliban sanctions resolution

#### III.A. Key issues in the negotiations

23. The Security Council had barely a week and a half to negotiate the latest Al Qaida and Taliban resolutions. In truth, owing to the political realities (and inequities) of the Security Council, private negotiations between the Permanent Members (also known as the “P5”) of the Council had been going on for some time with the aim of reaching a consensus. Any consensus among the P5 would make meaningful negotiations with the rest of the members of the Council virtually impossible. The Permanent Members were, however, unable to reach consensus on a number of critical issues related to due process, thus necessitating full negotiations with the rest of the Council.

24. The first draft text, presented by the United States, was remarkable in the steps that it sought to take not only to bring the regime closer to conformity with due process standards, but also to reflect some of the changed political realities. It is worth noting that the proposals for improvements were based on the recommendations of the Monitoring Team.<sup>59</sup> The text advanced by the United States,

56 SC Res 1904, above n.2, paras.20 and 21, with duties enumerated in Annex II thereto.

57 *Kadi II*, above n.5, para.128.

58 *Ibid.* para.151.

59 Above n.14.

and supported by France and the United Kingdom in the P5 negotiations, proposed three major changes to the 1267 framework. Firstly, the text proposed splitting the resolution into two separate regimes, one for Al Qaida and the other for the Taliban. Secondly, and perhaps most far-reaching, the text proposed linking sunset clauses to the de-listing procedures—this was advanced as a response to some of the due process challenges faced by the regime outlined above. Finally, the text circulated by the United States proposed to make explicit the right of the Ombudsperson to make recommendations to the Committee on de-listing requests.

25. While the proposal to split the Taliban regime from the Al Qaida regime is not directly related to due process, it is still necessary to say a few words about the proposed split for the sake of completeness. Moreover, the proposed split did have some indirect implications with regard to due process, as questions were raised about whether the advancements made in the Al Qaida resolution would also be applicable to the new Taliban regime. The proposal to split the regime was based on the assumption that the threat posed by the Taliban is qualitatively different from the threat posed by Al Qaida.<sup>60</sup> Originally, the link between Al Qaida and the Taliban was made because the Taliban was harbouring Osama bin Laden. However, given the change in the political situation in Afghanistan and the fact that the Taliban no longer harbours bin Laden, the question whether there is any sense in linking Al Qaida and the Taliban became relevant. Moreover, the proposals for the split also made the argument that the political dialogue between the Taliban and the Afghan government would be enhanced by treating the Taliban differently from Al Qaida.

26. The proposal presented by the United States thus created a completely different sanctions regime for the Taliban (hereinafter the “Taliban regime”). This proposed Taliban regime was modelled on many country-specific sanctions regimes and, in particular, would apply to individuals or entities that posed a threat to the peace, stability and security of Afghanistan. Moreover, the “reconciliation conditions” contained in the Kabul Communiqué would, under the US proposed text, be taken into account during the de-listing process.<sup>61</sup> The Kabul Communiqué, among other things, endorsed the Afghan government’s Peace and Re-integration Programme, which encouraged members of the Taliban to renounce violence, renounce any links with international terrorist organizations, respect the Afghan Constitution and respect the rights of women.<sup>62</sup> The proposed Taliban regime would more overtly be directed at promoting the Afghan peace process and the

60 See The Eleventh Report of the Analytical Support and Sanctions Implementation Monitoring Team, above n.49, especially at para.16 and further.

61 The Kabul Communiqué of 20 July 2010 was the outcome of a conference between the Afghan government and a number of countries, including the P5, referred to in the Kabul Communiqué as the “international community”.

62 Ibid. paras.13 and 14.

focus would be less on Al Qaida or international terrorism. In addition, the views of the Afghan government would, under the new framework, have an influence on decision-making in respect of de-listing while the procedures of the Ombudsperson described above would not be applicable. The de-linking of the Taliban regime from the Al Qaida regime was pushed strongly by the United States, France and the United Kingdom, while Russia and China were opposed to the de-linking process. Of the non-permanent members, only India supported the Russian and Chinese view. The rest of the membership either supported the de-linking or were willing to acquiesce to it.

27. The sunset clause proposals contained in the Al Qaida text were the most important of the proposals advanced by the United States. The negotiating text imposed two types of sunset clauses: firstly, one linked to the Ombudsperson process and, secondly, another more general sunset clause. The Ombudsperson-linked sunset clause would be triggered by a recommendation of the Ombudsperson to the Committee that a person be de-listed. However, under the US proposal, such recommendation by the Ombudsperson would not result in an immediate de-listing. Rather, there would be a probationary period during which the Ombudsperson could receive further information. Only after this probationary period would the listed person or entity be de-listed, subject to an affirmative decision by the Committee to retain the listing. In other words, the effect of the sunset clause would be to reverse the decision-making process of the Committee, such that all members of the Committee would have to agree to the continued listing, as opposed to the previous approach where all members have to agree to the de-listing. To this proposal, the United Kingdom offered an amendment, the effect of which would be to dispense with the probationary period.

28. The US proposal, augmented by the UK amendment, would go some way to addressing *some* of the concerns identified above. Firstly, the Ombudsperson-linked sunset clause proposal would enhance the effectiveness of the Ombudsperson process and make it meaningful—in a sense, this process could provide a remedy to the “right to be heard” challenge. With this sunset clause proposal, the Committee cannot, as it can under the Resolution 1904 procedure, simply ignore the observations of the Ombudsperson.

29. The second sunset clause proposal in the Al Qaida text, the general sunset clause, would ensure that listings, and the invasive violation of rights they impose, are not maintained perpetually and without reason. Importantly, by requiring a positive decision to continue listing, the sunset clause proposals force any State insisting on retaining a listing to justify their contentions, at least to the other members of the Committee.

30. The sunset clauses alone, however, cannot address all the due process deficiencies of the 1267 regime. Even with the Ombudsperson and related sunset clauses, the possibility of listing persons and entities without justification remains.

The text provided by the United States did not require the provision of “adequate” reasons for listing, let alone evidence that the person being listed is involved in terrorism, beyond the “statement of case”. The negotiating text, further, did not require the provision of sufficient identifiers as a precondition for listing (or even for proposing a listing).

31. The 1267 Committee negotiations towards the adoption of an updated resolution took place on two tracks. The first track took place in the open and involved all 15 members of the Council. In this track, delegations fretted about such issues as to whether to use “urge”, “request” or “decide” to qualify the actions that should be taken. In the second track, the real process of negotiations, the “P3” (the United States, United Kingdom and France) negotiated with Russia and China in order to achieve possible compromises on (i) splitting the regimes, (ii) the sunset clauses and (iii) strengthening the role of the Ombudsperson. The outcome of these two tracks is the adoption of Resolutions 1988 and 1989 on 17 June 2011.

### III.B. The Al Qaida/Taliban sanctions regime reborn

32. The Security Council adopted, on 17 June 2011, two resolutions effectively splitting up the Taliban sanctions regime from the Al Qaida sanctions regime. To address the human rights/due process concerns, the Al Qaida resolution adopts the sunset clauses described above, although in a somewhat diluted fashion. In this section, we describe, and provide some observations on, the treatment of due process/human rights issues in these two resolutions.

33. In Resolution 1988, a new sanctions regime related to the Taliban is created, complete with a new committee. The measures that States are to take against such individuals and entities are exactly the same as those required under the 1267 regime.<sup>63</sup> Operative paragraph 1 of the resolution creates a new list, the “Taliban List”, while operative paragraph 2 removes Taliban individuals and entities from the Consolidated List. The criterion for listing on the Taliban List is no longer “terrorism” but rather the nebulous concept of a “threat to the peace, stability and security of Afghanistan”.<sup>64</sup>

34. Resolution 1988 does not include any of the sunset clauses provided for in the Al Qaida sanctions regime. In fact, from a due process perspective, Resolution 1988 takes a significant step back from Resolution 1904, in that the Ombudsperson process is not made available to individuals and entities listed in the new Taliban List—including those who were previously listed in the 1267 regime and thus who would have had this process available to them.<sup>65</sup> The argument for not

63 See SC Res 1988, above n.6, para.1.

64 See, e.g., SC Res 1988, above n.6, paras.1, 6 and 21.

65 See SC Res 1988, above n.6, para.20, which provides that listed individuals and entities “are eligible to submit [requests for delisting] to the Focal Point mechanism...”. The text had originally provided that such individuals “may only” submit requests to the Focal Point,

providing either the Ombudsperson process or the sunset clauses in the Taliban resolution was that the new Taliban regime had to take on the character of other country-specific regimes and since these other regimes did not have the Ombudsperson process (or sunset clauses), it would be inappropriate to include such in the Taliban regime. However, and this point was argued forcefully but unsuccessfully by both South Africa and Portugal with some support from Brazil, this was simply a formal argument and no substantive argument was made for why these protections could not be included for the Taliban regime. Moreover, it is somewhat strange that individuals who were previously listed on the Consolidated List would, on the day that Resolution 1988 was adopted, suddenly lose the rights that they had.

35. This regression, in terms of the due process protection, was not the only eyebrow-raising element of the new Taliban regime. The very listing criteria, “threat to peace, stability and security”, could conceivably be used to sanction individuals who sought change, or individuals who expressed views different from the views of the Afghan government—the very basis of the freedoms that democracies seek to promote. Again, the argument from the proponents of the text—the United States, United Kingdom and France—was that this was consistent with other country-specific sanctions regimes. While this may be true,<sup>66</sup> this cannot be a reason to perpetuate a practice that cannot be justified other than by precedence. Furthermore, the resolution directs the new Committee, in considering de-listing requests, to consider “reconciliation conditions” set forth in the Kabul Communiqué, which include, *inter alia*, “respect for the Afghan Constitution, including the rights of women and persons belonging to minorities”.<sup>67</sup> These may well be values that the majority of us can accept as laudable but the respect for human rights and the promotion of free expression requires precisely the protection of views with which we may not agree. These de-listing requirements *may* suggest that, notwithstanding the lack of involvement in any actions that may threaten international peace and security—the Security Council’s sole mandate—sanctions may attach solely because of an individual’s unpopular views on the Afghan constitution, women and/or minorities. There is a potential, slight though it may be, that the regression in due process rights accorded to those on the Taliban List could become a fertile ground for legal challenge in the future.

but to appease delegations that wanted similar due process protection to individuals on the new list, this new, softer language was accepted.

66 For examples of other targeted, country-specific sanctions regimes based on sanctioning individuals who constitute a threat to “peace, stability and security”, see, among others, the Security Council sanctions regime concerning Somalia and Eritrea, pursuant to SC Res 751 (1992); see also the regime of sanctions concerning Liberia, pursuant to SC Res 1521 (2003); see also the Security Council sanctions regime concerning the situation in the Libyan Arab Jamahiriya, pursuant to SC Res 1970 (2011) [Second *reissue* for technical reasons (10 March 2011)], subsequently expanded by SC Res 1973 (2011).

67 SC Res 1988, above n.6, para.18.

36. While there was little improvement in terms of due process and human rights in the Taliban regime, the new Al Qaida resolution, Resolution 1989, contains a few provisions meant to promote due process protection for listed individuals. The most far-reaching concept introduced in Resolution 1989 is that of the sunset clause. The first sunset clause instituted by Resolution 1989 is linked to the Ombudsperson process. In operative paragraph 23, the Security Council decides that, with respect to a specific individual or entity,

[T]he requirement for States to take measures described in paragraph 1 [of the resolution] shall terminate . . . 60 days after the Committee completes consideration of the [report of the Ombudsperson] where the Ombudsperson recommends that the Committee considers delisting, unless the Committee decides by consensus . . . that the requirement shall remain in place . . . .<sup>68</sup>

37. Simply put, as described in the previous section, once the Ombudsperson recommends de-listing, a listed person would be de-listed unless *all* members of the Committee disagreed with the Ombudsperson's recommendation. This satisfies some of the due process objections in a number of ways. Firstly, it provides some recourse and the right to be heard to listed individuals in that the Ombudsperson's recommendations have some effect and cannot simply be ignored by the Committee. And, with this framework, the Ombudsperson almost becomes an "independent and impartial" decision-maker. Secondly, by reversing the onus and placing it on those seeking to retain a listing, the process would ensure, or at least encourage, a situation in which only those who truly belonged on the Al Qaida Sanctions List remained there. In an indirect way, this second implication would also encourage the provision of reasons because, presumably, any member wishing to retain an individual or entity on the list would have to provide reasons, at least to the other members of the Committee.

38. The second sunset clause, contained in operative paragraph 27 of Resolution 1989, creates a similar avenue for de-listing, with the trigger being the submission of a de-listing request by the designating State, i.e. where a designating State submits a request to de-list an individual or entity that it had submitted, such an individual would, at the expiry of a similar 60-day period, cease to be listed unless all members of the Committee agreed to retain the person or entity on the Al Qaida Sanctions List.

39. While the sunset clauses established in operative paragraphs 23 and 27 of the new Al Qaida resolution are quite innovative and reflect important steps towards due process protection, both sunset clauses are subject to the following severe caveat:

[P]rovided that, in cases where consensus does not exist, the Chair shall, on the request of a Committee Member, submit the question of whether [to delist

the individual seeking delisting] to the Security Council for a decision within 60 days; and *provided further* that, in the event of such a request, the requirement for States to take [sanctions measures] shall remain in place [against the said individual or entity] until the question is decided by the Security Council.

40. This caveat, in effect, allows a State seeking to maintain a de-listing to effectively block the setting of the sun contemplated by operative paragraphs 23 and 27. In theory, the new sunset clauses are, without question, an improvement. Under the old 1267 process, 1 out of 15 members of the Committee would be sufficient to block a de-listing, while under Resolution 1989 at least 6 members or at least 1 veto-carrying member would be required to retain the listing. The reality, however, is that, aside from the extra-procedural layer, things would remain the same: traditionally, it is the veto-carrying members that block de-listing and they would effectively retain this veto through the Security Council decision-making process in Article 27 of the Charter. The real progress made in Resolution 1989, therefore, lies not so much in normative development or substantive development of due process requirements. Rather, the real achievement of Resolution 1989 *could* lie in the political pressure brought upon States not to escalate issues to the Security Council—it is politically much easier for a State to single-handedly block a decision at the more secretive Committee level than to escalate a decision to the political Council level and there, to veto a decision.

41. But these are still political considerations and whether these political considerations are sufficient to assuage some of the legal concerns raised in the cases above, notably *Kadi*, remains to be seen. In assessing whether this change would be sufficient to meet the requirements laid down in *Kadi*, it has to be recalled that both the Court of Justice and the General Court, in the *Kadi* appeal and *Kadi II*, respectively, were not convinced by a system that still left decision-making to the whims of diplomacy and inter-governmental politics. The Court of Justice specifically mentioned a decision-making process that gave individual countries a veto as being problematic.<sup>69</sup> The General Court emphasized the need for a "full and rigorous judicial review".<sup>70</sup> With the sunset clauses as they are currently configured, the same decision-making structure is retained in that an individual or entity could remain listed on account of one veto-wielding country or six non-veto-wielding members. Moreover, there remains no obligation on the Committee to provide reasons for its decisions.

42. Whatever real effect the sunset clauses may have on the de-listing process, they will not be sufficient to ease the concerns regarding the lack of information and

69 Joined Cases C-402/05 P & C-415/05 P, *Kadi & Al Barakaat v. Council of the European Union*, above n.5, para.323.

70 *Kadi II*, above n.5, para.151.

reasons for listing. Paragraph 13 of Resolution 1989 reaffirms the obligation to provide a “detailed statement of case” found in Resolution 1735 but does little to take that forward.<sup>71</sup> Moreover, the requirement to provide information, in both regimes, is subject to the qualifier “as much relevant information as possible.”<sup>72</sup>

#### **IV. Concluding remarks**

43. The introduction of sunset clauses in Resolution 1989, particularly the Ombudsperson-linked sunset clause, represents a major but limited milestone in the direction of improving the due process standards in the Al Qaida regime. Whether the institution of the sunset clauses is sufficient to appease those that have questioned the consistency of the regime with international human rights standards remains to be seen. Moreover, the failure to extend the Ombudsperson process or the sunset clauses to the new Taliban regime is, without question, a regression.

44. Whether the Security Council will undertake further remodelling of the Al Qaida and Taliban regimes in particular, and the sanction regimes in general, will depend largely on the amount of pressure being brought to bear on the regime by legal challenges. The innovations that have so far been adopted have been adopted largely because of these legal challenges which have constituted a threat to the enforceability and credibility, and therefore the sustainability, of the regime.

71 See SC Res 1988, above n.6, para.12, with regard to the equivalent requirement in the Taliban resolution.

72 SC Res 1988, above n.6, para.11, and SC Res 1989, above n.6, para.15.



**D. Bethlehem**

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Nonstate Actors**

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## SELF-DEFENSE AGAINST AN IMMINENT OR ACTUAL ARMED ATTACK BY NONSTATE ACTORS

By *Daniel Bethlehem\**

There has been an ongoing debate over recent years about the scope of a state's right of self-defense against an imminent or actual armed attack by nonstate actors. The debate predates the Al Qaeda attacks against the World Trade Center and elsewhere in the United States on September 11, 2001, but those events sharpened its focus and gave it greater operational urgency. While an important strand of the debate has taken place in academic journals and public forums, there has been another strand, largely away from the public gaze, within governments and between them, about what the appropriate principles are, and ought to be, in respect of such conduct. Insofar as these discussions have informed the practice of states and their appreciations of legality, they carry particular weight, being material both to the crystallization and development of customary international law and to the interpretation of treaties.

Aspects of these otherwise largely intra- and intergovernmental discussions have periodically become visible publicly through official statements and speeches, evidence to governmental committees, reports of such committees, and similar documents. Other aspects have to be deduced from the practice of states—which, given the sensitivities, is sometimes opaque. In recent years, in a U.S. context, elements of this debate have been illuminated by the public remarks of senior Obama administration legal and counterterrorism officials,<sup>1</sup> including Harold Koh, the Department of State legal adviser,<sup>2</sup> John Brennan, the assistant to the president for homeland security and counterterrorism,<sup>3</sup> Jeh Johnson, the Department of Defense general counsel,<sup>4</sup> Attorney General Eric Holder,<sup>5</sup> and Stephen Preston, the Central Intelligence Agency general counsel.<sup>6</sup>

\* Sir Daniel Bethlehem QC was the principal Legal Adviser of the UK Foreign & Commonwealth Office from May 2006 to May 2011. Following his tenure at the FCO, he returned to practice at the London bar and is Director of Legal Policy International Ltd. and Consulting Senior Fellow for Law and Strategy at the London-based International Institute for Strategic Studies.

<sup>1</sup> For a public statement of the position as it came to be in the second term of the Bush administration, see the remarks by John B. Bellinger III, the then Department of State legal adviser, at the London School of Economics: Legal Issues in the War on Terrorism (Oct. 31, 2006), at [http://www2.lse.ac.uk/PublicEvents/pdf/20061031\\_JohnBellinger.pdf](http://www2.lse.ac.uk/PublicEvents/pdf/20061031_JohnBellinger.pdf).

<sup>2</sup> Harold Hongju Koh, Legal Adviser, U.S. Dep't of State, Remarks at the Annual Meeting of the American Society of International Law: The Obama Administration and International Law (Mar. 25, 2010), at <http://www.state.gov/s/rl/releases/remarks/139119.htm>.

<sup>3</sup> John O. Brennan, Assistant to the President for Homeland Security and Counterterrorism, Remarks at the Harvard Law School Program on Law and Security: Strengthening Our Security by Adhering to Our Values and Laws (Sept. 16, 2011), at <http://www.whitehouse.gov/the-press-office/2011/09/16/remarks-john-o-brennan-strengthening-our-security-adhering-our-values-an>; John O. Brennan, Speech at the Woodrow Wilson International Center for Scholars: The Ethics and Efficacy of the President's Counterterrorism Strategy (Apr. 30, 2012), at <http://www.wilsoncenter.org/event/the-ethics-and-ethics-us-counterterrorism-strategy>.

<sup>4</sup> Jeh Johnson, General Counsel, U.S. Dep't of Defense, Dean's Lecture at Yale Law School: National Security Law, Lawyers and Lawyering in the Obama Administration (Feb. 22, 2012), at <http://www.lawfareblog.com/2012/02/jeh-johnson-speech-at-yale-law-school>.

<sup>5</sup> Eric Holder, Attorney General, Remarks at Northwestern University Law School (Mar. 5, 2012), at <http://www.lawfareblog.com/2012/03/text-of-the-attorney-generals-national-security-speech/#mare-6236>.

<sup>6</sup> Stephen Preston, General Counsel, Central Intelligence Agency, Speech at Harvard Law School: CIA and the Rule of Law (Apr. 10, 2012), at <http://www.cfr.org/rule-of-law/cia-general-counsel-stephen-prestons-remarks-rule-law-april-2012/p27912>.

While there has been no similar flurry of speeches elsewhere, important elements of this debate have also attracted comment in the United Kingdom over the years. For example, between 2002 and 2006, the UK House of Commons Foreign Affairs Committee published a series of reports, entitled *Foreign Policy Aspects of the War Against Terrorism*, in which important elements of this debate were addressed.<sup>7</sup> In the first of its two reports from the 2002–03 session, for example, the committee addressed the doctrine of preemption contained in the Bush administration's then recently published *National Security Strategy*.<sup>8</sup>

We conclude that the notion of 'imminence' should be reconsidered in light of new threats to international peace and security—regardless of whether the doctrine of pre-emptive self-defence is a distinctively new legal development. We recommend that the Government work to establish a clear international consensus on the circumstances in which military action may be taken by states on a pre-emptive basis.<sup>9</sup>

Subsequently, in a debate in the House of Lords in April 2004, in response to a question put to the UK government on "whether [it] accept[s] the legitimacy of pre-emptive armed attack as a constituent of the inherent right of individual or collective self-defence under Article 51 of the UN Charter; and, if so, whether [the government] will define the principles upon which it will be exercised,"<sup>10</sup> the then attorney general, Lord Goldsmith, answered as follows:

Article 51 of the charter provides that,

"Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations."

It is argued by some that the language of Article 51 provides for a right of self-defence only in response to an actual armed attack. However, it has been the consistent position of successive United Kingdom Governments over many years that the right of self-defence under international law includes the right to use force where an armed attack is imminent. It is clear that the language of Article 51 was not intended to create a new right of self-defence. Article 51 recognises the inherent right of self-defence that states enjoy under international law. That can be traced back to the "Caroline" incident in 1837. . . . It is not a new invention. The charter did not therefore affect the scope of the right of self-defence existing at that time in customary international law, which included the right to use force in anticipation of an imminent armed attack.

The Government's position is supported by the records of the international conference at which the UN charter was drawn up and by state practice since 1945. It is therefore the Government's view that international law permits the use of force in self-defence against an imminent attack but does not authorise the use of force to mount a pre-emptive strike

<sup>7</sup> The reports and publications of the UK House of Commons Foreign Affairs Committee are available at <http://www.parliament.uk/business/committees/committees-a-z/commons-select/foreign-affairs-committee/Publications/>. The reports cited here are available at <http://www.parliament.uk/business/committees/committees/archive/foreign-affairs-committee/fac-list-of-old-war-reports/>.

<sup>8</sup> WHITE HOUSE, THE NATIONAL SECURITY STRATEGY OF THE UNITED STATES OF AMERICA 12–16 (2002), at [http://www.au.af.mil/au/awc/awgate/nss/nss\\_sep2002.pdf](http://www.au.af.mil/au/awc/awgate/nss/nss_sep2002.pdf).

<sup>9</sup> HOUSE OF COMMONS, FOREIGN AFFAIRS COMMITTEE, FOREIGN POLICY ASPECTS OF THE WAR AGAINST TERRORISM, 2002–03, H.C. 196, para. t.

<sup>10</sup> 21 Apr. 2004, PARL. DEB., H.L. (2004) 356 (Lord Thomas of Gresford, statement opening the debate on international self-defence), at <http://www.publications.parliament.uk/pa/ld200304/ldhansrd/v040421/text/40421-07.htm>.

against a threat that is more remote. However, those rules must be applied in the context of the particular facts of each case. That is important.

The concept of what constitutes an "imminent" armed attack will develop to meet new circumstances and new threats. For example, the resolutions passed by the Security Council in the wake of 11 September 2001 recognised both that large-scale terrorist action could constitute an armed attack that will give rise to the right of self-defence and that force might, in certain circumstances, be used in self-defence against those who plan and perpetrate such acts and against those harbouring them, if that is necessary to avert further such terrorist acts. It was on that basis that United Kingdom forces participated in military action against Al Qaeda and the Taliban in Afghanistan. It must be right that states are able to act in self-defence in circumstances where there is evidence of further imminent attacks by terrorist groups, even if there is no specific evidence of where such an attack will take place or of the precise nature of the attack.

Two further conditions apply where force is to be used in self-defence in anticipation of an imminent armed attack. First, military action should be used only as a last resort. It must be necessary to use force to deal with the particular threat that is faced. Secondly, the force used must be proportionate to the threat faced and must be limited to what is necessary to deal with the threat.

In addition, Article 51 of the charter requires that if a state resorts to military action in self-defence, the measures it has taken must be immediately reported to the Security Council. The right to use force in self-defence continues until the Security Council has taken measures necessary to maintain international peace and security. That is the answer to the Question as posed.<sup>11</sup>

In emphasizing that each case must be analyzed in context and that the concept of "imminence" will develop to meet new circumstances and new threats, Lord Goldsmith's statement underlined that self-defence is not a static concept but rather one that must be reasonable and appropriate to the threats and circumstances of the day.

In a subsequent report by the House of Commons Foreign Affairs Committee in its *Foreign Policy Aspects of the War Against Terrorism* series, the committee, taking into account the statement quoted above, as well as other evidence before it,<sup>12</sup> went on to conclude that

the concept of 'imminence' in anticipatory self-defence may require reassessment in the light of the [weapons of mass destruction] threat but that the Government should be very cautious to limit the application of the doctrine of anticipatory self-defence so as to prevent abuse by states pursuing their national interest. We recommend that in its response to this Report the Government set out how, in the event of the legitimisation of the doctrine of anticipatory self-defence, it will persuade its allies to limit the use of the doctrine to a "threat of catastrophic attack". We also recommend that the Government explain its position on the 'proportionality' of a response to a catastrophic attack, and how to curtail the

<sup>11</sup> *Id.* at 370–71 (Lord Goldsmith).

<sup>12</sup> See, e.g., Select Committee on Foreign Affairs, H.C., Written Evidence Submitted by Daniel Bethlehem QC, Director of the Lauterpacht Research Centre for International Law, University of Cambridge, "International Law and the Use of Force: The Law as It Is and as It Should Be" (June 7, 2004), at <http://www.publications.parliament.k/pa/cm200304/cmselect/cmfa/441/4060808.htm>.

abuse of that principle in the event of the acceptance of the doctrine of anticipatory self-defence by the international community.<sup>13</sup>

In parallel to these reports and statements, a good deal of scholarly writing has addressed the scope of the right of self-defence against imminent and actual armed attacks by non-state actors. These writings have illuminated the complexity of the issues as well as the doctrinal divide that continues to beset the debate—between those who favor a restrictive approach to the law on self-defence and those who take the view that the credibility of the law depends ultimately upon its ability to address effectively the realities of contemporary threats.

This scholarship faces significant challenges, however, when it comes to shaping the operational thinking of those within governments and the military who are required to make decisions in the face of significant terrorist threats emanating from abroad. There is little intersection between the academic debate and the operational realities. And on those few occasions when such matters have come under scrutiny in court, the debate is seldom advanced. The reality of the threats, the consequences of inaction, and the challenges of both strategic appreciation and operational decision making in the face of such threats frequently trump a doctrinal debate that has yet to produce a clear set of principles that effectively address the specific operational circumstances faced by states.

This situation is unsatisfactory. Particularly in this area of law, it is important that principle is sensitive to the practical realities of the circumstances that it addresses, even as it endeavors to prohibit excess and the egregious pursuit of national interest. The challenge is to formulate principles, capable of attracting a broad measure of agreement, that apply, or ought to apply, to the use of force in self-defence against an imminent or actual armed attack by nonstate actors. To this end, the sixteen principles set out below are proposed with the intention of stimulating a wider debate on these issues.

The principles do not reflect a settled view of any state. They are published under my responsibility alone. They have nonetheless been informed by detailed discussions over recent years with foreign ministry, defense ministry, and military legal advisers from a number of states who have operational experience in these matters. The hope, therefore, is that the principles may attract a measure of agreement about the contours of the law relevant to the actual circumstances in which states are faced with an imminent or actual armed attack by nonstate actors.

These principles are not intended to be enabling of the use of force. They are intended to work with the grain of the UN Charter as well as customary international law, in which resides the inherent right of self-defence, including anticipatory self-defence, usually traced back to the Webster-Ashburton correspondence of 1842 concerning the *Caroline* incident. The customary international law on state responsibility may also have a bearing on these issues.

This said, some of the principles will undoubtedly prove controversial. There is little scholarly consensus on what is properly meant by "imminence" in the context of contemporary threats. Similarly, there is little consensus on who may properly be targetable within the non-

<sup>13</sup> HOUSE OF COMMONS, FOREIGN AFFAIRS COMMITTEE, FOREIGN POLICY ASPECTS OF THE WAR AGAINST TERRORISM, 2003–04, H.C., 441–I, para. 429.

tate-actor continuum of those planning, threatening, perpetrating, and providing material support essential to an armed attack. Principles 6, 7, and 8 are therefore likely to attract comment, as no doubt also will others.

The reality, however, is that these principles address the kinds of circumstances that many states face today (and have been facing for some time)—which often require difficult decisions concerning the use of force. And it is not just the United States, the United Kingdom, and other Western states that face such threats. States ranging from Colombia to Kenya to Turkey, among others, have had to confront similar issues in recent years.

It is by now reasonably clear and accepted that states have a right of self-defense against attacks by nonstate actors—as reflected, for example, in UN Security Council Resolutions 1368 and 1373 of 2001, adopted following the 9/11 attacks in the United States. There is, however, a paucity of considered and authoritative guidance on the parameters and application of that right in the kinds of circumstances that states are now having to address. These circumstances include those of (1) successive attacks or threats of attack against a state or its interests, (2) attacks or threats of attack emanating from more than one territorial jurisdiction, and (3) attacks or threats of attack by a nonstate actor operating either as a distinct entity or in affiliation with a larger nonstate movement.

Separate from the above, while “imminence” continues to be a key element of the law relevant to anticipatory self-defense in response to a threat of attack, the concept needs to be further refined and developed to take into account the new circumstances and threats from nonstate actors that states face today.

In considering the principles, it is important to bear in mind three types of circumstances in which they might apply: (1) circumstances in which any given state might consider that it would have an imperative to act, (2) circumstances in which another state, with potentially opposing interests to the first, might consider that it would have an imperative to act, and (3) circumstances in which one state might consider that it had an imperative to act in support of another state, thereby engaging considerations either of collective self-defense or of state responsibility relevant to the provision of aid or assistance. An essential element of any legal principle is that it must be capable of objective application and must not be seen as self-serving—that is, in the interests of one state, or small group of states, alone.

The principles are intended to be indicative, rather than exhaustive, of elements of a state’s right of self-defense against an imminent or actual armed attack by nonstate actors. They address only the *ius ad bellum* (the law relevant to the resort to armed force) rather than the *ius in bello* (the law relevant to the conduct of military operations). As such, the principles address the threshold for the use of armed force in self-defense rather than the use of force in ongoing military operations. Any use of force in self-defense would be subject to applicable *ius in bello* principles governing the conduct of military operations.

The principles are offered for debate without any accompanying explanatory memorandum or commentary to situate them within the academic discussion or jurisprudence. Their intent is to address a strategic and operational reality with which states are faced, and to formulate principles that reflect, as well as shape, the conduct of states in the particular circumstances in question.

*Principles Relevant to the Scope of a State’s Right of Self-Defense Against an Imminent or Actual Armed Attack by Nonstate Actors*\*

1. States have a right of self-defense against an imminent or actual armed attack by nonstate actors.
2. Armed action in self-defense should be used only as a last resort in circumstances in which no other effective means are reasonably available to address an imminent or actual armed attack.
3. Armed action in self-defense must be limited to what is necessary to address an imminent or actual armed attack and must be proportionate to the threat that is faced.
4. The term “armed attack” includes both discrete attacks and a series of attacks that indicate a concerted pattern of continuing armed activity. The distinction between discrete attacks and a series of attacks may be relevant to considerations of the necessity to act in self-defense and the proportionality of such action.
5. An appreciation that a series of attacks, whether imminent or actual, constitutes a concerted pattern of continuing armed activity is warranted in circumstances in which there is a reasonable and objective basis<sup>a</sup> for concluding that those threatening<sup>b</sup> or perpetrating such attacks are acting in concert.
6. Those acting in concert include those planning, threatening, and perpetrating armed attacks and those providing material support essential to those attacks, such that they can be said to be taking a direct part in those attacks.<sup>c</sup>
7. Armed action in self-defense may be directed against those actively planning, threatening, or perpetrating armed attacks. It may also be directed against those in respect of whom there is a strong,<sup>d</sup> reasonable, and objective basis for concluding that they are taking a direct part in those attacks through the provision of material support essential to the attacks.
8. Whether an armed attack may be regarded as “imminent” will fall to be assessed by reference to all relevant circumstances, including (a) the nature and immediacy of the threat, (b) the probability of an attack, (c) whether the anticipated attack is part of a concerted pattern of continuing armed activity, (d) the likely scale of the attack and the injury, loss, or damage likely to result therefrom in the absence of mitigating action, and (e) the likelihood that there will be other opportunities to undertake effective action in

\* As the introduction accompanying these principles and setting them in context makes clear, they are proposed with the intention of stimulating debate on the issues. They do not purport to reflect a settled view of the law or the practice of any state.

<sup>a</sup> The “reasonable and objective basis” formula—in paragraphs 5, 7, 8, 11, and 12—requires that the conclusion is capable of being reliably supported with a high degree of confidence on the basis of credible and all reasonably available information.

<sup>b</sup> The term “threatening”—in paragraphs 5, 6, 7, and 9—refers to conduct that, absent mitigating action, there is a reasonable and objective basis for concluding is capable of completion and that there is an intention on the part of the putative perpetrators to complete. Whether a threatened attack gives rise to a right of self-defense will fall to be assessed by reference to the factors set out *inter alia* in paragraph 8.

<sup>c</sup> The concept of direct participation in attacks draws on, but is distinct from, the *ius in bello* concept of direct participation in hostilities.

<sup>d</sup> The addition of the adjective “strong” to the “reasonable and objective basis” formula—in paragraphs 7 and 12—raises the standard that is required for the conclusion in question, given that this assessment would form the basis for taking armed action against persons other than those planning, threatening, or perpetrating an armed attack.

self-defense that may be expected to cause less serious collateral injury, loss, or damage. The absence of specific evidence of where an attack will take place or of the precise nature of an attack does not preclude a conclusion that an armed attack is imminent for purposes of the exercise of a right of self-defense, provided that there is a reasonable and objective basis for concluding that an armed attack is imminent.

9. States are required to take all reasonable steps to ensure that their territory is not used by nonstate actors for purposes of armed activities—including planning, threatening, penetrating, or providing material support for armed attacks—against other states and their interests.

10. Subject to the following paragraphs, a state may not take armed action in self-defense against a nonstate actor in the territory or within the jurisdiction of another state (“the third state”) without the consent of that state. The requirement for consent does not operate in circumstances in which there is an applicable resolution of the UN Security Council authorizing the use of armed force under Chapter VII of the Charter or other relevant and applicable legal provision of similar effect. Where consent is required, all reasonable good faith efforts must be made to obtain consent.

11. The requirement for consent does not operate in circumstances in which there is a reasonable and objective basis for concluding that the third state is colluding<sup>e</sup> with the nonstate actor or is otherwise unwilling<sup>f</sup> to effectively restrain the armed activities of the nonstate actor such as to leave the state that has a necessity to act in self-defense with no other reasonably available effective means to address an imminent or actual armed attack. In the case of a colluding or a harboring state, the extent of the responsibility of that state for aiding or assisting the nonstate actor in its armed activities may be relevant to considerations of the necessity to act in self-defense and the proportionality of such action, including against the colluding or harboring state.

12. The requirement for consent does not operate in circumstances in which there is a reasonable and objective basis for concluding that the third state is unable<sup>g</sup> to effectively restrain the armed activities of the nonstate actor such as to leave the state that has a necessity to act in self-defense with no other reasonably available effective means to address an imminent or actual armed attack. In such circumstances, in addition to the preceding requirements, there must also be a strong, reasonable, and objective basis for concluding that the seeking of consent would be likely to materially undermine the effectiveness of action in self-defense, whether for reasons of disclosure, delay, incapacity to act, or otherwise, or would increase the risk of armed attack, vulnerability to future attacks, or other development that would give rise to an independent imperative to act in self-defense. The seeking of consent must provide an opportunity for the reluctant host to agree to a reasonable and effective plan of action, and to take such action, to address the armed activities of the nonstate actor operating in its territory or within its jurisdiction. The failure or refusal to agree to a reasonable and effective plan of action, and to take such action, may support a conclusion that the state in question is to be regarded as a colluding or a harboring state.

<sup>e</sup> Referred to as a “colluding state.”

<sup>f</sup> Referred to as a “harboring state.”

<sup>g</sup> As here described, referred to as a “reluctant host.”

13. Consent may be strategic or operational, generic or ad hoc, express or implied. The relevant consideration is that it must be reasonable to regard the representation(s) or conduct as authoritative of the consent of the state on whose territory or within whose jurisdiction the armed action in self-defense will be taken. There is a rebuttable presumption against the implication of consent simply on the basis of historic acquiescence. Whether, in any case, historic acquiescence is sufficient to convey consent will fall to be assessed by reference to all relevant circumstances, including whether acquiescence has operated in the past in circumstances in which it would have been reasonable to have expected that an objection would have been expressly declared and, as appropriate, acted upon, and there is no reason to consider that some other compelling ground operated to exclude objection.

14. These principles are without prejudice to the application of the UN Charter, including applicable resolutions of the UN Security Council relating to the use of force, or of customary international law relevant to the use of force and to the exercise of the right of self-defense by states, including as applicable to collective self-defense.

15. These principles are without prejudice to any right of self-defense that may operate in other circumstances in which a state or its imperative interests may be the target of imminent or actual attack.

16. These principles are without prejudice to the application of any circumstance precluding wrongfulness or any principle of mitigation that may be relevant.



**D. Tladi**

**An Assessment of Bethlehem's Principles on the Use of Force  
Against Non-State Actors in Self-Defense in the Light of  
Foundational Principles of International law**

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concerns that stem from the general law of self-defense. However, it may be that a set of principles that are designed, explicitly, not just to state the existing law but rather to “formulate principles that reflect, as well as shape, the conduct of states”<sup>26</sup> should strive for a higher degree of precision. Bethlehem is right to lament the “paucity of considered and authoritative guidance on the parameters and application” of the right of self-defense against imminent or actual armed and to stress the need for legal principles that are “capable of objective application.”<sup>27</sup> However, more attention needs to be paid to what necessity, imminence, and proportionality actually require.

## THE NONCONSENTING INNOCENT STATE: THE PROBLEM WITH BETHLEHEM’S PRINCIPLE 12

By *Dire Tladi*\*

In a recent issue of this *Journal*, Daniel Bethlehem proposed a set of principles on the scope of a state’s right of self-defense against an imminent or actual armed attack by nonstate actors.<sup>1</sup> In response, this essay seeks to assess Bethlehem’s proposition in principle 12 that a state may use force against nonstate actors on the territory of another state without the consent of the territorial state when the territorial state is not responsible for the initial attack and when the attack cannot be imputed to the territorial state. This description might be termed the *non-consenting innocent state problem*.

The dilemma that I take on here arises when Bethlehem’s principles are applied to the use of force against nonstate actors without the consent of the territorial state. Principle 1 indicates that “[s]tates have a right of self-defense against an imminent or actual armed attack by nonstate actors.”<sup>2</sup> Principle 10 provides that, as a general rule, the consent of the territorial state is required whenever force is used against nonstate actors.<sup>3</sup> Yet principle 11 states that consent is not required when the territorial state colludes with or is “*unwilling to effectively* restrain the armed activities of the nonstate actor” carrying out armed attacks against another state.<sup>4</sup> While this proposition should be fairly uncontroversial, it is unclear what is meant by that quoted phrase. To the extent that this choice of language—in particular, the term *effectively*—is meant to suggest that consent may be dispensed with even in those instances where the territorial state takes reasonable but ineffective measures to prevent its territory from being used to launch attacks, problems arise that parallel those that I discuss in relation to principle 12. Principle 12, the second exception and the focus of this paper, provides that consent can be dispensed with

<sup>26</sup> Bethlehem, *supra* note 1, at 774.

<sup>27</sup> *Id.*

\* Principal State Law Adviser (International Law), Department of International Relations and Cooperation of South Africa; Extraordinary Professor, Department of Public Law, University of Stellenbosch. The views expressed in this article are not attributable to the Government of South Africa or the Department of International Relations and Cooperation.

<sup>1</sup> Daniel Bethlehem, *Self-Defense Against an Imminent or Actual Armed Attack by Nonstate Actors*, 106 AJIL 769 (2012).

<sup>2</sup> *Id.* at 775, princ. 1.

<sup>3</sup> *Id.* at 776, princ. 10.

<sup>4</sup> *Id.*, princ. 11 (emphasis added) (footnote omitted).

where “there is a reasonable and objective basis for concluding that the third state [the territorial state] is *unable to effectively* restrain the armed activities of the nonstate actor” operating in or from its territory.<sup>5</sup> Presumably, this principle is intended to convey that the fault of the territorial state is irrelevant or at least not determinative; otherwise, principle 11 would be applicable. In essence, under principle 12, force may be used on the territory of an innocent state without its consent.

Leaving aside the policy, political, and practical implications, principle 12 raises important questions about the interaction between the law on self-defense and the law relevant to territorial integrity and sovereignty. At the heart of the issue appears to be the basic proposition that a state may lawfully use force in self-defense against nonstate actors on the territory of a non-consenting innocent state.

## *The Use of Force Against Nonstate Actors in International Law*

The starting point for determining the law on self-defense is, of course, Article 51 of the United Nations Charter. In part, it provides: “Nothing in the present Charter shall impair the inherent right of individual or collective self-defense if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security.”<sup>6</sup> Those arguing for the right of a state to use force in self-defense on the territory of an innocent state make two points with respect to Article 51. First, nothing in the language of Article 51 limits the right of self-defense to situations of armed attacks by states.<sup>7</sup> Second, Article 51 expressly refers to an “inherent right” of a state to self-defense grounded in customary international law.<sup>8</sup> Both points are valid, but they are not answers in themselves. What is called for is a good-faith and contextual interpretation of Article 51, in accordance with the Vienna Convention on the Law of Treaties.<sup>9</sup>

## *The Line of Reasoning of the International Court of Justice*

The decisions of the International Court of Justice (ICJ) interpreting Article 51 provide an appropriate starting point. In the *Military and Paramilitary Activities* case, the ICJ explained that “an armed attack must be understood as including not merely action by regular armed forces across an international border, but also ‘the sending by or on behalf of a State of armed bands, groups, irregulars or mercenaries, which carry out acts of armed force . . . .’”<sup>10</sup> This ruling seems to imply that, to qualify as an armed attack justifying use of force in self-defense, an act performed by a nonstate actor must be imputable to the authorities of the state where the

<sup>5</sup> *Id.*, princ. 12 (emphasis added) (footnote omitted).

<sup>6</sup> UN Charter, Art. 51.

<sup>7</sup> See, e.g., Sean D. Murphy, *Self-Defense and the Israeli Wall Advisory Opinion: An Ipse Dixit from the ICJ?*, 99 AJIL 62, 64 (2005); Jordan J. Paust, *Self-Defense Targetings of Non-state Actors and Permissibility of U.S. Use of Drones in Pakistan*, 19 J. TRANSNAT’L L. & POL. 237, 241 (2010); JOHN DUGARD, INTERNATIONAL LAW: A SOUTH AFRICAN PERSPECTIVE 512 (3d ed. 2005).

<sup>8</sup> See, e.g., Paust, *supra* note 7, at 241–44; Murphy, *supra* note 7, at 64–67.

<sup>9</sup> Vienna Convention on the Law of Treaties, opened for signature May 23, 1969, 1155 UNTS 331.

<sup>10</sup> Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), 1986 ICJ REP. 14, para. 195 (June 27) [hereinafter *Military and Paramilitary Activities*].

alleged act of self-defense is exercised.<sup>11</sup> The ICJ was much more explicit on this issue in *Armed Activities on the Territory of the Congo*.<sup>12</sup> Assessing the arguments of self-defense advanced by Uganda for its actions in the Democratic Republic of Congo (DRC), the Court determined that there was “no satisfactory proof of the involvement in [the attacks by the Allied Democratic Forces], direct or indirect, of the Government of the DRC,” noting that these attacks were not sent by or on behalf of the DRC.<sup>13</sup> As such, the ICJ concluded that the attacks were not attributable to the DRC and thus could not justify a claim of self-defense.<sup>14</sup>

Given the very clear line of reasoning by the Court that an attack by a nonstate actor without attribution to a state cannot justify the use of force against the territory of another state, any assertion that a state can exercise force in self-defense against nonstate actors, on the territory of an innocent state without the latter’s consent, must be properly probed.

#### *Customary International Law and Self-Defense Against Nonstate Actors*

Adherents of the view that an armed attack for purposes of self-defense includes an armed attack from nonstate actors often point to Article 51’s reference to an “inherent right” of self-defense, which suggests that the right exists independent of Article 51.<sup>15</sup> In particular, they argue that Article 51 preserves a right already existing under customary international law and that, to determine the content of this right, recourse must be had to customary international law. In the *Military and Paramilitary Activities* case, the ICJ not only noted that Article 51 referred to an “inherent right” of self-defense but also declared that “nothing in the present Charter shall impair” such a right.<sup>16</sup> It went on to say that the “areas governed by the two sources of law thus do not overlap exactly, and the rules do not have the same content.”<sup>17</sup>

The *Caroline* incident of 1837 is often referred to as authority for the view that customary international law permits the use of force against nonstate actors on the territory of one state by another without the consent of the former.<sup>18</sup> On the basis of an exchange of letters in 1842 between Lord Ashburton of the United Kingdom and Secretary of State Daniel Webster of the United States, it has been argued that the two powers viewed self-defense against nonstate actors on the territory of another state without the consent of the latter as permissible under international law.<sup>19</sup> Offering an explanation for the British attack in U.S. waters on the

*Caroline*, Ashburton wrote that there are “possible cases in the relations of nations, as of individuals, where necessity . . . may be pleaded.”<sup>20</sup> In response, Webster noted that such necessity is “confined to cases in which the ‘necessity of that self-defense is instant, overwhelming, and leaving no choice of means, and no moment for deliberation.’”<sup>21</sup> Neither questioned that the initial attack to which the United Kingdom had responded was committed by nonstate actors. For this reason, some commentators have concluded that customary international law accepts a state’s use of force against nonstate actors on the territory of another state for acts not attributable to the territorial state.<sup>22</sup>

At the time of the *Caroline* incident, international law did not prohibit the use of force.<sup>23</sup> Even those who suggest that there were *legal* constraints on the resort to force at the time of the incident concede that, until the twentieth century, “war itself remained legal and appropriate when undertaken to defend rights in international law.”<sup>24</sup> But the usefulness of the *Caroline* incident as a standard should be assessed in the context of the developments of international law in the twentieth and twenty-first centuries. That international law did not prohibit the use of force at the time of the *Caroline* incident means that justification for the use of force, in particular on the grounds of self-defense, was often advanced for “political expediency” and “to secure the moral high ground,” rather than to provide a shield against legal wrongfulness.<sup>25</sup> This perspective seems to be borne out by Ashburton’s statement that it should not be lightly assumed that the United Kingdom would “provoke a great and powerful neighbor.”<sup>26</sup> Ian Brownlie makes the following important observation: “The formula used by Webster has proved valuable as a careful formulation of anticipatory self-defense but the correspondence made *no difference to the legal doctrine, such as it was, of the time.*”<sup>27</sup>

Brownlie also notes that “[t]he reference to the period of 1838 to 1842 [following the *Caroline* incident] as the critical date for the customary international law said to lie behind the United Nations Charter, drafted in 1945, is anachronistic and indefensible.”<sup>28</sup> Moreover, even if the Ashburton-Webster exchange did reflect customary international law in 1842, customary international law continually evolves. It is better to look to post-Charter state practice when interpreting Article 51, rather than attempting to fashion a competing vision of the right of self-defense, whether based on events in 1837 or more recent events.

#### *Interpreting Article 51*

Whether self-defense against nonstate actors on the territory of an innocent state without the latter’s consent is permissible in international law ultimately depends on a good-faith interpretation of the words in Article 51, in their context and in light of the object and purpose of

<sup>20</sup> 2 MOORE, *supra* note 19, at 411.

<sup>21</sup> *Id.* at 412.

<sup>22</sup> See, e.g., Paust, *supra* note 7, at 241–44; Murphy, *supra* note 7, at 65.

<sup>23</sup> See generally IAN BROWNIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 697 (6th ed. 2003); DUGARD, *supra* note 7, at 501; PHILIPPE SANDS, LAWLESS WORLD: AMERICA AND THE MAKING AND BREAKING OF GLOBAL RULES—FROM FDR’S ATLANTIC CHARTER TO GEORGE W. BUSH’S ILLEGAL WAR 176 (2005).

<sup>24</sup> MARK W. JANIS, AN INTRODUCTION TO INTERNATIONAL LAW 172 (3d ed. 1999).

<sup>25</sup> DUGARD, *supra* note 7, at 501.

<sup>26</sup> 2 MOORE, *supra* note 19, at 412.

<sup>27</sup> BROWNIE, *supra* note 23, at 701 (emphasis added).

<sup>28</sup> *Id.*

<sup>11</sup> See *id.*, para. 155; see also Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 2004 ICJ REP. 136, para. 139 (July 9) [hereinafter *Wall*].

<sup>12</sup> Armed Activities on the Territory of the Congo (Dem. Rep. Congo v. Uganda), 2005 ICJ REP. 168, para. 146 (Dec. 19) [hereinafter *Armed Activities*].

<sup>13</sup> *Id.*

<sup>14</sup> *Id.*

<sup>15</sup> See Paust, *supra* note 7, at 241–44; Murphy, *supra* note 7, at 65; see also Bethlehem, *supra* note 1, at 771. See generally Raphaël van Steenberghe, *Self-Defense in Response to Attacks by Non-state Actors in the Light of Recent Practice: A Step Forward*, 23 LEIDEN J. INT’L L. 183, 185 (2010).

<sup>16</sup> *Military and Paramilitary Activities*, *supra* note 10, para. 176.

<sup>17</sup> *Id.*

<sup>18</sup> For a description of the facts, see Paust, *supra* note 7, at 241–43. For a fuller discussion, see Abraham D. Sofaer, *On the Necessity of Pre-emption*, 14 EUR. J. INT’L L. 209, 214–20 (2003).

<sup>19</sup> See Paust, *supra* note 7, at 241–44; Murphy, *supra* note 7, at 65. The exchange of diplomatic notes between the United Kingdom and the United States is reprinted in 2 JOHN BASSETT MOORE, A DIGEST OF INTERNATIONAL LAW 409–13 (1906).

the Charter.<sup>29</sup> Any interpretation of Article 51 must take into account that self-defense is an *exception* to a general rule, namely the prohibition on the use of force against the territorial integrity of another state. Its parameters should be strictly construed and should not have the effect of overwhelming the general rule, namely the prohibition on the use of force.<sup>30</sup> Also, the right of self-defense must be construed in the context of other principles of international law, namely territorial integrity, sovereign equality of states, and the prohibition of the use of force. The use of self-defense against nonstate actors on the territory of an *innocent* state without the latter's consent would violate each and every one of these foundational principles of international law. Primarily for this reason, an "armed attack" considered under Article 51 should be seen as an armed attack by a state or at least attributable to the state in the manner suggested by the ICJ.<sup>31</sup> Real-world practice is only an aid to interpretation and should not be regarded as determinative of the content of Article 51.<sup>32</sup> Nonetheless, practice is important for interpretation and, of course, for the analysis of customary international law.

Some argue that recent state practice supports the view that the use of force against nonstate actors on the territory of an innocent state without the consent of such a state is permissible under international law on self-defense.<sup>33</sup> Space does not permit an assessment of all the examples of state practice since 1945 that have been adduced to support this proposition. I therefore limit myself to two distinct, but related, examples of practice that have been presented most frequently in support of this argument. The first is the U.S. invasion of Afghanistan following the September 2001 attacks that were carried out not by Afghanistan but, rather, by Al Qaeda, a nonstate entity.<sup>34</sup> It is claimed that the decision of the United States to use force in self-defense in Afghanistan after an attack by Al Qaeda and the lack of any significant objection from other states suggest the permissibility under international law of the use of force in self-defense against nonstate actors on the territory of another state. The second example, directly linked to the first, relates to UN Security Council Resolutions 1368 and 1373<sup>35</sup> adopted in response to the 2001 attacks and, it is argued, recognizes the right of a state to take measures in self-defense against nonstate actors on the territory of another state.<sup>36</sup>

An important consideration is that the U.S. invasion of Afghanistan in the aftermath of 9/11 was not widely questioned.<sup>37</sup> Given the horrific nature of the attacks on 9/11 and the solidarity that many pledged to the United States, few were willing to openly criticize any U.S. action

in response, and many were content to give the United States some leeway.<sup>38</sup> In other words, 9/11 and the responses thereto *may be* exceptional. It is, moreover, inaccurate to present the U.S. attack on Afghanistan, irrespective of its legality, as an illustration of the use of force in self-defense against nonstate actors. The U.S. attacks on Afghanistan were not attacks on Al Qaeda, but attacks on Afghanistan. That the United States was attacking Afghanistan and not differentiating between the Taliban government and Al Qaeda is clear from President George W. Bush's speeches immediately following the attacks and announcing the war in Afghanistan. He said that the United States "will make no distinction between the terrorists who committed these acts and those who harbor them,"<sup>39</sup> that by "aiding and abetting murder, the Taliban regime is committing murder,"<sup>40</sup> and that the "Taliban must act and act immediately [and] . . . hand over the terrorists, or they will share in their fate."<sup>41</sup>

Thus, the war in Afghanistan cannot be advanced for the proposition that a state can use force *against nonstate actors* on the territory of another state without the latter's consent. The basis for U.S. action in Afghanistan seems to be some kind of attribution of blameworthiness on the government of the state on which the use of force was to be carried out. Whether or not the international law standard for attribution is met is a different question and not at issue here, but that the rationale advanced was some kind of attribution is a fact not to be taken lightly.

Nothing in Security Council Resolutions 1368 and 1373 supports the proposition that a state may use force in self-defense against nonstate actors on the territory of an otherwise blameless state without that state's consent. Yet, admittedly, both resolutions include a preambular paragraph recognizing the "inherent right of individual or collective self-defense,"<sup>42</sup> and Sean Murphy correctly states that "[n]o language in these resolutions indicates that the Security Council believes that terrorist acts must first be imputed to a state so as to trigger the right of self-defense under Article 51."<sup>43</sup> However, no language in either resolution suggests that the use of force on the territory of an innocent state is permissible under Article 51 without the consent of that state. The resolutions condemn the terrorist attacks and reaffirm the right of self-defense but say nothing more relevant to an innocent state.

### Conclusion

While Bethlehem asserts that his principles, including principle 12, are "not intended to be enabling of the use of force" and are meant to "work with the grain of the UN Charter," the effect of principle 12 is precisely to be "enabling of the use of force" beyond what the Charter

<sup>29</sup> Vienna Convention, *supra* note 9, Art. 31(1).

<sup>30</sup> PETER MALANCZUK, *AKEHURST'S MODERN INTRODUCTION TO INTERNATIONAL LAW* 312 (7th rev. ed. 1997).

<sup>31</sup> See *Military and Paramilitary Activities*, *supra* note 10, para. 195; *Wall*, *supra* note 11, para. 139; *Armed Activities*, *supra* note 12, para. 146; cf. Murphy, *supra* note 7, at 64; Paust, *supra* note 7, at 241; DUGARD, *supra* note 7, at 512.

<sup>32</sup> Vienna Convention, *supra* note 9, Art. 31(3)(b) (noting that, for treaty interpretation, subsequent practice "shall be taken into account"); see also International Law Commission, Provisional Summary Record of the 3172nd Meeting: Subsequent Agreements and Subsequent Practice in Relation to the Interpretation of Treaties, at 3, Draft Conclusion 1, para. 3, UN Doc. A/CN.4/SR.3172 (June 25, 2013) (report of the drafting committee stating that for treaty interpretation "there shall be taken into account, together with the context, . . . any subsequent practice").

<sup>33</sup> Paust, *supra* note 7, at 238; Murphy, *supra* note 7, at 67; van Steenberghe, *supra* note 15, at 194.

<sup>34</sup> See Paust, *supra* note 7, at 248–49; Murphy, *supra* note 7, at 67.

<sup>35</sup> SC Res. 1368 (Sept. 12, 2001); SC Res. 1373 (Sept. 28, 2001).

<sup>36</sup> Paust, *supra* note 7, at 248–49; Murphy, *supra* note 7, at 67.

<sup>37</sup> See Paust, *supra* note 7, at 249; Murphy, *supra* note 7, at 67.

<sup>38</sup> David Ray Griffin, *Did 9/11 Justify the War in Afghanistan? Using the McChrystal Moment to Raise a Forbidden Question*, FOREIGN POL'Y J., June 25, 2010, at www.foreignpolicyjournal.com/2010/06/25/did-911-justify-the-war-in-afghanistan (noting that the question of the legality of the war in Afghanistan "has . . . been considered off-limits, not to be raised in polite company").

<sup>39</sup> George W. Bush, Address After Terrorist Attacks (Sept. 11, 2001), available at <http://archives.cnn.com/2001/US/09/11/bush.speech.text/index.html>.

<sup>40</sup> George W. Bush, Speech to Joint Session of Congress: War on Terror (Sept. 20, 2001), available at <http://middleeast.about.com/od/usmidwestpolicy/a/bush-war-on-terror-speech.htm>.

<sup>41</sup> *Id.*

<sup>42</sup> SC Res. 1368, *supra* note 35; SC Res. 1373, *supra* note 35.

<sup>43</sup> Murphy, *supra* note 7, at 67.

permits.<sup>44</sup> The proposition contained in principle 12 is based on an erroneous assessment of customary international law and state practice and on an acontextual interpretation of Article 51. The use of force by a state against nonstate actors for acts not attributable at all to another state falls to be considered under the paradigm of the law enforcement (in which the consent of the territorial state would be required) and not the law of self-defense.

In assessing what is permissible and what is not permissible under the international law principle of self-defense, other principles such as territorial integrity, the prohibition on the use of force, and sovereignty must be respected. Such an assessment requires that, before force is used against nonstate actors on the territory of another state, either the consent of the territorial state is obtained or a reasonable basis exists for attributing responsibility for the initial attack to the territorial state. To hold otherwise would imply that self-defense takes priority over these foundational principles of international law, a proposition that has no basis in international law.

#### ARE NEW PRINCIPLES REALLY NEEDED? THE POTENTIAL OF THE ESTABLISHED DISTINCTION BETWEEN RESPONSIBILITY FOR ATTACKS BY NONSTATE ACTORS AND THE LAW OF SELF-DEFENSE

*Mahmoud Hrnoud\**

Daniel Bethlehem's note on self-defense principles is intended to stimulate debate on one of the most contentious issues facing the international community today, namely, the legal response to imminent or actual terrorist attacks by nonstate actors. The note contains a set of principles that are sensitive to the practical realities of the circumstances that it addresses. But it is also intended to take up a legal policy matter—to create or amend principles of international law related to the use of armed force in dealing with threats from nonstate actors. To create or amend these principles, there must be clear evidence and sufficient state practice, or at least *opinio juris*, pointing toward the change of existing rules or the creation of new rules to “fill the gap.” The whole balance in international law among the various rights, obligations, and interests of international actors will be compromised if the notion of self-defense is to be expanded beyond its legitimate limitations. As illustrated below by some basic examples drawn from the existing law of self-defense, there is sufficient flexibility in the current legal order to allow for the lawful exercise of self-defense in response to most situations of armed terrorist attacks.

While the conditions for attribution, such as direction and control over the conduct, must be fulfilled for an attack by a terrorist group to fall under the international responsibility of a state, that does not mean that for other purposes—namely, the law on the use of force—the attack would not trigger the right of the victim state to use self-defense if the attack is launched from the territory of the host state. The state from whose territory the attack occurs is estopped from claiming that its sovereignty and territorial integrity have been violated, and the use of

<sup>44</sup> Bethlehem, *supra* note 1, at 773.

\* Member, International Law Commission.