

## **A MACHIAVELLIAN MOMENT? THE UN SECURITY COUNCIL AND THE RULE OF LAW**

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The purpose of this paper is to analyse some of the implications of the Security Council's (SC) recent practice of targeting individuals as part of its function of maintaining and restoring international peace and security, and, in particular, the possible remedies for individuals whose legal position has been affected by SC resolutions. Reflection on this topic, which ultimately prompted the paper, originated from the reading of two recent judgments of the Court of First Instance of the EC (CFI), which addressed the issue of the domestic judicial remedies available to individuals targeted by sanctions decided at the SC level and implemented by the EC.<sup>1</sup>

The Court of First Instance, a Tribunal having, *inter alia*, the competence to review the validity of EC decisions affecting the legal position of individuals, was asked to annul restrictive measures enacted by the Community in order to implement SC resolutions that imposed sanctions against individuals suspected of having links with terrorist groups.<sup>2</sup> Among other complaints, the appellants asked the Court to find that the EC measures were in breach of human rights guaranteed to individuals under international and EC law. In particular, they

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<sup>1</sup> Judgments of 21 September 2005, Case T-315/01, *Yassin Abdullah Kadi v. Council and Commission*, and Case T-306/01, *Ahmed Ali Yusuf and Al Barakaat International Foundation v. Council and Commission*, n.y.r. The text of the first is reproduced in *International Legal Materials*, 2006, p. 77, with note by A. Reinisch. Among the first comments, see C. Tomuschat, in 43 *Common Market Law Rev.* (2006), p. 537. See also, more recently, the judgment of 12 July 2006, case T-253/02, *Chafiq Ayadi v Council of the European Union*, n.y.r. For a more in-depth analysis of this latter decision, see below, note 23.

<sup>2</sup> For a more detailed account of the facts, see paras. 10 ff. of the two decisions.

complained that their right to property and their right to a fair trial had been infringed.<sup>3</sup>

In order to answer that question, the CFI had to deal with questions that are still highly controversial: the existence of legal constraints on SC resolutions; the existence of legal remedies available at the international level to individuals affected by SC sanctions; and the competence of domestic courts to judicially review SC resolutions. Beyond their indisputable technical dimension, these questions have a more general relevance, as they are situated at the point of intersection of fundamental issues of contemporary international law, such as the role of the Security Council and its relations with domestic orders based on principles of constitutionalism and the rule of law.

Not all these questions will be dealt with in the current study, which represents rather only an attempt – and a very imperfect one at that – to analyse the legal basis and the standard of judicial review of SC resolutions by domestic courts, and to show the advantages and the shortcomings of such a review.

This quite narrow purpose will also dictate the otherwise unusual architecture of the paper.

The first section contains a brief survey of the question of the competence of the ICJ to review the legality of the SC resolutions. In the second section, the efficiency of judicial forms of control hinged on inter-state disputes settlement mechanisms will be assessed against the recent practice of the SC targeting individuals. The analysis of the two decisions of the CFI, mentioned above, will then open the part of the paper devoted to exploring the legal basis, the standard and the effect of domestic decisions on the legality of SC resolutions. Particular attention will be devoted to the question of the interaction between domestic and international legal standards in protecting fundamental individual rights. I will argue that these standards, although not co-extensive, tend to overlap, and this overlap helps to limit the risk that judicial oversight by domestic courts might bring about a “nationalization” of the protection of individual rights against SC resolutions.

In its final part, the paper will then explore the implications of this form of judicial review and its possible impact on the future evolution of the UN

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<sup>3</sup> In the EC legal order, fundamental human rights are peacefully recognised as enshrined in general principles of Community law. The right to a fair trial, which proved to be the essential yardstick for assessing the legality of the contested measures, has received substantive elaboration by the ECJ starting with Case C-222/84, *Johnston / Chief Constable of the Royal Ulster Constabulary* [1986], ECR I-1651, paras. 21-22. On the conventional international level, it is guaranteed by Art. 13 of the ECHR and by Art. 14 of the ICCPR. See also Art. 25 AmCHR, and Art. 7 of the AfCHPR.

system. It will be argued that judicial review by domestic courts, far from imperilling the efficiency and authority of the UN, might bestow an enhanced transparency and legitimacy on the UN system and could dispel the fear that the exercise of power by the SC may constitute a facile avenue for circumventing the restraints extant in many states' constitutional orders for the protection of individual fundamental rights. Moreover, by exercising jurisdiction over such matters, domestic courts would encourage the development of remedies within the UN legal system open to individuals and able to counterbalance the otherwise unfettered power of the SC. This evolution eventually would lead to an acknowledgement of the autonomy of the UN legal system as a full-fledged legal system, assisted by a substantial and procedural system of protection of fundamental rights.

In the following sections, the reasoning will unfold along these lines.

## 1. JUDICIAL CONTROL OF SC RESOLUTIONS BY THE ICJ

A superficial glance at the scholarly writings on this issue unveils the existence of two main trends of thought, one tending to affirm, the other tending to deny the existence of the ICJ's competence. An infinite range of intermediate positions have been taken, tending, in various manners, to affirm such competence in principle, but to limit its actual exercise in order to recognize a certain deference to what is undeniably the political organ of the UN *par excellence*.<sup>4</sup>

In order to discuss, albeit briefly, this issue, one must first dispel a methodological misconception that can distort the legal analysis. The relations between the ICJ and the SC are often analysed starting from the implied premise that where the Charter established a power it must have simultaneously laid down

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<sup>4</sup> Among the countless contributions, see T.M. Franck, The Power of "Appreciation": Who is the Ultimate Guardian of UN Legality?, 86 *American Journal of International Law* (1992), p. 519; M. Bedjaoui, *Nouvel ordre mondial et contrôle de la légalité des actes du Conseil de sécurité*, Bruylant, Bruxelles, 1994; J. Alvarez, Judging the Security Council, 90 *American Journal of International Law* (1996), p. 1; K. Zemanek, Is the Security Council the Sole Judge of its own Legality? in E. Yakpo and T. Boumedra (eds), *Liber Amicorum Judge Mohammed Bedjaoui*, The Hague/London/Boston 1999, p. 629; D. 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* (1997), p. 309; B. Martenczuk, The Security Council, The International Court and Judicial Review: What Lessons from Lockerbie?, 10 *European Journal of International Law* (1999), p. 517; B. Fassbender, Quis Judicabit? The Security Council: Its Powers and Its Legal Control, 11 *European Journal of International Law* (2000), p. 219.

restraints and remedies, apt to constitute a workable control on the exercise of that power.

This and other similar analogies are, however, misleading. They do not sufficiently take into account that the Charter does not necessarily possess the features of a State Constitution. In particular, it does not aim at laying down a coherent and comprehensive framework for inter-state relations. Rather, the primary objective of the Charter is to set up a practical mechanism for the control of armed force. In pursuit of this aim, the drafters of the Charter conceived of the collective security system as an exceptional case of centralized functioning within the international legal order. Other functions remained basically decentralized. Thus, unlike state-legal orders, which typically have their functions organized at a centralized level, it was perfectly conceivable for the drafters of the Charter to establish only some basic functions while leaving others undisciplined and essentially governed by customary international law. It is this constant interplay between the UN Charter and general international law, this need to refer continuously to the multi-dimensional nature of almost every issue concerning the UN legal system, that makes the study of this topic fascinating, though very complex indeed.

Thus, it comes as no surprise that the Charter does not contain any provisions aimed at dealing with the judicial control of SC acts. The question, therefore, arises as to the meaning to be given to the silence of the Charter. Does it mean simply that the question is left unresolved, and, therefore, must be dealt with under international customary law? Conversely, does the silence exclude any form of judicial review, meaning that the legality of the SC resolutions can be checked only through the political process?

Both conclusions are logically sustainable. The latter puts much emphasis on the absence of a clear determination purporting to submit the acts of the SC to judicial review and sees this silence as evidence that the Framers of the Charter chose to provide a broad discretion to the organ entrusted with the most politically sensitive function: that of maintaining international peace and security. Those who sustain such a perspective recall that a proposal to include a provision in the Charter calling for judicial review was rejected at the San Francisco conference, evincing the will to keep SC action beyond the reach of judicial control.<sup>5</sup>

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<sup>5</sup> See Documents of the United Nations Conference on International Organizations, San Francisco, 1945, Vol. XII, p. 48 ff. and Vol. XIV, p. 378 ff. The significance of the preparatory works is largely debated in the Dissenting Opinion of Judge Weeramantry appended to the Order of 14 April 1992, Questions of Interpretation and Application of the 1971 Montreal

A systematic argument, which further supports this first conclusion, is that the lack of judicial control is not logically inconsistent with the very idea of the UN Charter as a legal order.<sup>6</sup> The idea of judicial control over the legality of legislation is intimately connected to the evolution of state-constitutionalism, and is based on the widespread acceptance that certain functions must be, for the sake of the common good, subjected to neutral, non-majoritarian, assessment. This precise form of legitimacy hardly can be reproduced within the international legal order, in which the judicial function is still reliant on the previous consent of the addressees of the judicial decision to be legally bound by it.<sup>7</sup> Thus, the idiosyncratic features of the international system make it very difficult for a court of justice to gain the legitimacy necessary to overrule determinations of the highest institution of the international community.

An alternative view is taken by those who advocate a strict separation between the function discharged by the ICJ and the function entrusted to the SC.<sup>8</sup> Whereas the latter maintains peace in the legal frameworks set up by the

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Convention Arising from the Aerial Incident at Lockerbie (*Libyan Arab Jamahiriya v. United States of America*), Provisional Measures, *ICJ Reports 1992*, p. 50 ff., at 61 ff.

<sup>6</sup> As the ICJ said in the Advisory Opinion on Certain Expenses of the United Nations (*ICJ Reports 1962*, p. 21): "In the legal systems of States, there is often some procedure for determining the validity of even a legislative or governmental act, but no analogous procedure is to be found in the structure of the United Nations".

<sup>7</sup> This argument is developed by W. M. Reisman, *The Constitutional Crisis in the United Nations*, 87 *American Journal of International Law* (1993), p. 83. One may doubt that a construction evoking a Madison-style judicial review can be replicated in a legal order, such as that of the UN, which lacks the characteristics of social and political homogeneity necessary for the acceptance of judicial findings over and above political determinations which reflect the outcome of a complex bargaining among the leading world Powers.

<sup>8</sup> See the famous *dictum* of the ICJ in the Nicaragua case, according to which "both organs can perform their separate but complementary function with respect to the same events" (*Military and Paramilitary Activities in and against Nicaragua, United States v. Nicaragua, Jurisdiction, ICJ Reports 1984*, p. 392, at 435. See A. Stein, *Der Sicherheitsrat der Vereinten Nationen und die Rule of Law: Auslegung und Rechtsfortbildung des Begriffs der Friedensbedrohung bei humanitären Interventionen auf der Grundlage des Kapitels VII der Charta der Vereinten Nationen*, Nomos Verlagsgesellschaft, Baden-Baden, 1999. The different functions performed respectively by the SC and by the ICJ might also be regarded as a conflict-avoidance technique. In this perspective, either organ should give way to the other, and should avoid superimposing its view in issues for which the other has a superior competence under the Charter. See R. Kennedy, *Libya v. United State: The International Court of justice and the Power of Judicial Review*, 33 *Virginia Journal of International Law* (1993), p. 899.

Charter, the former settles disputes between States. Though the Charter mentions the ICJ as the principal judicial organ of the UN, the exercise of the contentious function by the ICJ has developed in a legal framework quite unrelated to the UN legal order. Thus, review of the legality of SC resolutions by the ICJ is not part of a constitutional design drawn out of the Charter, but rather is based on the consent of the parties to a dispute, which bestow on it the competence to determine the law applicable in their mutual relations.<sup>9</sup> In other words, it is true that the ICJ, like other international tribunals, is not designed to review the legality of resolutions of the SC. However, in contentious cases, such a review can be done incidentally, at the request of the parties to a dispute, in respect to whom alone the decision has binding effect. As regards Advisory Proceedings, the control of legality of SC resolutions can be considered inherent in the task discharged to the ICJ to say what the law is in regard to a specific question answered to it.<sup>10</sup>

From a more systematic perspective, the solution that admits the competence of the ICJ to review SC resolutions might seem appealing as it accords with an intuitive sense of justice, which is fed, in the present era, by judicial, non-political control over the legality of acts. Particularly in light of the activism sometimes exhibited by the SC, which in recent decades tends to operate very close to the limits of its competence, the existence of some form of judicial review would appease disquieting concerns about the risk of political choices resulting in arbitrary outcomes. Whereas it is plainly acceptable that explicit or, more frequently, implicit rules of the system recognize a certain discretionary space reserved for political organs, it is not acceptable to exclude judicial review for an entire area of legal activities.<sup>11</sup> Applied to the question of the justiciability of UN resolutions, this construction suggests an interpretation of the UN Charter consistent with the aspiration, which emerges from many of its provisions, to be the constitutive instrument of a new constitutional international legal order.<sup>12</sup>

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<sup>9</sup> See L. Condorelli, *La Corte internazionale di giustizia e gli organi politici delle Nazioni Unite*, 78 *Rivista di diritto internazionale* (1994), p. 897.

<sup>10</sup> See D. Akande, *The International Court of Justice and the Security Council*, *supra*, note 4, at 327 ff.

<sup>11</sup> It is widely accepted, for instance, that the Security Council enjoys a particularly broad discretion as regards the assessment of the existence of a threat to peace. This, however, can be seen as a consequence of the political elements inherent in this type assessment, which can justify the adoption of a relaxed standard of review, and not as a consequence of a limit to the jurisdiction of the ICJ. See below, note 37.

<sup>12</sup> See E. McWhinney, *The International Court as Emerging Constitutional Court and the Coordinate UN Institutions (Especially the Security Council): Implications of the Aerial*

Some authors seem to favour an evolution within the UN legal system, akin to that which took place in some domestic systems, notably in the United States, in which the absence of a specific indication in the Constitution was not seen as an obstacle to the development of forms of judicial review of legislation.<sup>13</sup> Whilst judicial review is not necessarily required in the concept of a legal system, the idea that the powers of the UN organs are not subject to non-political, independent control seems at odds with the construction of the United Nations as a community of law, a construction implicitly stemming from the Charter.

In my view, the arguments in favour of the second proposition support the conclusion that the ICJ incidentally can assess the legality of SC resolutions as part of its competence to settle disputes among States. This, indeed, appears to be the more logical consequence of the absence in the Charter on an explicit prohibitory rule. The parties to a dispute can limit the competence of an arbitral tribunal, to which they have referred to the dispute, to a particular aspect of that dispute or to a part thereof. They also could, what altogether appears more controversial, limit the law applicable by the tribunal by indicating, for example, that the dispute must be settled on the basis of a certain treaty only. In the same vein, they could exclude the competence of the tribunal to determine the legality of SC resolutions. If they do not, however, the competence of the tribunal to say what the law is in the relations between the parties extends to the determination of their mutual obligations under a SC resolution in so far as this is necessary for settling the dispute. This, in turn, entails the competence of the Court to determine, incidentally, the scope, the effect and the validity of that resolution as between the parties. The opposite perspective should entail the demonstra-

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Incident at Lockerbie, 30 *Canadian Journal of International Law* (1992), p. 261. For a more general perspective, see B. Simma, From Bilateralism to Community Interest in International Law, 250 *Recueil des cours de l'Académie de droit international* (1994), p. 217; P.M. Dupuy, The Constitutional Dimension of the Charter of the UN Revisited, 1 *Max Planck Yearbook of UN Law* (1997), p. 1; B. Fassbender, The United Nations Charter as Constitution of the International Community, 36 *Columbia Journal of Transnational Law* (1998), p. 531. Cf. the remarks of G. Arangio Ruiz, The « Federal Analogy » and the UN Charter Interpretation, 8 *European Journal of International Law* (1997), p. 1; ID., On the Security Council's « Law Making », 83 *Rivista di diritto internazionale* (2000), p. 609, at 685.

<sup>13</sup> *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803), a landmark case in United States law which served as a basis for the exercise of judicial review of Federal statutes by the United States Supreme Court as a constitutional power. On the analogy between these two situations, see T. M. Franck, The Power of "Appreciation": Who is the Ultimate Guardian of UN Legality ?, *supra*, note 4.

tion that the UN Charter contains an implied prohibition against the parties to a dispute referring to the ICJ, or to another arbitral tribunal, the competence to settle a dispute on the validity of an SC resolution. To my knowledge, no demonstration of the existence of such a rule has been convincingly given.

In analogous terms, I maintain that the ICJ has the power to pass on the legality of an SC resolution when it gives an advisory opinion under Article 96 of the Charter. Absent a clear indication to the contrary, one can reasonably assume that the competence of the Court to answer a legal question extends to the determination of those preliminary questions whose solutions are necessary for giving its answer. Thus, not only the ICJ must determine the legality of a SC resolution when it is expressly asked to do so. It can moreover do it *ex officio* if, and to the extent to which, its answer entails such a preliminary assessment. To the limited aims of the present paper, there is no need to determine more precisely the cases in which the assessment of the legality of a SC resolution might constitute a preliminary question in the context of an advisory opinion.

This conclusion is without prejudice to the existence of a legally appreciable standard for judicial assessment. As we will see below, a number of authors retain that some determinations of the SC are not judicially reviewable for want of an appreciable judicial standard. However, this does not mean that the Court lacks the competence to decide the case. Rather, it means that the question is answered positively, absent a cogent yardstick for assessing the legality of SC determinations.

Be that as it may, the existence of a competence of the ICJ, or of other international arbitral tribunals, can be of avail in particular cases, but it does not amount to an efficient system of control of the legality of acts of UN organs.

The structure of international legal relations makes it extremely infrequent for States to refer to the ICJ, or to other international tribunals, disputes on the legality of SC resolutions, both because of a lack of jurisdictional link and because of the mistrust in the capacity of judicial dispute settlement to assert itself against the determination of the highest political body of the international community.<sup>14</sup> Even more remote is the possibility for an organ of the UN to ask the ICJ for an advisory opinion entailing the control of legality of an SC resolution, a contingency that indeed has never occurred.

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<sup>14</sup> This is quite a common remark among international scholars. See, for example, D. Akande, *The International Court of Justice and the Security Council*, *supra*, note 4, at 342; See also N. Angelet, *International Law Limits to the Security Council*, in V. Gowlland-Debbas (ed.), *United Nations Sanctions and International Law*, KLI, The Hague-London-New York, 2001, p. 71.



The infrequency of this form of control militates against it constituting an acceptable instrument for discharging an important function of the system, namely the judicial function, and for securing in a great majority of cases, if not in all, the review of the legality of acts of the UN organs. Moreover, the structural limits of the dispute-settling mechanism of the ICJ, and in particular, the fact that it is not open to individual claims, make the ICJ ultimately unfit to protect individual rights affected by SC resolutions. In other words, the classical dispute-settling mechanisms are not suitable to cope with the possible evolution of the SC from an organ operating basically in an inter-state legal environment to one entitled to pierce the veil of state intermediation and to directly target individuals.

## 2. SC RESOLUTIONS DIRECTLY AFFECTING THE LEGAL POSITION OF INDIVIDUALS

Examples of SC resolutions potentially impinging on rights individually possessed by natural or legal persons, though not lacking, have been an infrequent occurrence in the past.<sup>15</sup> However, the most recent practice of the SC has established a true international system of administering sanctions against individuals. This makes the conflict between SC action and individual rights more likely to occur and emphasizes the need to open to individuals the means to protect their fundamental rights from intrusions coming from determinations adopted at the international level.

The first resolutions of this new pattern were adopted by the SC towards the end of the 1990s. They outline sanctions against individuals deemed to be

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<sup>15</sup> It might be worthwhile to recall that the legal position of individuals can also be affected by measures not directly aimed at them. The implementation of sanctions established by the SC toward a State can affect the execution of contracts or other business transactions, limit the rights to travel, or interfere in more sophisticated ways with individual freedoms enjoyed under domestic and international instruments. This possibility is well exemplified by the *Bosphorus* saga. An aircraft leased by a Yugoslav air company to a Turkish company was impounded by Ireland as part of the measures enacted by that State in order to implement the sanctions toward the RFY by SC resolution 820 (1993). The Irish measure, adopted pursuant to a set of measures taken by the EU on the basis of both its foreign policy and commercial policy competence, was challenged before domestic, EU and international courts. For a complete account, see the recent decision of the European Court of Human Rights of 30 June 2005, *Bosphorus v. Ireland*, 45 *International Legal Materials* (2006), p. 136.

involved in terrorist activities.<sup>16</sup> The measures generally have consisted of the freezing of assets and the restriction of cross-border travel. Occasionally, they have also extended to more radical measures such as confiscation of assets.<sup>17</sup> Even outside the particular context of terrorism, the SC repeatedly has adopted measures aimed at directly sanctioning individuals as part of its action for maintaining or restoring international peace and security.<sup>18</sup>

It is worth noting that the practice of adopting Resolutions that target individuals directly appears qualitatively different from the establishment of international criminal tribunals, set up in order to criminally prosecute individuals indicted for violations of minimum international legal standards. What marks off these two instances is that, in the latter case, the international sanctioning process functions according to a full-fledged set of substantive and procedural guarantees that satisfy the criminal law standards of the most advanced states. Moreover, the judicial practice of the international criminal tribunals exemplifies how the inevitable gaps in international criminal law and procedure can be filled by recourse to principles mainly extracted from national legal orders. This stands as testament to the important role of national legal experience to support the international order, especially when individual rights are at stake.<sup>19</sup> These tribunals did not hesitate to review the legality of the SC resolutions on which their competence is based. The two decisions of the International Criminal Tribunal for the Former Yugoslavia in the Tadic case are notable examples of the kind.<sup>20</sup>

On the other hand, the most recent practice of targeting individuals whose action constitutes, in the view of the SC, a threat to international peace and security is entirely carried out through an administrative procedure.<sup>21</sup> Generally,

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<sup>16</sup> A non-exhaustive list includes Res. 1267 (1999); Res. 1333 (2000); Res. 1373 (2001); Res. 1390 (2002); 1455 (2003); 1526 (2004); 1566 (2004); Res. 1617 (2005).

<sup>17</sup> See, for example, Res. 1483 (2003).

<sup>18</sup> Notable examples are: Res. 1572 (2004), concerning the situation in Côte d'Ivoire; Res. 1533 (2004) and 1596 (2005) concerning the situation in Congo; Res. 1636 (2005), concerning the situation in Lebanon.

<sup>19</sup> See A. Cassese, *International Criminal Law*, OUP, Oxford, 2003, 31 ff.

<sup>20</sup> See the two decisions on the Tadic case of the Trial Chamber (10 August 1995), *Prosecutor v. Tadic, Decision on the Defence Motion on Jurisdiction*, and of the Appeals Chamber (2 October 1995), *Prosecutor v. Tadic, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction*.

<sup>21</sup> See the SC Res. 1267 (1999) that established the Al-Qaida and Taliban Sanctions Committee, and the SC Res. 1373 (2001) that established the Counter-Terrorism Committee.

the SC decides the type of sanctions to be applied by the States, and sets up a Sanctions Committee, typically composed of one representative for each of the Member States sitting in the Council, with the task of preparing and maintaining a list of individuals to whom the sanctions apply.<sup>22</sup> Information about the individual persons to be included in the list is mainly provided by designating States, and presumably based on intelligence reports. Individuals who oppose their inclusion can petition their government of residence or citizenship to request a review of the case. The petitioned government should then approach the designating state and discuss the case. The two governments can exchange relevant information. In the end, the petitioned government can file a de-listing request with the Committee.<sup>23</sup> Decisions as to the de-listing must be approved by consensus. Thus, every single member of the Committee can block the adoption of de-listing decisions.

The Committee meets behind closed doors, and no public account is given of its works. Consistent with this approach, the Committees do not disclose the reasons on which their decisions are based.

The specific targeting of individuals in international action against terrorism marks a far-reaching change of perspective in the action of the SC. The practice does not stop short of State intermediation, but rather pierces this veil,

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<sup>22</sup> See the procedural rules of the Al-Qaida and Taliban Sanctions Committee: Guidelines of the Committee for the conduct of its work (Adopted on 7 November 2002, as amended on 10 April 2003 and revised on 21 December 2005), available on Guidelines of the Committee for the conduct of its work <[www.un.org/Docs/sc/committees/1267/1267\\_guidelines.pdf](http://www.un.org/Docs/sc/committees/1267/1267_guidelines.pdf)>.

<sup>23</sup> In *Ayadi*, supra, note 1, at paras. 144 ff., the ECJ found that, in exercising the powers conferred to them by the Guidelines, the Member States must be guided by their obligation to respect the Community human rights standard. Consequently, they must avail themselves of the margin of discretion given by the Guidelines so as to secure a human rights friendly implementation. It ensues that individuals have a right under the Community order to present a request for review to the Member State competent to receive it. Further, “both in examining such a request and in the context of the consultations between States and other actions that may take place under paragraph 8 of the Guidelines, the Member States are bound, in accordance with Article 6 EU, to respect the fundamental rights of the persons involved, as guaranteed by the ECHR and as they result from the constitutional traditions common to the Member States, as general principles of Community law, given that the respect of those fundamental rights does not appear capable of preventing the proper performance of their obligations under the Charter of the United Nations”. The existence of positive obligations imposed to the Member States should, in the view of the CFI, assuage to a certain degree the curtailing of the fundamental rights recognised to individuals under community law.

and thrusts into the international sphere functions traditionally attributed to the State, such as that of governing the conduct of individuals.

Yet the theoretical and the practical importance of this event - the transfer to a supranational level of functions so intimately related to the relationship between the State and individuals - is fraught with problematic issues and ultimately has the potential to upset the complex and fragile balance of powers and guarantees on which the modern State rests.

The adoption, at the international level, of a decision-making procedure likely to affect the legal positions of individuals, without a corresponding incorporation of safeguards and guarantees equivalent to those that have been developed at the State level, creates a clear asymmetry. Being taken by international bodies, these decisions are removed from their usual national context, with the consequent waning of fundamental guarantees, which surround, in most States of the world, the processes of both making and implementing internal decisions affecting individuals. Indeed, there are no forms of redress against actions taken at the international level that intrude directly upon the legal positions of individuals. Remedies established by international human rights treaties are barred by the provision of Article 103 of the Charter, which provides that obligations deriving from the Charter take priority over any other international obligation, including obligations to respect human rights.<sup>24</sup>

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<sup>24</sup> This solution is probably the simplest explanation of the relationship between obligations deriving from the UN Charter and obligations deriving from human rights treaties. In spite of its apparent simplicity, however, it is not free from challenge. It is difficult to see why a body set up by a human rights treaty in order to receive complaints by individuals should decline its jurisdiction simply because the State conduct, allegedly in breach of the treaty has been performed in order to implement a SC resolution. First, in the prevailing scholarly view the effect of Art. 103 of the UN Charter is not to render invalid treaty obligations inconsistent therewith, but rather to require States to give priority to the obligations arising under the Charter. Second, the procedural provisions of the treaty which set up such a body, and confer jurisdiction to it, are generally not by themselves inconsistent with the SC resolution. An inconsistency can exist between substantive obligations of the treaty and SC resolutions requiring conduct entailing a breach of the treaty. An inconsistency can also arise in consequence of a judgment finding that State conduct performed under an SC resolution is inconsistent with the human rights treaty. If that treaty contains an obligation for the States parties to comply with the judgment, an inconsistency arises between such an obligation and the obligation to implement the resolution. It is difficult to go beyond these hypotheses and to construe Art. 103 as a provision affecting the jurisdiction of a judicial body set up by a human rights treaty when the findings of such a body can potentially create a situation of inconsistency with SC resolutions.

A different, albeit related, issue concerns the identification of the law applicable by that body. Is it to apply only the treaty or also the obligations deriving from the UN

At a time when there is an increasing tendency to sacrifice civil liberties to the struggle against terrorism, taking decisions at the international level presents an enticing leeway for circumventing the legal hurdles for taking such determination on a state level.

### 3. THE TWO DECISIONS OF THE EUROPEAN COURT OF FIRST INSTANCE

The lack of international remedies open to individuals against acts of the SC that impinge directly on their legal position raises the question of the competence of domestic courts to review such acts. At this point of the analysis, it is therefore opportune to examine more in detail the two recent decisions of the CFI mentioned above.

Interestingly enough, the Court did not decline its competence. However, it refused to review the legality of the EC measures in light of superior EC law. Integral to the court's decision was the finding that the EC was acting under "circumscribed power", in so far as the measures enacted were meant to implement SC resolutions.<sup>25</sup> This finding prompted the conclusion of the court

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Charter and from SC resolutions? It seems reasonable to assume that, in order to avoid the fragmentation of the international legal order which would otherwise arise from the consideration in isolation of obligations flowing from a treaty (see E. Cannizzaro and B. Bonafé, *Fragmenting International Law through Compromissory Clauses? Some Remarks on the Decision of the ICJ in the Oil Platforms Case*, 16 *European Journal of International Law* (2005), p. 481), the judge is to consider Art. 103 as part of the law applicable by it. This however does not necessarily preclude the application of human rights treaties due to the priority granted by that provision to the obligations deriving from the UN Charter. Indeed, one should not lose sight of the fact that the dynamics among international rules do not only flow in one direction, and interference is often mutual. Therefore, while human rights treaties must be interpreted and applied in connection with the Charter, the Charter must likewise be interpreted and applied in connection with human rights treaties. Since one of the purposes of the Charter is the protection and the promotion of human rights, it seems simplistic to construe the relation between human rights treaties and the Charter in terms of reciprocal incompatibility. This issue, very complex indeed, is referred to, albeit briefly, in section 6, below.

<sup>25</sup> "Any review of the internal lawfulness of the contested regulation, especially having regard to the provisions or general principles of Community law relating to the protection of fundamental rights, would therefore imply that the Court is to consider, indirectly, the lawfulness of those resolutions. In that hypothetical situation, in fact, the origin of the illegality alleged by the applicant would have to be sought, not in the adoption of the contested regulation but in the resolutions of the Security Council which imposed the sanctions" (para. 266 of the *Yusuf* decision, T-306/01).

that the real object of the review sought by the applicants was not so much the EC measures; rather they desired direct review of the SC resolution. However, in the court's view, SC resolutions could not be reviewed on the basis of EC human rights standards,<sup>26</sup> and may be reviewed uniquely on the basis of the international *jus cogens*, conceived by the court as the only limit erected by international law to the power of the SC.<sup>27</sup>

The CFI seemed to base this conclusion on the provisions of Article 103 of the UN Charter, which gives priority to the obligations deriving from the Charter over any other conflicting international obligations. In the reasoning that emerges, although not very clearly, from the decisions, Article 103 requires the MS to give priority to the UN resolutions over conflicting human rights obligations deriving from the EC Treaty. In the "domestic" legal order of the EC, the priority of obligations deriving from the Charter would be assured by Article 307 of the EC Treaty, which confers on the MS the right to maintain conduct inconsistent with the EC treaty in order to comply with agreements concluded before their entry into the EC. The combined effect of Article 103 of the UN Charter, on the international plane, and of Article 307 of the EC Treaty on the domestic plane, would thus, according to the CFI, exclude domestic human rights standards from limiting the powers of the Security Council.<sup>28</sup>

Upon closer inspection, this conclusion does not appear immune from criticism. There is little doubt that Article 103 of the UN Charter confers on the Member States the right to disregard EC obligations in order to abide by its obligations under the Charter. However, the situations presented to the court differed significantly from that simple paradigm. The court was asked to determine whether EC action, taken pursuant its competence under the Treaty, should be unrestricted by EC human rights standards when that action is taken to comply with a SC resolution. Yet, whereas the Member States may invoke their obligation under the UN Charter in order to justify conduct inconsistent with the EC Treaty, it is highly doubtful that the EC can invoke obligations of the MS in order to override limits on its actions established by the EC Treaty. A different conclusion would be tantamount to saying that, under Article 307 of the EC Treaty, the existence of international obligations of the Member States allows the EC to act beyond the limits of its competence. This is a result that cannot be easily drawn from Article 307 of the EC Treaty.

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<sup>26</sup> Paras. 269 of the *Yusuf* decision (T-306/01).

<sup>27</sup> Para. 277 of the *Yusuf* decision (T-306/01).

<sup>28</sup> See paras. 221 ff. of the *Yusuf* decision (T-306/01).

To all appearances, the CFI conceived the conflict between SC resolutions and EC human rights standards as a conflict between international obligations of the MS. But even if one assumed that Article 307 gave priority to pre-existent international obligations of the MS over obligations deriving from the EC treaty,<sup>29</sup> this would by no means lead to the conclusion that these commitments enjoy priority over the EC's "bill of rights" within the legal order of the EC. This perspective would be patently inconsistent with the constitutional nature of the EC Treaty, one of the milestones of the European integration and a major jurisprudential achievement of the judicial institutions of the EC. If one embraced this perspective, one would be led to conclude that the CFI itself would be not so much a judicial organ of an entity having its own legal personality, distinct from its MS, but rather a common agent of the MS.

Be that as it may, two major achievements of these decisions are to be welcomed. First, there is the acknowledgement that the powers of the SC are not completely unfettered from legal restraint, but that they must conform to international *jus cogens*. Second, and perhaps more importantly, the court seems to have implicitly acknowledged the competence of domestic courts to control the international validity of SC resolutions that breach *jus cogens* rules. However, the court adopted a very restrictive notion of *jus cogens*, and, in particular, excluded that the right of individuals to have recourse to an impartial and independent tribunal against measures affecting their individual legal position, which is expressly laid down in the major human rights conventions on the universal and on the regional plane,<sup>30</sup> is part of contemporary *jus cogens*. On account of both the very restrictive notion of *jus cogens* adopted by the court and the very broad latitude of discretion recognized to the SC, the

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<sup>29</sup> This is certainly debatable. Art. 307 simply allows the MS to temporarily maintain conduct inconsistent with the EC treaty in order to comply with pre-existing international agreements, while, at the same time, stipulating that: "To the extent that such agreements are not compatible with this Treaty, the Member State or States concerned shall take all appropriate steps to eliminate the incompatibilities established". If one considered that there is an irredeemable inconsistency between the UN Charter and EC human rights obligations, one should coherently conclude that the MS are under an obligation to withdraw from the Charter, a conclusion which is not to be drawn lightly.

<sup>30</sup> *Supra*, note 3. In the Community legal order, the right to a fair trial acquired the rank of fundamental principle. See, again, Case C-228/84, Judgment of 15 May 1986, *Johnston / Chief Constable of the Royal Ulster Constabulary* [1986], ECR I-1651. The Court stated as a general principle of EC law the right of all individuals to obtain an effective remedy in a competent court against measures which they consider to be contrary to their rights laid down under EC law (paras. 18-19 of the judgment). This right is now codified as art. 47 of the Charter of fundamental rights of the European Union.

decision found that the measures adopted by the SC, although they disregarded any procedural guarantees for the individuals concerned, were fully consistent with *jus cogens*, and therefore within the scope of the SC's powers.

Whilst the CFI's decisions met the expectations both of the EC Institutions and of the MS intervening in the proceedings, which, incidentally, exhibited an unexpected unanimity in accepting the apparent curtailment of the human rights standards that otherwise apply to EC acts, its findings are not entirely free from criticism. Many of its passages are obscure and convoluted, and appear technically questionable.<sup>31</sup> All in all, the impression is that the magnitude of the issue, and the unanimous political consent surrounding the determination of the SC, weighed heavily on the CFI's decision.

It is not opportune, in this analysis of a general character, to follow in full detail the line of reasoning of the two decisions, which will presumably form the subject of extensive literature. Rather, it is timely to look at the general legal framework surrounding judicial review of SC resolutions by domestic courts. By so doing, I hope to demonstrate that review by domestic courts is not only technically possible, but also politically desirable as a tool aimed at mainstreaming respect for human rights and the rule of law within the UN legal system. Far from undermining efficiency in the SC's action, such a development would bestow increased legitimacy and authority on action carried out on behalf of the international community. This analysis will indirectly highlight the technical flaws of the decisions of the CFI, and their scarce judicial wisdom.

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<sup>31</sup> Among the less convincing passages of the two decisions, it is worth mentioning the argument used in order to uphold the competence of the Community to adopt the contested regulation. The Court found that Art. 301 has the effect of permitting the EC to go beyond the objectives specifically assigned to it and to pursue political objectives determined by a Common Foreign and Security Policy act. However, Art. 301 confers on the EC the competence to adopt sanctions against *third States*, and not against individuals. This gap was thus filled by Art. 308, which points out that the Community can use means of action not explicitly assigned to it by the Treaty, when they are necessary to pursue one of the objectives of the Community. The conjunction of the two legal bases should make it possible for the Community to adopt sanctions against individuals under the umbrella of a CFSP act. This conclusion, though suggestive, is scarcely convincing and, to the contrary, results in a vicious circle. Indeed, an action of the EC based on Art. 301 consists of using means already at the EC's disposal for goals not assigned to it by the Treaty. Conversely, an action based on Art. 308 consists of pursuing objectives assigned to the EC by the Treaty through means of action not expressly conferred to it. Thus, to have recourse to a joint legal basis composed of Articles 301 and 308 in order to justify a Community action is essentially boot-strapping. It results in permitting a Community action for which the EC Treaty did not provide either the means or the goals.



#### 4. OF SOME TENUOUS YET RESILIENT THREADS: INTERNATIONAL JUDICIAL FUNCTION AND DOMESTIC COURTS

In order to ascertain whether judicial review by domestic courts can be a viable alternative form of control over the legality of SC resolutions at the international level, I will first consider the nature of this purported review. This, I hope, will also clarify the scope of the control likely to be exercised by domestic courts.<sup>32</sup> At this stage of the analysis the issue can be dealt with only in general terms, since the jurisdiction of domestic courts depends, naturally, on the rules that govern the judicial function in each individual domestic legal order.

In the current section, an attempt will be made to demonstrate that a judicial review of SC resolutions by domestic courts does not run counter to any prohibitory rule in the UN Charter. Specifically, I will endeavour to show that, even assuming (though not conceding) that the UN Charter prohibits States from referring the issue to an international tribunal, this would by no means deprive domestic courts of their jurisdiction under internal law.

In order to prove this contention, I refer to an argument of general theory concerning the relations between international law and domestic law. Beyond terminological analogies, there is little space for doubting that a determination by a domestic judge that reviews the legality of a SC resolution, in light of an international or a domestic standard, is not part of the international judicial function. Rather, where such an issue arises in the context of a domestic trial and is necessary for solving the particular case presented to the judge, the judicial determination represents nothing more than the conduct of a State organ that might lead to a breach of an international obligation to which that State is bound.

Thus, from the perspective of the UN legal order, a judicial determination as to the legality of a SC resolution by a domestic court is, by itself, legally irrelevant. However, insofar as it may make it impossible for the State to comply with its obligations arising under the SC resolution, the judicial finding may produce effects inconsistent with the Charter.<sup>33</sup>

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<sup>32</sup> This issue is amply explored by E. De Wet and A. Nollkaemper, *Review of Security Council Decisions by National Courts*, in 45 *German Yearbook of International Law* (2003), p. 166.

<sup>33</sup> It is hardly worthy mentioning that this assumption is independent of the ideological views about the relations between international law and domestic legal order, sometimes referred to as monism and dualism. As we will see, these views are not completely irrelevant

This consideration paves the way for the following logical step, which consists of the demonstration that the possible existence of a rule that pre-emptly the review of SC resolutions by international courts has no impact on the competence of domestic courts under internal law. In order to demonstrate this conclusion, a technical discussion of the issue seems unavoidable.

As seen above, a theory postulating the existence of an implied clause of the UN Charter, preventing international tribunals settling disputes between states from commenting incidentally on the legality of SC resolutions, could be grounded on the principle of the primacy of obligations deriving from the Charter over other international obligations.<sup>34</sup> Since the competence of the ICJ, and of other international arbitral tribunals, rests basically on the consent of the parties, one could argue that the agreement by which the parties refer a certain dispute to judicial settlement could not confer on that court the power to find a SC resolution to be illegal, even if this assessment would produce effects only in the mutual relations of the parties.

On the flipside, it is a large step to assume that States are prevented from contesting the legality of SC resolutions through diplomatic means, and from entering into a dispute, with other States, or with the SC itself, about the legality of its acts. Such an assumption would be tantamount to saying that the SC has the power to modify the Charter at its will, and it would make the SC an organ with absolute powers in the international community. To draw such a conclusion from the ambiguity of the provisions of the Charter is not easy altogether. The conclusion would be at variance with Articles 108 and 109 of the Charter, which expressly indicate that modifications of the Charter can occur only by way of a particular procedure. The preposterousness of such a conclusion also emerges from a superficial glance at the international practice, which does not support the view that States are legally prohibited from contesting the legality of SC resolutions.<sup>35</sup>

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to the aims of the present study, and, quite the contrary, can have a profound impact on it. However, they do not have a bearing on this preliminary assumption, which is based rather on the observation of the structure of the legal relations within the particular sub-system established by the Charter of the UN. I assume that the obligations deriving from the Charter address only States, conceived as politically organized units and does not have regard to the subdivision of competences within a certain State.

<sup>34</sup> UN Charter, art.103

<sup>35</sup> See N. Angelet, *Protest Against Security Council Decisions*, in K. C. Wellens (ed.), *International Law: Theory and Practice: Essays in Honour of Eric Suy*, Martinus Nijhoff, The Hague-Boston-London, 1998, p. 277, at 281; B. Conforti, *The Law and Practice of the United Nations*, 2<sup>nd</sup> ed., KLI, The Hague-London-Boston, 2000, at 293 ff.; E. De Wet,

Yet if one accepts this conclusion, there is no logical reason for denying the competence of domestic courts to engage in a review of the legality of SC resolutions. As we have seen above, determinations of domestic courts do not constitute an expression of international judicial review and should rather be likened to forms of unilateral contestation of the resolutions of the SC by a State.<sup>36</sup>

## 5. THE STANDARD OF REVIEW: INTERNATIONAL STANDARD AND THE DUAL CHARACTER OF *JUS COGENS*

The next step in the analysis consists of determining the standard of review. At least in those domestic legal orders in which SC resolutions produce effects, it seems reasonable to assume that such review would apply a twofold standard: first, an international standard, in order to see whether the relevant SC resolutions are valid under international law; and second, an internal standard, which encompasses the fundamental principles of the domestic legal order of the court, unless the resolutions of the SC are accorded a higher rank internally than the Constitution itself.

The first assessment is substantially analogous to the one that would have been conducted by an international court. It is for a domestic court entrusted with the determination of the internal effects of an international act to determine whether that act was validly formed and is still in force. This is a common activity for a domestic court entrusted with the application of international law. For example, if a claim based on a treaty is duly presented to a domestic court,

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Human Rights Limitations to Economic Enforcement Measures Under Article 41 of the United Nations Charter and the Iraqi Sanctions Regime, 14 *Leiden Journal of International Law* (2001), p. 277, at 280.

<sup>36</sup> One may wonder whether a bar to this competence might derive from the lack of contestation by the political organs of the State. The failure by these organs to raise timely objections to the legality of the resolution or, even worse, the possible active participation in the adoption and implementation of the resolution, could be seen as a form of acquiescence to the legality of the resolution. This argument would be fallacious. Indeed, the acquiescence by a State is meaningful in the international legal order, in which the acquiescing State might be deemed to have lost its right to engage in a further dispute about the legality of the act to which it has acquiesced. This, however, can hardly bar the competence of domestic court once it is proven that the acquiescence by its State clashes with superior standards of law. In any case, even from an international perspective, the acquiescence of the State cannot have the effect of nullifying a violation of fundamental individual rights, as States cannot contract out of their obligations to respect such rights.

the determination as to the validity of that treaty may be considered as part of the judicial determination. To this end, the court must look at the international law of treaties and apply at least those rules of the law of treaties that produce direct effects in its domestic order.

An analogous logical process must be followed by a domestic court when it is presented with a claim based on, or contrary to, a SC resolution. In order to adjudicate the claim, the court can be called to first decide a dispute between the parties as to the legality of the resolution. However, due to the nature of the SC resolution as an act adopted under the UN Charter, the assessment of its international validity is twofold. It entails a review under the UN Charter, as well as under rules of peremptory nature.

### a) The Principles and Purposes of the Charter

It is common knowledge that the Charter does not explicitly mention substantive limits to SC action. Certain limits can be deduced by implication, as being inherent in the function that the SC is called on to discharge. For example, when the Charter assigns to the Council the power to take forcible or non-forcible action for maintaining or restoring international peace and security, it seems safe to assume that each of these powers is limited to the means necessary and proper to that end.<sup>37</sup>

To extract substantive limits to SC action from other provisions of the Charter requires a lengthier logical process. Article 24 expressly states that the Security Council must act in compliance with the purposes and principles of the Charter. However, most of the principles and purposes of the Charter, included Article 1 (3), which mentions human rights, impose obligations on

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<sup>37</sup> On proportionality as a general limit to the sanctioning power of the UN, see, among others, M.J. Herdegen, *The "Constitutionalization" of the U.N. Security System*, 27 *Vanderbilt Journal of Transnational Law* (1994), p. 135; J.A. Frowein and N. Krisch, Article 41, in B. Simma (ed.), *The Charter of the United Nations. A Commentary*, OUP, Oxford, 2002, p. 735; N. Angelet, *International Law Limits to the Security Council*, *supra*, note 14 at 71; M.E. O'Connell, *Debating the Law of Sanctions*, 13 *European Journal of International Law* (2002), p. 63. Conversely, the vast majority of legal writers favour the idea that the determination of a threat to international peace and security, by virtue of its political character, is beyond judicial control. For various positions, see I. Österdahl, *Threat to Peace*, Uppsala, 1998; D. Akande, *The International Court of Justice and the Security Council*, *supra*, note 4, at 338, who however draws a distinction between the determination of a threat to peace and the determination of the existence of an act of aggression; E. Sciso, *Può la Corte internazionale di giustizia rilevare l'invalidità di una decisione del Consiglio di sicurezza ?*, 75 *Rivista di diritto internazionale* (1992), p. 396.

the member States and only indirectly can be referred to the institutional action of the UN organs.

Thus, at first glance, it is not easy to construe Article 24 as establishing a limit to SC action in relation to human rights. Indeed, in the logic of the Charter, the UN organs are not seen as among the addressees of obligations concerning human rights; in other words, they are not seen as possible violators, but rather as actors that promote compliance with human rights. This is a consequence of the ambivalent nature of the Charter, which on the one hand is a conventional instrument that imposes obligations on its member States, and that on the other hand is, aspirationally at least, the constitutive instrument of a universal legal order, and assigns powers and prerogatives to its organs in order to accomplish its universalistic design.

Yet, the lack of express limitations to SC action thus seems to be due more to unawareness as to the possibility of human rights breaches by UN organs, than to the will to leave the institutional action free from legal restraint. The distinction between States, bound to respect an international human rights standard, and institutional actors, bound to promote compliance therewith, tends more and more to blur. It is nowadays clear that the action of the UN organs, aimed at achieving one of the purposes of the Charter, can result in a breach of another of the fundamental principles of this instrument. As concerns specifically human rights, there are many ways in which the institutional action of the UN organs can violate the same rights with which, otherwise, the UN seeks compliance from its member States, as abundantly shown above.

Elementary consideration of coherence of the UN system should then induce one to assume that the promoter must abide by the same basic principles that inspire his action and, therefore, to comply with at least the basic values underlying the human rights for which he seeks compliance. In particular, in regard to the emergence of new powers, implied in the provisions of the Charter, whose exercise is likely to impinge upon the positions of individuals, it does not seem unreasonable to postulate the existence of a class of implied limitations concerning the protection of individual rights likely to be affected by the SC action.

Whereas it is acceptable that the particular nature and function of the UN institutional action might require a standard different from that imposed on the States, it is also reasonable to assume that the core content of human rights treaties concluded under the auspices of the UN expresses, at the treaty level, the more general commitment of the Charter towards human rights. It materialises, in other words, the appropriate standard of protection, under the Charter, for

action likely to endanger fundamental human rights and constitutes, therefore, the expression of fundamental principles and purposes of the Charter.<sup>38</sup>

To extract from these treaties a more limited nucleus of human rights, which moreover should prove fit to bind the institutional action of the UN, is not easy. Although scholars sometimes refer to the notion of non-derogable rights, a notion embracing those rights from which States cannot derogate even in case of emergency,<sup>39</sup> this notion does not appear fully appropriate to describe the limits to the institutional action of the SC.

Indeed, a necessary pre-condition for SC action under Chapter VII is the existence of a threat to the peace. Undoubtedly, this notion encompasses some element of emergency. Thus, to deal with an emergency is not an exceptional situation for the SC, but rather constitutes its *raison d'être*. There is, however, a strong case for maintaining that the emergency underlying the concept of threat to the peace does not coincide with the notion of emergency employed by human rights treaties for permitting a derogation from its substantive provisions. On the one hand, it is common knowledge that the SC has interpreted broadly the notion of threat to the peace, so as to justify its intervention in situations of crisis of minor gravity. On the other hand, the human rights bodies have interpreted very narrowly the notion of state of emergency, so as to render it more and more difficult for States to invoke it as a justification for not abiding

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<sup>38</sup> True, there may be situations in which rules limiting the action by States do not limit the action of the SC, by virtue of the different nature and purpose of their respective action. There is, however, a strong case for thinking that this distinction cannot apply in relation to human rights, which, by nature, tend to accord protection to individuals against public action. The view that Security Council action is limited by the core standards of human rights treaties concluded under the auspices of the UN, as part of their action to promote respect for human rights has been sustained by E. De Wet, *The Chapter VII Powers of the United Nations Security Council*, Hart Publishing, Oxford and Portland Oregon, 2004, p. 191 ff. According to the author, this obligation would be strengthened by the principle of good faith, which “implies that the United Nations have to conform to human rights standards developed within the framework of the organisation”.

<sup>39</sup> See, for example, T.D. Gill, Legal and Some Political Limitations on the Power of the UN Security Council to Exercise its Enforcement Powers under Chapter VII of the Charter, 26 *Netherlands Yearbook of International Law* (1995), p. 33, at 79, who however seems to conceive of the groups of non-derogable rights as a minimum standard, which does not exhaust the group of human rights which limits the SC action. Indeed, the author includes in this group the right to a fair trial, which notoriously is not included in the narrow group of non-derogable rights.

by human rights obligations.<sup>40</sup> Therefore, it seems preposterous to assume that the SC, acting under Chapter VII, is not bound by those rights from which States can derogate only in extreme cases. After all, the kind of emergency that authorises the States parties to a human rights treaty to derogate from its provisions is not a “simple” emergency, but rather must amount to an emergency likely to threaten the life of the nation. Transposing such a concept within the international community would lead to a recognition that not every kind of “threat to the peace” would allow derogations from human rights, but only a qualified threat: one constituting an imminent and grave danger for the peaceful co-existence among States.

More than to the notion of non-derogable rights, therefore, it seems appropriate to refer to a notion of an international human rights standard<sup>41</sup> whose more precise determination in concrete cases requires a process of balancing among various interests and values at stake: the core values expressed by human rights treaties concluded under the auspices of the UN, on the one hand, the objectives and the needs of the institutional action, in the pursuit of the objectives of the UN Charter, on the other.

### **b) Limits Deriving from the *Jus Cogens***

Even more promising seems an analysis conducted on the notion of peremptory law, which includes human rights norms that, by virtue of their superior rank, cannot be contracted out of by States or derogated from by acts of international organizations.<sup>42</sup>

The identification of the scope and content of such rules, commonly referred to as *jus cogens*, has never been an easy task. The idea of superior norms, protecting fundamental values of the international community, has hovered for decades in international literature, but only very rarely have been referred to in order to terminate or invalidate inferior norms.<sup>43</sup>

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<sup>40</sup> For a comprehensive account, see General comment No. 29, States of Emergency (Article 4), CCPR/C/21/Rev.1/Add.11, adopted by the Human Rights Committee on 31 August 2001.

<sup>41</sup> See General Comment no. 29, *supra*, note 36, at para. 11.

<sup>42</sup> See A. Orakhelashvili, The Impact of Peremptory Norms on the Interpretation and Application of United Nations Security Council Resolutions, 16 *European Journal of International Law* (2005), p. 59.

<sup>43</sup> This is probably due to a partial consideration of the notion of *jus cogens*, whose main effect is to transform values into norms and, therefore, to order what would otherwise be

Recently, *jus cogens* norms have been referred to as a limit to the domestic jurisdiction of States. It is not infrequent in international practice to come across expressions of principles, such as the “international minimum standard of human rights”, or “generally agreed standards of treatment of individuals”. Though lacking precision, these and analogous formulae seem to refer to a particular effect produced by certain international rules, which constitute a standard of validity for otherwise applicable domestic law. In particular, in determining the law applicable in territories under international control, international administrative bodies have felt confident disregarding domestic law, which should otherwise apply, which is determined to be inconsistent with such principles, generally identified by reference to the core human rights enshrined in treaties of universal character or generally accepted in regional contexts.<sup>44</sup>

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purely sociological values in a hierarchical legal order. As P.M. Dupuy puts it (*L'unité de l'ordre juridique international. Cours general de droit international public, 297 Recueil des cours de l'Académie de droit international* (2002), at 281), the notion of *jus cogens* “introduit une logique d'ordre public dans l'ordre juridique international” and must not be seen only as a category of rules which cannot be contracted out of by States.

<sup>44</sup> See Regulation n. 1 of the UN Interim Administration in Kosovo (UNMIK/REG/1999/1), established by Res. 1244 (1999) of 10 June 1999, whose Section 3 reads: “The laws applicable in the territory of Kosovo prior to 24 March 1999 shall continue to apply in Kosovo insofar as they do not conflict with standards referred to in Section 2 ...” Section 2 refers to internationally recognized human rights standards as limits to the exercise of public functions in the territory of Kosovo. A more precise reference to human rights treaties as a source of *jus cogens* is contained in Regulation n. 24 of 12 December 1999 (UNMIK/REG/1999/24) On the Law Applicable in Kosovo, whose Art. 1.3. reads: “In exercising their functions, all persons undertaking public duties or holding public office in Kosovo shall observe internationally recognized human rights standards, as reflected in particular in:

- (a) The Universal Declaration on Human Rights of 10 December 1948;
- (b) The European Convention for the Protection of Human Rights and Fundamental Freedoms of 4 November 1950 and the Protocols thereto;
- (c) The International Covenant on Civil and Political Rights of 16 December 1966 and the Protocols thereto;
- (d) The International Covenant on Economic, Social and Cultural Rights of 16 December 1966;
- (e) The Convention on the Elimination of All Forms of Racial Discrimination of 21 December 1965;
- (f) The Convention on Elimination of All Forms of Discrimination Against Women of 17 December 1979;
- (g) The Convention Against Torture and Other Cruel, Inhumane or Degrading Treatment or Punishment of 17 December 1984; and



It is worthwhile to recall that the SC itself, along with other UN bodies, has referred to such concepts when inviting States implementing its decisions to conform to the international minimum standards of treatment of individuals.<sup>45</sup> This might be taken as a further element indicating the awareness of the Council as to the need to abide by some basic limitation to action potentially impinging on human rights. It would be paradoxical if the principles that limit States' actions in implementing SC resolutions did not also place a limit on the action of the SC itself.<sup>46</sup>

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(h) The International Convention on the Rights of the Child of 20 December 1989".

From these references it seems safe to infer that human rights treaties are considered by international Institutions to be a source of inspiration for determining the international minimum standards by which States much abide, even outside the scope of the individual conventions.

<sup>45</sup> See, among other examples, res. 1373 (2001), which in paragraph 3 calls upon all States to take appropriate measures in conformity with the relevant provisions of national and international law, including international standards of human rights, before granting refugee status for the purpose of ensuring that the asylum seeker has not planned, facilitated or participated in the commission of "terrorist acts". The use of the formula "international standards of human rights" instead of that, technically more appropriate, of "conventions in force" seems to indicate that we are outside the scope of Art. 103 of the Charter, and seems to point out that the international standards of human rights constitute a limit on States acting in the implementation of SC resolutions. A more precise reference to the right of appeal as part of the international standard of human rights is contained in the Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808 (1993), presented on 3 May 1993. Para. 116 reads: "Such a right (the right of appeal) is a fundamental element of individual civil and political rights and has, *inter alia*, been incorporated in the International Covenant on Civil and Political Rights". D. Akande, The International Court of Justice and the Security Council, *supra*, note 4, after recalling the statement of the Secretary General of the UN contained in its "Report Pursuant to Paragraph 2 of Security Council Resolution 808 (1993), according to which the Art. 14 of the ICCPR expresses the internationally recognized standards regarding the rights of the accused, notes that "it would indeed be surprising if the Council has the power to set up a criminal tribunal ... but has no obligation to set up one that guarantees the rights of the persons brought before it". This line of argument can be further developed. It would be indeed paradoxical to assume that the Council is under an obligation to indicate human rights as a limit to the power of a tribunal set up in order to take judicial decisions towards individuals, but does not have the obligation to comply with the same standard when it decides to act directly with measures amounting to judicial decisions towards individuals.

<sup>46</sup> Thus, in *A & Ors v. Secretary of State for the Home Department (Respondent)* [2005] UKHL 71, the UK House of Lords addressed the issue of the scope of the obligation on the UK not to use evidence obtained by torture in foreign States. Commenting on UNSC

There is a case for arguing that this practice indicates the existence of a category of rules of a peremptory character, which is seemingly broader than the very restrictive catalogue of *jus cogens* rules revealed by inter-state practice. Admittedly, *jus cogens* is not a new category of international rules. This term simply refers to the particular normative value attached to some existing rules of international law, a value that justifies certain consequences flowing from breaches of such rules. Therefore, in order to prove that a certain rule has a peremptory character, one must first establish that the rule has customary status.<sup>47</sup> Arguably, however, the customary nature of rules that operate in the field of vertical relations between States, or international organizations, and individuals must be ascertained in a different way than those that operate in horizontal relations.<sup>48</sup> In the former case, the scarcity of state practice and the abundance of expression of *opinio juris* may induce one to conclude that, in this field, scarcity, or even lack, of State practice does not preclude, in absolute terms, the possibility to determine the existence of general law.

A further, and more subtle, positive effect of domestic courts assessing the legality of SC resolutions on the basis of this category of peremptory rules is the

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Resolution 1373 of 28 September 2001, which calls for States to combat terrorism “by all means”, the opinion of the court at paragraph 42 notes that the resolution also reaffirmed UNSC Resolution 1269, which had emphasized that measures to combat terrorism had to comply with fundamental international law obligations, particularly human rights obligations. The direction was repeated in Resolution 1566 of 8 October 2004. Through this interpretive approach, the House of Lords avoids commenting on the legality of Resolution 1373 in light of international law. The result contrasts with that reached in *R (on the application of Al-Jedda) v. Secretary of State for Defence*, (2005) EWHC 1809 (Admin) (12 August 2005), where the English High Court interpreted the powers provided to the UK occupying forces in Iraq under Resolution 1456 as wide and unrestrained by other international obligations despite the resolution’s silence on the impact on other international obligations of States.

<sup>47</sup> See recently J. C. Hathaway, *The Rights of Refugees under International Law*, CUP, Cambridge, 2005, p. 5 ff.

<sup>48</sup> The idea that *opinio iuris* weighs more heavily than practice in shaping the customary international discipline of human rights is widespread in legal literature. See B. Simma and P. Alston, *The Sources of Human Rights Law: Custom, Jus Cogens, and General Principles*, 12 *Australian Year Book of International Law* (1992), p. 82. A decisive step in this direction was made by the ICTY in *Kupreskic, Prosecutor v. Kupreskic et al.*, Trial Chamber II, 14 January 2000, para. 527, where the tribunal found that in the field of humanitarian law the scarcity of practice can be set off by the presence of a well settled *opinio iuris*. The relevant passage reads: “Admittedly, there does not seem to have emerged recently a body of State practice consistently supporting the proposition that one of the elements of custom, namely *usus* or *diuturnitas* has taken shape. This is however an area where *opinio iuris sive necessitatis* may play a much greater role than *usus*”.

fact that domestic courts are likely to introduce in the process of determination of the *jus cogens* the sensitivity of judges accustomed to dealing with human rights and experienced in drawing a fair balance between individual liberties and collective interests. This may, in turn, result in sensibly contributing to the further development of *jus cogens*, by approaching this concept, which has asserted itself mainly in an inter-state legal environment, from the perspective of the relations between individual and public powers. By looking at *jus cogens* from the perspective of an inter-individual legal order, domestic courts would bring their own sensitivity and would be able to positively influence the further development of this legal concept, and may even aid the rise of an authentic international bill of rights, applicable to both state and international actions having intrusive effects on individual positions.<sup>49</sup>

This argument gives much weight to the elements that seem to point to the emergence of a basic human rights standard for individuals targeted by Security Council action, sensibly larger than the body of fundamental rights commonly considered as part of *jus cogens*. In this perspective, there seems to be a case for maintaining that the fundamental elements of the right to a fair hearing to individuals with a criminal charge, secured by Article 14 of the ICCPR are now part of *jus cogens* and, therefore, constitutes part of the standard against which the legality of SC resolution must be assessed.<sup>50</sup>

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<sup>49</sup> As I. Brownlie put it, “It would be absurd if it were not possible to evaluate the workings of the international system in terms of the Rule of Law. Indeed, the development of standards of human rights, as well as the procedural standards prevalent in international tribunals as an aspect of general principles of law, demonstrate that domestic law standards, adopted as paradigms or ideals, have penetrated the sphere of international law to a considerable degree” (The Rule of Law in International Affairs, *supra*, note 24, at p. 213).

<sup>50</sup> The peremptory nature of the right to a fair trial is affirmed in the General Comment no. 29, *supra*, note 39 at para. 11: “States parties may in no circumstance invoke article 4 of the Covenant as justification for acting in violation of humanitarian law or peremptory norms of international law, for instance by taking hostages, by imposing collective punishments, through arbitrary deprivations of liberty or by deviating from fundamental principles of fair trials, including the presumption of innocence”. It seem reasonable to construe such a statement in the sense that it indicates that not only the fundamental principles of fair trial, but also, and above all, the core content of the right to an individual to have a trial, has peremptory nature. See also para 16.

## 6. REVIEWING SC RESOLUTIONS IN THE LIGHT OF DOMESTIC STANDARDS

The potential contribution of domestic courts to the shaping of a broad notion of *jus cogens* as a shield for human rights against intrusive international action might be appreciated even more if we now proceed to determine the second standard of review, on the basis of domestic bills of rights. Indeed, if domestic courts ascertained that the international standards do not afford sufficient protection for fundamental human rights, they should proceed to assess the legality of the effect produced in the domestic legal order by SC resolutions on the basis of purely domestic standards.<sup>51</sup>

From a formal perspective, such a conclusion seems inescapable. Whereas the assessment of the international validity of SC resolutions must be conducted, as we have seen in the preceding paragraph, against an international legal background, the constitutionality of the effects produced in the domestic legal order by international acts, or by implementing domestic legislation, is part of the judicial review function that domestic Courts are called on to conduct in domestic legal systems.<sup>52</sup>

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<sup>51</sup> This assessment is not barred by Art. 27 of the VCLT, relied upon by the CFI in the *Yusuf* and in the *Kadi* decisions (see paras. 232 and 272 of the *Yusuf* decisions), the EC in the decisions mentioned in the preceding paragraphs. This provision excludes that a State can invoke national law as a valid justification for failure to comply with a treaty. It is apparent that this effect concerns solely the international law plane where, in all evidence, the legal effect of a treaty is not impaired by the possible conflict with domestic norms. It is very difficult to go beyond the express term of the provision and to draw from it the obligation for the states parties to a treaty to accord supremacy to that treaty in the domestic legal order over any conflicting domestic provision. Notoriously, absent specific indication to the contrary, every State remains free to determine the effect of a treaty in its domestic legal order and even to deny application to it in cases of inconsistency with internal law. Obviously, the failure to comply with the treaty is not justifiable in international law, and the State is to meet the consequence of its conduct under the rules of State responsibility.

<sup>52</sup> Even assuming that the UN Charter requires the parties to give priority within the domestic order to the obligations deriving from the Charter and to disregard any inconsistent constitutional rule, this requirement would, in turn, be subjected to constitutional judicial review, in order to see if there is a legal basis in the domestic legal order for assuming such a far-reaching obligation, potentially disruptive of the fundamental underpinnings of the constitutional order. It seems, in particular, extremely doubtful that the obligations deriving from the UN Charter and from UN secondary law enjoy absolute priority within the EC/EU domestic order. As we have seen above, no rule of the EC Treaty can be deemed to grant such an effect and, quite to the contrary, Art. 300, para. 6, expressly establishes the priority of the EC Treaty over provisions of international agreements concluded by the EC: it is even

Devices aimed at mitigating the strictness of internal judicial review when international interests and values are at stake are not lacking. Many legal orders allow, explicitly or implicitly, deviation from the principles governing judicial review of domestic acts in order to safeguard the dynamics of the international legal order, and to avoid arriving at a legal solipsism contrary to good sense even more than to constitutional wisdom. Garnering increased support is the idea that modern constitutions, rather than encapsulating the international action of the State within strict constitutional restraints, are aware that this action must go along the lines of the international legal order, and are therefore willing to allow a larger degree of discretion to international law makers than that allowed to domestic ones.<sup>53</sup> Moreover, in many modern Constitutions, the Charter of the UN is seen as an overarching legal instrument that not only governs inter-state relations but also has established a new legal order, exercising sovereign powers that were otherwise to remain strictly under the reach of the domestic Constitution.<sup>54</sup>

All these considerations plead in favour of a more relaxed judicial review of SC resolutions. It seems altogether reasonable that the need to preserve or

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doubtful that the priority of SC Resolutions within the EU/EC legal order can rest on art. 11 TUE, according to which one of the objectives of the Common Foreign and Security Policy (CFSP) is “to preserve peace and strengthen international security, in accordance with the principles of the United Nations Charter ....”. Regardless of the existence of a link between CFSP and EC action (on this, see *supra*, note 30), it is clear that such a provision is technically incapable of producing the effect of according priority to SC Resolutions within the Union’s domestic system. First, the maintenance of international peace and security is not the only objective of the CFSP, but is part of a set of objectives, another one being “to develop and consolidate democracy and the rule of law, and respect for human rights and fundamental freedoms”, which must be balanced with each other. Second, and perhaps more important, this reference to the UN constitutes not much more than an objective, to be achieved through the EU action. To reach the result mentioned above one must demonstrate that reference to the UN entails the recognition of the EU of an exclusive competence of that organisation to determine the aims and the means for responding to a threat to the international peace and security and the concomitant abandonment of the power of the EU to contest the legality of its action. Moreover, one should demonstrate that such a predominant role of the UN in the international law order is automatically transposed within the EU legal order, to the effect that SC Resolutions are to be seen over and above any other constitutional interest of that order. Yet it seems a very large step to draw all these implications from a provision worded in such general terms.

<sup>53</sup> I refer to my book *Trattati internazionali e giudizio di costituzionalità*, Giuffrè, Milan, 1994.

<sup>54</sup> See, among the numerous examples, Art. 11 of the Italian Constitution, Art. 24 of the Basic Law of the Federal Republic of Germany.

restore international peace and security might entail a curtailment of the protection guaranteed by domestic Constitutions in purely domestic situations. To determine in concrete cases the fair balance between competing legal interests – fundamental principles of the domestic order on the one hand, fundamental interests and values of the international community on the other – is not an easy task and may require a certain capability of adjusting legal categories in regard to a case-by-case analysis. By relaxing the otherwise more stringent domestic standards, domestic courts may arrive at the conclusion that domestic legal standards tend to coincide with international legal standards. By expanding the protection accorded under international law, and by curtailing that required under strict domestic law, domestic courts could render a great service to the international development of a system of protection of human rights strongly influenced by the most advanced domestic legal systems, and yet international in character.

All in all, there might be reasons that justify a certain deference by domestic jurisdictions in favour of an autonomy of international legal dynamics, especially if there is a certain correspondence between the fundamental individual rights protected in the respective legal orders. However, while there may be good reason for a domestic court, when dealing with international acts, to soften domestic standards in order to cope with the complexities of international relations, to completely forsake domestic standards seems technically unwarranted and politically dangerous. Indeed, it opens a crack in the legal protection of domestic fundamental values. This fissure may progressively widen and ultimately result in the subverting of the scope of domestic judicial review.

## 7. INTERNATIONAL PROTECTION OF HUMAN RIGHTS AGAINST INTERNATIONAL ACTION: A LESSON FROM THE CONDITIONAL “SOLANGE” PROTECTION

The observations contained in the foregoing paragraphs prompt the conclusion that domestic courts, in particular those of countries endowed with strong substantive and procedural systems of protection of human rights, should not exercise their “passive virtues”<sup>55</sup> in regard to SC resolutions; rather, they should actively promote the emergence of an international substantive and procedural corpus of human rights apt to constitute an “internal” limit to the SC’s action. The existence of such a corpus, analogous but not necessarily identical to the

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<sup>55</sup> The obvious referente is to A. Bickel, *The Least Dangerous Branch*, Indianapolis, Bobbs-Merrill Company, 1962. (reprinted by the Yale University Press, 1986).

domestic system of protection of fundamental human rights, should facilitate the conclusion that there is no need to review SC resolutions in light of a domestic standard. This, in turn, might facilitate the transformation of the SC into a body able to directly address individuals' rights but legally restrained in its interference with their legal position.

In other words, in a process of transferring upwards, from States to the SC, functions concerning the governing of individuals' conduct, a corresponding transfer of the basic guarantees, which in many States surround the treatment of individuals, seems unavoidable.

In this pursuit, domestic courts could draw inspiration from the experience of European integration. It is well known and not worth dwelling on the fact that domestic courts of the Member States have explicitly or implicitly made the renunciation of their exercise of jurisdiction over the constitutionality of EC acts impinging upon the legal positions of individuals conditional upon the development, within the EC legal order, of a system of protection of human rights substantively and procedurally equivalent to the domestic legal systems. This doctrine is generally referred to as the *Solange* doctrine, from the famous jurisprudential pattern of the Constitutional Court of the Federal Republic of Germany, which decidedly postulated the existence of a conditional connection between the two systems of protection. After proclaiming, in a decision issued on 29 May 1974,<sup>56</sup> that it retained its jurisdiction to rule on the constitutionality of EC legislation until such time as (*solange*) the EC had developed its internal system of protection of human rights, the same court ascertained, in its order of 22 October 1986<sup>57</sup> that these conditions were fulfilled and declared, therefore, its readiness to forgo its jurisdiction so long as (*solange*) they remained unaltered. An analogous stance was taken by other supreme courts in Europe, including, preeminently, by the Italian Constitutional Court.<sup>58</sup> Correspondingly, the ECJ developed its theory of the fundamental human rights principles inherently present in the legal order established by the EC Treaty. Thus, it may be reasonably inferred that the development of a system of protection of human rights in the EC was deeply influenced by the corresponding systems of its MS, and by the constant interrelation between the ECJ and the supreme courts of the States.

There are certainly many differences between these two contexts; hasty analogies would be misleading. The UN has not yet developed into a supranational

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<sup>56</sup> 93 *International Law Reports*, 362.

<sup>57</sup> 93 *International Law Reports*, 403.

<sup>58</sup> Decision of 27 December 1973, n. 183, *Frontini*, 47 *Rivista di diritto internazionale* (1974), p. 130.

organization and, thus far, the action of UN organs likely to directly affect the legal position of individuals has been scarce. Moreover, there are elements that render the EU experience unique and *in toto* difficult to transplant within the UN legal system. The small number and relative homogeneity of the MS of the EC, and their common commitment towards human rights, contributed significantly to the development of a common heritage on which the ECJ has built its doctrine of European human rights principles. Conversely, even the more optimistic among the advocates of a universal human rights theory must accept that a common heritage among the States parties to the UN is much more difficult to locate. The universality of the UN has the unpleasant, but so far inevitable, consequence that an attempt to identify common standards would reduce the protection of human rights practice to practically nothing. Such an attempt would be arduous even among States sincerely committed to the protection of human rights, which have different legal traditions and different conceptions about such a notion. It would be an expression of short-sighted nationalism by domestic courts to claim a system of limits to SC resolutions based entirely on domestic standards. To say the least, a certain balancing between competing standards of various legal traditions is to be expected.

This consideration somewhat limits, but does not exclude, the possibility of reviewing SC resolutions in light of domestic standards. Domestic courts committed to the protection of human rights should reasonably claim that respect for the minimum international standard, in the sense described above, provides a limit to SC action. In order to meet such a standard, the SC should undertake certain steps, aimed at ensuring the existence within the UN legal order of a system of protection of fundamental human rights open to individuals whose presence could provide justification for domestic courts declining their jurisdiction and whose failure would, on the other hand, justify a full review of the substantive part of the resolution in light of domestic standards. How to reach such an otherwise fully desirable result is an issue for political debate. The setting up of *ad hoc* judicial or quasi-judicial bodies, applying the core provisions of the universal convention of human rights concluded under the auspices of the UN, could be a viable solution.<sup>59</sup> Other solutions could be equally appropriate, such as the provision of the possibility for individuals to file a claim to existing human rights bodies alleging that their rights under these conventions have been directly violated by a SC resolution.

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<sup>59</sup> See also E. De Wet, *The Charter VII Powers of the United Nations Security Council*, *supra*, note 37 at 354.



## 8. EPILOGUE: A MACHIAVELLIAN MOMENT?

This course entails accepting the risk of a multiplicity of interventions by domestic courts of the most various legal traditions, which could distort the principle of the primacy of the UN Charter and could ultimately affect its constitutional design. The existence of a multifarious jurisprudence of domestic courts exerting pressures on the SC undoubtedly could have the unpleasant effect of creating an ongoing process of negotiation on the respect of the Resolutions of this organ and could jeopardise the need for a uniform application by the Member States, which is an essential requisite of their effectiveness.<sup>60</sup> This consideration, however, should be taken as a further proof of the need to complete the as-yet unfinished constitutional design of the Charter and to endow this system with organs and procedures capable of guaranteeing the protection of human rights to an internationally acceptable standard

Even from a political viewpoint, such an itinerary seems to be commendable. It is very difficult to accept, from a domestic legal perspective, that the SC develops into a supranational body, capable of penetrating the legal system of States and imposing conditions that upset their systems of fundamental values without, at the same time, abiding by some basic conditions that limit the exercise of political power within the States' legal systems. This prospect is particularly disquieting if one considers how far the SC can go on the basis of a flexible interpretation of the notion of threat to the peace, on the one hand, and the weak limitations to its actions that currently exist, on the other. If an evolution of the role of the SC is desirable, one could expect that its transformation would not entail the rise of the modern prince of the world, exercising political power outside the constraint of the law.

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In Machiavelli masterwork, *The Prince*, written in 1513, at the dawn of modern political thought, one can read:

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<sup>60</sup> See J. Alvarez, Review Essay : Between Law and Power, 99 *American Journal of International Law* (2005) p. 926, at 932, who notes that judicial review of SC resolutions by domestic courts can produce “potential adverse impact on the capacity of our *deus ex machina* to resolve even *some* of the crises that, as *Security Council* makes painfully clear, remain unaddressed by anyone else”.

... A Prince, and especially a new Prince, cannot observe all those things, for which men are held good; he being often forc'd, for the maintenance of his State, do to contrary to his faith, charity, humanity and religion: and therefore it behooves him to have a mind so disposd as to turne and take the advantage of all winds and fortunes; and as formerly I said, not forsake for good, while he can, but to know how to make use of the evill upon necessity....

*Let a Prince therefore take the surest courses he can to maintaine his life and the State: the meanes shall alwaies be thought honorable, and commended by every one ... A Prince there is in these days, whom I shall not do well to name, that preaches nothing else but peace and faith; but had he kept the one and the other, severall times had they taken from him his State and reputation.*<sup>61</sup>

It is commonly believed that Machiavelli stripped away the ethical and religious clothes that hitherto had wrapped the conception of politics, and proceeded to proclaim a new theology of political power, considered finally in its purest essence, unbound by any restraint, aimed uniquely at self-preservation and not shying away from recourse to any means to secure the welfare of the sovereign and the State.

The strongholds of the new political doctrine, which Machiavelli so stunningly, and even provocatively, proclaimed in his major work seemed, to a certain extent at least, to have been buried with the rise of constitutional thought. The central premise of such thought, that no political power can exist unfettered from legal restraints, echoes, explicitly or implicitly, in the major Constitutions of the 19th and 20th Centuries and appears diametrically opposed to that of Machiavelli's doctrine. It provides the basis for the legal development that ultimately has led to the modern Constitutional State.

Purely political notions such as the *raison d'Etat* still crop up in our legalistic modern political systems, although it is clear that they can survive in modern Constitutionalism only insofar as they can be embodied in legal notions. Consequently, a number of legal doctrines, of both procedural and substantive nature, accommodate situations, particularly but not uniquely related to the conduct of foreign relations, in which legal restraints are necessarily limited.

Although such notions are, in principle, repugnant to the orderly ideals of constitutionalism, they have gradually been incorporated under its large wings.

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<sup>61</sup> Chapter XVIII.

These notions have been vested with the dignity that accompanies the status of full-fledged legal doctrines. The almost religious deference to political will, and the absolute prevalence accorded to the collective interest over individual rights, which reigned in constitutional doctrine until the beginning of the 20th Century, has thus bowed to a more positivistic approach tending to balance individual and collective interests and seeking to avoid individual rights being unnecessarily or unjustly sacrificed on the altar of the *raison d'Etat*.

Thus, the story of the relation between law and politics, from Machiavelli on, reminds us not only of the eternal fight between power and rights, but also of the tendency to envelop the dynamics of political power within legal restraints, and the continuing resurrection of strands of political doctrine unleashed from legal constraints, like the legendary nine heads of Lerna's Hydra.

The struggle between the Machiavellian moment and the Constitutional moment seems now at the centre of the SC evolution. In the end, the question arises as to what the SC wants to be: the legitimate head of the international legal order governing international relations in an increasingly interdependent world, inspired by at least some basic restraints that limit the exercise of political power within many domestic legal orders; as it were a prince whose action is blessed by legitimacy and the respect for the rule of law? Or does it prefer to be an instrument by which States, especially the most powerful, can act, and pursue their political aims, free from judicial intrusion, that is to say, a Machiavellian prince who "preaches nothing else but peace and faith", but whose action is inspired only by the harsh needs of *realpolitik*.<sup>62</sup>

At the conclusion of this analysis, a general remark on the use, and abuse, of theoretical schemes outside their proper historical context seems appropriate. The idea that the legality of SC resolutions must be reviewed only on the basis of international standards leads to the assertion of the absolute autonomy of the international system of norms and values. We have seen, in the foregoing paragraphs, that this conclusion is technically inaccurate. Insofar as these resolutions are aimed at producing effects, directly or indirectly, within the domestic legal orders of the States, they must be subjected to judicial review conducted according to national standards, which can be somewhat relaxed, but should not be completely relinquished out of deference to the SC.

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<sup>62</sup> As rightly pointed out by J. Alvarez, Judging the Security Council, *supra*, note 4, at 31, much of the effectiveness of the UN collective security system is due not to the realistic threat of UN force but to the successful espousal of ideas and principles – peace, decolonization, human rights – and, most importantly, to the idea that when international subjects act they do so under the rule of law.

The idea of a complete autonomy of the international legal order is also misplaced in a more general perspective. By insulating the international legal order from the benign influence of the legal order of States, this approach would proceed in the reverse direction, along the path that led, more than a century ago, to the assertion of the impermeability of state legal orders from the intrusion of international law. This doctrine, known as the dualistic conception of the relations between international law and domestic law, was conceptualized in order to protect the state legal order, based on principles of the separation of powers and the rule of law, from intrusions of international legal acts, which are rather the product of intergovernmental arrangements and not significantly influenced by these principles. It would be paradoxical now to use the monistic approach, and the idea of the primacy of international law, in order to insulate the international law sphere and to protect the prerogatives of governments exercised at the international level from the influence of the principles of democracy and the rule of law, principles with which, according to the western liberal tradition, the notion of State is inextricably intertwined.