

SUBSIDIARITY IN THE MAINTENANCE OF INTERNATIONAL PEACE AND SECURITY

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I

INTRODUCTION

The allocation of authority among multiple decision-making bodies involves the prioritization of one normative value over another. Subsidiarity, a principle regarding the allocation of authority, favors “decentralised decision making” at a lower level of governance over “centralised decisionmaking” at a higher level of governance.¹ Centralization here means that one body’s decisions restrict other actors’ autonomous choices in a given society. In giving preference to localized decisionmaking, subsidiarity makes a particular normative claim that places greater importance on autonomy, diversity, and individual liberty than on effectiveness, coherence, and unity, which demand centralized decisionmaking.² In the Catholic social thought in which the principle of subsidiarity was first articulated,³ subsidiarity was ultimately meant to help humans flourish, and one’s immediate human communities were considered as the best site for human flourishing.⁴ Given that subsidiarity is a normative claim, a shift of decision-making authority from one level to another would likely accompany a change in the prioritization of normative foundations on which the decisionmaking is based.

International law essentially embraces the normative claim of subsidiarity: it is based on each state’s consent to be bound by a rule without any centralized legislative body. While subsidiarity is by no means established as a general

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1. Michelle Evans & Augusto Zimmermann, *The Global Relevance of Subsidiarity: An Overview*, in GLOBAL PERSPECTIVES ON SUBSIDIARITY 1, 3–4 (Michelle Evans & Augusto Zimmermann eds., 2014) [hereinafter GLOBAL PERSPECTIVES] (noting that subsidiarity does not rule out the need for centralized decisionmaking, but that the need depends on the circumstances).

2. See George A. Bermann, *Taking Subsidiarity Seriously: Federalism in the European Community and the United States*, 94 COLUM. L. REV. 332 (1994); Augusto Zimmermann, *Subsidiarity, Democracy and Individual Liberty in Brazil*, in GLOBAL PERSPECTIVES, *supra* note 1, at 85, 88–89.

3. QUADRAGESIMO ANNO, ENCYCLICAL OF POPE PIUS XI ON RECONSTRUCTION OF THE SOCIAL ORDER (1931), reprinted in THE PAPAL ENCYCLICALS 1903–1939, 427–28, ¶¶ 78, 80 (Claudia Carlen Ihm, 1981); Patrick McKinley Brennan, *Subsidiarity in the Tradition of Catholic Social Doctrine*, in GLOBAL PERSPECTIVES, *supra* note 1, at 29, 31–36.

4. Jonathan Chaplin, *Subsidiarity: The Concept and the Connections*, 4 ETHICAL PERSP. 117, 118–19 (1997).

principle in international law, its decentralized law-making processes almost take for granted the idea of subsidiarity, not only as a matter of fact, but also due to its respect for the principle of sovereign equality and the autonomy of every state. At the same time, the decentralized processes through which international law is made, applied, and enforced have been incrementally modified since the mid-twentieth century by the establishment of the United Nations (UN), the UN's invigoration after the 1990s, and the growth of other international organizations and international courts. The active presence of international organizations and international courts in the creation, application, and enforcement of international law revived the question of subsidiarity as to how much international organizations and courts ought to respect the autonomy of each state's decisionmaking.

The maintenance of international peace and security, which is the topic of this article, is by no means immune to this question of subsidiarity. In essence, this area of law is increasingly torn between normative claims for centralization and those for decentralization. On the one hand, centralization is an ethos of collective security established under the UN Charter,⁵ and the UN Security Council's internationally binding decisions also prevail over any other international agreements.⁶ Within the framework of Jachtenfuchs and Krisch's introduction to this symposium, the maintenance of international peace and security appears to be one of the fields "in which a strong presumption in favor of the local is undesirable."⁷ On the other hand, especially since the 1990s, the Security Council's exercise of authority has had significant impact on the rights of individuals; illustrative are the practices of targeted sanctions, territorial administrations, and ad hoc international criminal tribunals. This exercise of authority has led to an increased call for bringing some of the decision-making processes back to the national level as a site more capable of ensuring respect for the rights of those affected individuals.⁸

Against this background, this article analyzes how these opposite normative claims have arisen with regard to the Security Council's mandate and whether there are any criteria under international law with which to balance these claims. In this article, the terms "subsidiarity" and "decentralization" are often used interchangeably; yet it must be reiterated that subsidiarity is much broader than decentralization. Subsidiarity is a value-laden claim that decentralized decisionmaking, as opposed to centralized decisionmaking, better protects autonomy, diversity, and individual liberty.

5. U.N. Charter arts. 39–51.

6. *See infra* Part II.A.

7. Markus Jachtenfuchs & Nico Krisch, *Subsidiarity in Global Governance*, 79 LAW & CONTEMP. PROBS., no. 2, 2016, at 1, 8.

8. In the context of targeted sanctions, see Stephan Hollenberg, *The Security Council's 1267/1989 Targeted Sanctions Regime and the Use of Confidential Information: A Proposal for Decentralization of Review*, 28 LEIDEN J. INT'L. L. 49, 62–69 (2015).

This article deals with the locus of decisionmakers between the Security Council and its member states.⁹ The article makes particular reference to the jurisprudence of the European Court of Human Rights (ECtHR), which has encountered tension during the last decade between, on the one hand, the effective maintenance of international peace and security at the Security Council's level, and on the other hand, the protection of individuals' rights at the level of member states. Part II.A of this article provides an overview of how the UN Charter concentrates decisionmaking at the Security Council for the imperative aim of international peace and security. Parts II.B and III show how the demand for decentralization reemerged with the greater relevance of the Council to individuals' rights. Any compromise between the two claims struggles to be successful owing to their opposite nature. Yet the Security Council and its member states cannot afford to avoid such a struggle, as they are all committed to maintaining international peace and security and respecting individuals' fundamental rights.

II

CENTRALIZED DECISIONMAKING

The Security Council is an outcome of World War II that legitimized the restriction on individual states' autonomous decisionmaking. In an essentially decentralized legal order, the UN Charter did its best to concentrate decisionmaking at the Security Council, whose priority, as discussed in part II.A, has been recognized outside the Charter's treaty regime. Since receiving this power designated to it by the Charter, the Security Council has been exercising its centralized authority through its subsidiary organs in determining the status of individuals, as explained in part II.B.

A. Elements of Centralization

Although the term "centralization" is typically associated with a modern state with the authority to make and enforce law,¹⁰ in this article centralization is more broadly understood to signify that one body's decisions restrict other actors' autonomous choice in a given society. Despite being a "legalised hegemony,"¹¹ the Security Council is by no means a centralized lawmaker or law-enforcer as it is ordinarily contemplated for a modern state. The Security Council's decisions are, in principle, binding only on member states and only at the international level. Enforcement measures under Chapter VII of the

9. It does not devote itself to the question of competence allocation between the Security Council and regional organizations. See generally W. Andy Knight, *Towards a Subsidiarity Model for Peacemaking and Preventive Diplomacy: Making Chapter VIII of the UN Charter Operational*, 17 *THIRD WORLD Q.* 31 (1996); David O'Brien, *The Search for Subsidiarity: The UN, African Regional Organizations and Humanitarian Action*, 7 *INT'L. PEACEKEEPING* 57 (2000).

10. See HANS KELSEN, *PRINCIPLES OF INTERNATIONAL LAW* 100–02 (1952).

11. See GERRY SIMPSON, *GREAT POWERS AND OUTLAW STATES: UNEQUAL SOVEREIGNS IN THE INTERNATIONAL LEGAL ORDER* 165–93 (2004) (discussing the processes through which states agree to legalize under the UN Charter the hegemonic power of the UN Security Council).

Charter are triggered by threats to the peace, and are probably not intended to be “sanctions” against a violation of Charter obligations or other international obligations.¹² The Security Council’s authority is derived from the treaty concluded by states, which are instead the primary lawmakers and enforcers in the international legal order. Through the following three interrelated elements of the UN Charter, states have agreed, however, to centralize decisionmaking at the Security Council.

1. Collective Security

The first element is the idea of “collective security” itself, the very essence of which is to limit decentralized responses when a member acts against any other members and jeopardizes a common security interest. The Charter institutionalized the idea by prohibiting the use of force by individual states and by empowering the Security Council to adopt enforcement measures under Chapter VII and internationally binding decisions under Article 25.¹³ Although a member state can still resort to the use of force in self-defense, it is presumed to be of a temporary nature until the Security Council has taken measures necessary to maintain international peace and security.¹⁴ The UN is based on an unsuccessful attempt by the League of Nations to limit self-help, which characterizes a decentralized legal order.¹⁵ This attempt was hampered by the limited prohibition of war, the unanimous decision-making process, and the nonparticipation of the United States.¹⁶ Article 15, paragraph 7 of the Covenant of the League of Nations, which reserved to individual states the right to resort to self-help if the Council of the League of Nations fails to reach a report, was the treaty’s most significant shortcoming. By remedying the weaknesses of its predecessor, the UN Charter transformed this decentralized international legal disorder of self-help to a collective system in which the use of force by individual states is prohibited. As the Security Council broadened the concept of international peace and security and a threat to the peace, the system of collective security under the Charter has been applied, not only to inter-state military confrontations, but also a wide range of non-inter-state situations.¹⁷

2. Primary Responsibility

The second element through which the UN Charter concentrated decisionmaking at the Security Council is provided by Article 24(1), which entrusts the Security Council with the “primary”—as opposed to subsidiary—

12. HANS Kelsen, *THE LAW OF THE UNITED NATIONS: A CRITICAL ANALYSIS OF ITS FUNDAMENTAL PROBLEMS* 789–90 (1950).

13. U.N. Charter art. 2, ¶ 4, arts. 25, 39–42.

14. *Id.* art. 51.

15. HANS Kelsen, *COLLECTIVE SECURITY UNDER INTERNATIONAL LAW* 8–9 (1957); Kelsen, *supra* note 10, at 15–17.

16. See League of Nations Covenant art. 5, ¶ 1, arts. 12, 13, ¶ 4, art. 15, ¶ 6, art. 15 ¶ 7; ROBERT KOLB, *INTRODUCTION AU DROIT DES NATIONS UNIES* 26–31 (2008).

17. See *infra* Part II.B.1.

responsibility for the maintenance of international peace and security. “Responsibility” in this particular treaty provision falls short of constituting an obligation, yet it appears to signify a task rather than a mere competence.¹⁸ Under Article 24(1) of the Charter, the Security Council’s primary responsibility is regarded as instrumental to “prompt and effective action” in the maintenance of international peace and security.¹⁹ In theory, the provision is meant to prioritize the Security Council over the General Assembly, and not over member states’ authorities or any other entities outside of the UN.²⁰ Nevertheless, the phrase “primary responsibility” has been invoked, from time to time, beyond the UN’s treaty regime as if it is a normative indication of the priority of the Security Council over a guardian of other purposes of international law, such as the promotion of respect for human rights.²¹

Illustrative in this regard is the reasoning of the ECtHR, an international court outside of the domain of the UN Charter, in *Behrami and Saramati*,²² in which the Strasbourg Court referred to the “imperative nature” of the Security Council’s powers and the “primary responsibility” of the Council.²³ In this case, the applicants brought proceedings against states that were stationed in Kosovo as part of the UN Interim Administration in Kosovo (UNMIK)²⁴ and the Kosovo Force.²⁵ In rendering the application inadmissible on the basis of the attribution of the conduct of states to the UN, the ECtHR drew attention to

the *imperative nature* of the principle aim of the UN and, consequently, of the powers accorded to the UNSC under Chapter VII to fulfil that aim. . . . [I]t is evident from the Preamble, Articles 1, 2 and 24 as well as Chapter VII of the Charter that the *primary objective* of the UN is the maintenance of international peace and security. While it is equally clear that ensuring respect for human rights represents an important contribution to achieving international peace . . . , *the fact remains that the UNSC has primary responsibility* . . . to fulfil [*sic*] this objective . . .²⁶

On this basis, the ECtHR, in order to not undermine the effectiveness of the UN’s operations for its “imperative peace and security aim,”²⁷ observed that

18. See Anne Peters, *Article 24*, in *THE CHARTER OF THE UNITED NATIONS: A COMMENTARY* 761, 766–67, ¶¶ 13, 18 (Bruno Simma et al. eds., 3d ed. 2012). Regional organizations, which can act as regional arrangements within the meaning of Chapter VIII of the UN Charter, employ the concept of “primary responsibility,” although its meaning is multi-faceted. See ALEXANDER ORAKHELASHVILI, *COLLECTIVE SECURITY* 117–20 (2011).

19. Peters, *supra* note 18, at 772, ¶ 35.

20. *Id.* at 767, ¶ 17.

21. *Behrami and Behrami v. France and Saramati v. France, Germany and Norway*, App. No. 71412/01, Eur. Ct. H.R. ¶ 148 (2007).

22. *Behrami*, Eur. Ct. H.R. 42–43 (2007).

23. *Id.* at 42–43, ¶ 148.

24. S.C. Res. 1244, ¶¶ 5, 10, 11 (June 10, 1999).

25. *Id.* ¶¶ 5, 7, 9.

26. *Behrami*, Eur. Ct. H.R. 42–43, ¶ 148 (2007) (emphasis added).

27. *Id.* at 43, ¶ 149.

the [European] Convention [on Human Rights] cannot be interpreted in a manner which would subject the acts and omissions of Contracting Parties which are covered by UNSC Resolutions . . . to the scrutiny of the Court.²⁸

The Strasbourg Court made these remarks presumably to indicate the relative weight of the Security Council's mandate in comparison to the protection of human rights, and supposedly to explain why the Strasbourg Court deferred to the UN organ and its imperative mandate. The ECtHR referred to the reasoning of *Behrami and Saramati* in its subsequent case of *Mothers of Srebrenica*,²⁹ which addressed the compatibility of the grant of jurisdictional immunity to the UN with the right of access to a court. In likewise dismissing the human rights complaint, the Strasbourg Court reaffirmed the importance of the fulfillment of the UN's key mission in the field of international peace and security.³⁰

Overall, these limited cases show that the regional human rights court assumed both the priority of the Security Council's competence for the effective maintenance of international peace and security and the relative importance of the Security Council's mandate over the protection of human rights.³¹ When the member states' courts follow the Strasbourg Court's reasoning, the competence of the Security Council is preserved not only at the international level, but also in the domestic legal order.

3. Primacy of Charter Obligations

Article 103 embodies the third element by which the UN Charter concentrated decisionmaking at the Security Council.³² The provision provides a normative hierarchy of Charter obligations over other conflicting obligations that member states owe under international agreements. It bears particular importance to the Security Council, which is the only UN organ with the general authority to render binding decisions for its mandate,³³ and whose internationally binding decisions prevail over any other obligations under international agreement.³⁴ Of course, the primacy applies not only to the Security Council's binding decisions but also to other Charter obligations. For

28. *Id.*

29. *Stichting Mothers of Srebrenica v. Netherlands*, 2013-III Eur. Ct. H.R. 255.

30. *Id.* at 279, ¶ 154 (referring to *Behrami and Saramati* at 43, ¶ 149).

31. *But see infra* Parts III.B, C.

32. Article 103 of the UN Charter reads, "In the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail."

33. The General Assembly's authority to render binding "decisions" is over the UN's organizational issues. *See* U.N. Charter arts. 5, 6, 17, 18, ¶ 2; *S. W. Afr. Cases (Eth. v. S. Afr.; Liber. v. S. Afr.)*, Judgment, 1966 I.C.J. Rep. 50-51 (July 18); *Certain Expenses of the United Nations (Article 17, Paragraph 2, of the Charter)*, Advisory Opinion, 1962 I.C.J. Rep. 151, 163 (July 20).

34. U.N. Charter art. 25; *Questions of Interpretation and Application of 1971 Montreal Convention Arising from Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v. U.K.)*, Provisional Measure, 1992 I.C.J. Rep. 3, 15, ¶ 39 (Apr. 14); *Questions of Interpretation and Application of 1971 Montreal Convention Arising from Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v. U.S.)*, Provisional Measure, 1992 I.C.J. Rep. 114, 126, ¶ 42 (Apr. 14).

instance, the primacy applies to the obligation of member states to award immunities to the UN and its officials under Article 105(1)–(2) of the Charter; this renders it difficult to readily apply the reasoning of *Waite & Kennedy*³⁵ to the immunities granted to the UN, inasmuch as the obligation under Article 105(1) of the Charter prevails over member states’ human rights obligations.³⁶ Yet the primacy of the obligation under Article 105(1) still has relevance to the Security Council’s subsidiary organs, which undertake peacekeeping operations in various parts of the world and enjoy jurisdictional immunities in a host state. Article 103 of the UN Charter therefore effectively signifies a preferential status of the Security Council’s exercise of authority over member states’ other commitments under international agreements.

In principle, Article 103 of the UN Charter is a treaty provision applicable to UN member states, and it does not establish any general rule of hierarchy in international law.³⁷ Despite the Charter’s constitutional characteristics,³⁸ Article 103 does not in theory establish an overarching rule for resolving normative conflicts between multiple treaty regimes. It is thus important to assess how Article 103 of the Charter is understood, in practice, by international and national courts in their application of other international treaties.

A relatively clear sign of deference to the supremacy of Charter obligations came from the U.K. House of Lords (now Supreme Court) in *Al Jedda*,³⁹ a 2007 case concerning the human rights compatibility of the applicant’s detention by the British force deployed as part of the Security Council–authorized multinational forces in Iraq.⁴⁰ Having identified a clash between the power to detain, as authorized by Security Council Resolution 1546,⁴¹ and the protection of the applicant’s right to liberty and security under Article 5 of the European Convention on Human Rights (ECHR), the U.K. House of Lords held that the phrase “any other international agreement” in Article 103 of the Charter “leaves no room for any excepted category” and that binding Security Council decisions supersede all other treaty commitments.⁴²

In summary, the idea and system of collective security under Articles 24(1) and 103 of the UN Charter, in conjunction with Article 25 and Chapter VII, present a decisive normative articulation that the centralized responses necessary for the effective maintenance of international peace and security

35. *Waite & Kennedy v. Germany*, 1999-I Eur. Ct. H.R. 393, 407–12.

36. *See Stichting Mothers of Srebrenica v. Netherlands*, 2013-III Eur. Ct. H.R. 255, ¶¶ 152–69.

37. Antonios Tzanakopoulos, *Collective Security and Human Rights*, in *HIERARCHY IN INTERNATIONAL LAW: THE PLACE OF HUMAN RIGHTS* 42, 63–64 (Erika De Wet & Jure Vidmar eds., 2012).

38. Bardo Fassbender, *The United Nations Charter As Constitution of the International Community*, 36 COLUM. J. TRANSNAT’L L. 529, 568–84 (1998).

39. *Al-Jedda v. Secretary of State for Defence* [2007] UKHL 58, <http://www.publications.parliament.uk/pa/ld200708/ldjudgmt/jd071212/jedda-1.htm>.

40. S.C. Res. 1546, ¶¶ 9–10 (June 8, 2004); S.C. Res. 1511, ¶ 13 (Oct. 16, 2003).

41. S.C. Res. 1546, annex at 11 (June 8, 2004).

42. *Al-Jedda*, [2007] UKHL 58, ¶ 35.

should not be disturbed by member states and their other international legal commitments. Such a normative claim has been recognized beyond the Charter's treaty regime. At the same time, as explained in part III.B below, the Security Council's preferential status has been incrementally counterbalanced through some of the affected individuals' judicial proceedings in pursuit of better human rights protection.

B. Extent of Centralization

Under Chapter VII of the UN Charter, the Security Council could potentially engage in determining three groups of issues: (1) whether a particular situation qualifies as a matter of international peace and whether it amounts to one of the triggers under Article 39 of the Charter; (2) whether enforcement measures ought to be taken, what types of enforcement measures should be applied, and against whom those measures should be applied; and (3) through what means such measures should be implemented. Over the years, the Security Council and its subsidiary organs became involved in these stages in a way that allows member states to have little discretion over individuals under their jurisdiction.

1. Extending the Concept of International Peace

Although the system of collective security under the Charter was established as a system to respond to inter-state military confrontations, the Security Council has been applying the concepts of "international peace and security" and "threats to the peace" to a number of non-inter-state situations such as civil wars, humanitarian crises, and the systematic violations of international humanitarian and human rights law in armed conflicts.⁴³ The extension was partly in response to the advocacy in the 1960s and 1970s of newly independent Asian and African states, which, having encountered the Rhodesian and South African questions, urged the inclusion of human rights agendas into the matter of international peace and security⁴⁴ and even preempted the Security Council in determining the threats.⁴⁵ The conceptual extension, which illustrates the Security Council's greater emphasis on the protection of individuals and their rights,⁴⁶ has enabled the Council and its subsidiary organs to exercise their authority in a way that is much more relevant to those individuals.

43. Nico Krisch, *Article 39*, in *THE CHARTER OF THE UNITED NATIONS: A COMMENTARY*, *supra* note 18, at 1272; INGER ÖSTERDAHL, *THREAT TO THE PEACE: THE INTERPRETATION BY THE SECURITY COUNCIL OF ARTICLE 39 OF THE UN CHARTER* 9–17 (1998).

44. See SYDNEY D. BAILEY, *THE UN SECURITY COUNCIL AND HUMAN RIGHTS* 3–15 (1994); N. D. WHITE, *KEEPING THE PEACE: THE UNITED NATIONS AND THE MAINTENANCE OF INTERNATIONAL PEACE AND SECURITY* 164–69 (2d ed. 1997).

45. See WHITE, *supra* note 44, at 164–69. With respect to Rhodesia, see G.A. Res. 2022 (XX), ¶ 13 (Nov. 5, 1965); S.C. Res. 232, ¶ 1 (Dec. 16, 1966); S.C. Res. 217, ¶ 1 (Nov. 20, 1965). About South Africa, see G.A. Res. 2054 (XX), ¶ 6 (Dec. 16, 1965).

46. Krisch, *supra* note 43, at 1279, ¶ 15.

The extension of the Security Council's mandate has occasionally met opposition from member states. For instance, a number of states raised fierce opposition when the Security Council debated climate change in 2007 as part of the maintenance of international peace and security.⁴⁷ At the same time, the specific oppositions have not amounted to the general claim on the allocation of competence that the concept of international peace and security (and threats to the peace) ought to be defined, not by the Security Council, but by the General Assembly or each member state.

2. Target Specification

The question of competence allocation came to the fore regarding the process of designing nonmilitary enforcement measures. Since 1994, the Security Council and its sanctions committees have directly designated specific individuals and entities as the targets of asset freezes and travel bans instigated under Article 41 of the UN Charter.⁴⁸ Before the introduction of targeted sanctions, the Security Council, having determined the overall strategic targets of economic sanctions, had still left member states to specify the targets of restrictive measures. In the sanctions regime against Southern Rhodesia, for instance, the Security Council required member states to prevent, except for medical, educational, and humanitarian purposes, the import of all commodities from Southern Rhodesia, the sale of commodities to any person therein, the transfer of funds, and the travel of Southern Rhodesian citizens and those residents who "furthered or encouraged" Southern Rhodesia's unlawful actions.⁴⁹ Although these frameworks were designed by the Security Council, it was still for member states to specify permissible humanitarian exceptions or residents who furthered or encouraged the unlawful actions.⁵⁰ There was then a sanctions committee, the Watchdog Committee, yet it had only a passive mandate to gather and report information about national implementation.⁵¹ The targeted sanctions regimes therefore shifted a member states' competence to the Security Council and the Council's sanctions committees insofar as the designation of specific targets was concerned.

47. U.N. SCOR, 61st Sess., 5663d mtg. at 24–25, U.N. Doc. S/PV.5663 (Apr. 17, 2007); U.N. SCOR, 61st Sess., 5663d mtg. at 12, 27, U.N. Doc. S/PV.5663 (Resumption 1) (Apr. 17, 2007).

48. For a list of targeted sanctions, see Machiko Kanetake, *Catching Up with Society—What, How, and Why: The Regulation of the UN Security Council's Targeted Sanctions*, in L'ÊTRE SITUÉ, EFFECTIVENESS AND PURPOSES OF INTERNATIONAL LAW 255, 262 n.27 (Shotaro Hamamoto et al. eds., 2015).

49. S.C. Res. 253, ¶¶ 3(a), 3(d), 4, 5(a), 5(b) (May 29, 1968).

50. See Vera Gowlland-Debbas, *Implementing Sanctions Resolutions in Domestic Law*, in NATIONAL IMPLEMENTATION OF UNITED NATIONS SANCTIONS: A COMPARATIVE STUDY 33, 51–52 (Vera Gowlland-Debbas ed., 2004).

51. S.C. Pres. Statement S/8697 (Jul. 29, 1968); S.C. Res. 253, ¶ 20 (May 29, 1968). See P.J. Kuyper, *The Limits of Supervision: The Security Council Watchdog Committee on Rhodesian Sanctions*, 25 NETH. INT'L. L. REV. 159–94 (1978).

3. Direct Implementation

A shift of competence is arguably most comprehensive when the Security Council, through its subsidiary organs, directly executes its decisions vis-à-vis individuals and entities, instead of asking national governments to implement international decisions, as in the case of economic sanctions. Territorial administration and ad hoc international criminal tribunals are two major categories of practice in this regard. Under Chapter VII of the UN Charter, the Security Council's subsidiary organs directly administered war-torn territories such as Kosovo and East Timor.⁵² Although the UN Operation in the Congo had engaged in civil administration in the early 1960s,⁵³ the administration of territories by the Security Council's subsidiary organs became much more comprehensive in the 1990s. The organs prescribed and enforced a wide range of decisions that had immediate effect on local inhabitants. In Kosovo, for instance, UNMIK was vested with “[a]ll legislative and executive authority with respect to Kosovo, including the administration of the judiciary.”⁵⁴ UNMIK has engaged in determining tax rates,⁵⁵ administering social welfare,⁵⁶ issuing licenses,⁵⁷ resolving property claims,⁵⁸ privatizing public enterprises,⁵⁹ ordering the detention of individuals,⁶⁰ and so on and so forth, just as a government would, and exercised its authority directly over the local populations.

The creation of two ad hoc international criminal tribunals in the 1990s provides another example of when the Security Council's subsidiary organs directly executed their decisions vis-à-vis a restricted category of individuals. By exercising wide discretion under Articles 39 and 41 of the Charter for the maintenance of international peace and security,⁶¹ the Security Council established the International Criminal Tribunal for the former Yugoslavia

52. S.C. Res. 1244 (June 10, 1999); S.C. Res. 1272 (Oct. 25, 1999).

53. Sally Morphet, *Organizing Civil Administration in Peace-Maintenance*, 4 GLOBAL GOVERNANCE 41, 43–44 (1998).

54. Special Representative to the Secretary-General, *On the Authority of the Interim Administration in Kosovo*, sec. 1.1, U.N. Doc. UNMIK/REG/1999/1 (July 25, 1999).

55. *E.g.*, Special Representative to the Secretary-General, *On Excise Taxes in Kosovo*, UNMIK/REG/2000/2 (Jan. 22, 2000).

56. *E.g.*, Special Representative to the Secretary-General, *On the Establishment of the Administrative Department of Local Administration*, UNMIK/REG/2000/10 (Mar. 3, 2000).

57. *E.g.*, Special Representative to the Secretary-General, *On the Licensing and Regulation of the Broadcast Media in Kosovo*, UNMIK/REG/2000/36 (June 17, 2000).

58. *E.g.*, Special Representative to the Secretary-General, *On the Establishment of the Housing and Property Directorate and the Housing and Property Claims Commission*, UNMIK/REG/1999/23 (Nov. 15, 1999).

59. *E.g.*, Special Representative to the Secretary-General, *On the Establishment of the Kosovo Trust Agency*, UNMIK/REG/2002/12 (June 13, 2002).

60. *See, e.g.*, Ombudsperson Institution in Kosovo Special Report No. 3 on the Conformity of Deprivations of Liberty under ‘Executive Orders’ with Recognised International Standards (June 29, 2001), http://www.ombudspersonkosovo.org/repository/docs/E4010629a_526704.pdf.

61. *Prosecutor v. Duško Tadić*, Case No. IT-94-1-AR72, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, ¶¶ 28–38 (Int’l Crim. Trib. for the Former Yugoslavia Oct. 2, 1995); Effect of Awards of Compensation Made by the United Nations Administrative Tribunal, Advisory Opinion, 1954 I.C.J. Rep. 47, 61 (July 13, 1954).

(ICTY) in 1993⁶² and the International Criminal Tribunal for Rwanda (ICTR) in 2004.⁶³ The ICTY and ICTR were accorded authority to issue orders, not only against the states concerned (namely former Yugoslavian states and Rwanda) or other UN member states, but also against the accused and other individuals such as witnesses.⁶⁴

4. Deepening the Claims of Supremacy

The aforementioned three groups of practice—targeted sanctions, territorial administration, and ad hoc criminal tribunals—added another dimension to the priority of the Security Council’s competence and the supremacy of Charter obligations. With regard to targeted sanctions, Article 103 of the Charter is applicable to member states’ obligations to implement the Security Council’s sanctions and thereby to the designation of specific targets undertaken by the Council’s sanctions committees. As far as the target designation is concerned, the sanctions regimes allow virtually no discretion to member states.⁶⁵ This would mean that the listed individuals and entities effectively bear the consequence preserved by the preferential status given to the Security Council’s exercise of authority.

The claim of supremacy was even deepened with regard to the UN’s territorial administration and ad hoc criminal tribunals. In the case of territorial administration in Kosovo, UNMIK’s regulation promulgated by the Special Representative of the Secretary-General and subsidiary instruments issued thereunder “[took] precedence” over the preexisting *domestic* law in Kosovo if the latter conflicted with the former.⁶⁶ Likewise, the Security Council extended its claim of supremacy with regard to the ICTY and ICTR. Under the tribunals’ statutes, the ICTY and ICTR have primacy over national courts.⁶⁷ Under the tribunals’ rules of procedure, the obligations of states to cooperate with the tribunals⁶⁸ “prevail over any legal impediment” to the surrender or transfer of the accused or of a witness to the tribunals.⁶⁹ Such normative primacy is

62. S.C. Res. 827 (May 25, 1993); S.C. Res. 808 (Feb. 22, 1993).

63. S.C. Res. 955 (Nov. 8, 1994).

64. Updated Statute of the International Criminal Tribunal for the Former Yugoslavia, art. 19(2), adopted 25 May 1993 by Security Council Resolution 827 (last amended by Resolution 1877 of 7 July 2009); ICTY, R. P. EVID. 54, IT/32/Rev.49 (adopted on 11 February 1994, as last amended 22 May 2013) (Dec. 10, 2009). For the details of the ICTY’s decisions and orders concerning individuals’ rights and obligations, see Shuichi Furuya, *Legal Effect of Rules of the International Criminal Tribunals and Court upon Individuals: Emerging International Law of Direct Effect*, 47 NETH. INT’L. L. REV. 111 (2000).

65. *Cf. Nada v. Switzerland*, 2012-V Eur. Ct. H.R. 213, 255, ¶ 180 (noting that Switzerland enjoyed some latitude in implementing the UN’s listing decisions).

66. Special Representative to the Secretary-General, *On the Law Applicable in Kosovo*, UNMIK/REG/1999/24, § 1.1 (Dec. 12, 1999).

67. Updated Statute for Yugoslavia, *supra* note 64, art. 9(2); Statute of the International Criminal Tribunal for the Former Rwanda, 33 ILM 1598, art. 8(2) (1994).

68. Updated Statute for Yugoslavia, *supra* note 64, art. 29; Statute of Rwanda, *supra* note 67, art. 28.

69. ICTY, R. P. EVID. 58, IT/32/Rev.49 (adopted on 11 February 1994, as last amended May 22,

claimed, not only over extradition treaties, but also over *national* law.⁷⁰ The claim of supremacy over domestic law in the contexts of territorial administration and ad hoc international criminal tribunals is not derived from Article 103 of the UN Charter, but is instead based on the Security Council's authority under Chapter VII.

III

DECENTRALIZING DECISIONMAKING

As the exercise of authority by the Security Council and its subsidiary organs increasingly bears resemblance to the exercise of authority by national governments against individuals, it becomes apparent that legal safeguards available to the affected individuals at the UN level are significantly underdeveloped compared to those available at the domestic level, as highlighted in part III.A. As discussed in parts II.B and II.C, the inadequacy of human rights protection has generated calls for shifting decisionmaking from the Security Council to a lower level of governance in part based on the doctrine of equivalent protection.

A. Respecting Human Rights while Maintaining International Peace and Security

The UN Charter by no means exempts the guardian of international peace and security from respect for fundamental rights. Under Articles 24(2) and 1(3) of the Charter, the Security Council should act in accordance with the purposes of the UN, including the promotion of respect for human rights and for the universality of fundamental freedoms. Nevertheless, the interpretation of these Charter provisions does not categorically suggest that the UN (and therefore its organs) is formally obligated to ensure respect for human rights established under customary law or major human rights treaties.⁷¹ Neither the fact that the UN has international legal personality nor the development of the rules of international institutional law is sufficient to bind the UN with international human rights law.⁷²

The less stringent normative constraint is combined with some pragmatic obstacles for the UN's efforts in respecting human rights. First, the UN does not have a standing judicial venue in which the affected individuals may bring their human rights claims. Although the Security Council can, in principle, establish judicial organs whose findings could also bind the Council as far as it is so intended,⁷³ political stakes may be too high to create a judicial body that has the

2013) (Dec. 10, 2009); ICTR, R. P. EVID. 58, ITR/3/Rev.1 (June 29, 1995).

70. ICTY, R. P. EVID. 58, IT/32/Rev.49 (adopted on 11 February 1994, as last amended May 22, 2013) (Dec. 10, 2009); ICTR, R. P. EVID. 58, ITR/3/Rev.1 (June 29, 1995).

71. See Machiko Kanetake, *The Interfaces Between the National and International Rule of Law: The Case of UN Targeted Sanctions*, 9 INT'L ORGS. L. REV. 267, 278–80 n.37–44 (2012).

72. See *id.*

73. See Effect of Awards of Compensation Made by the United Nations Administrative Tribunal,

competence to review the Council's own exercise of authority.⁷⁴ Second, if the provision of legal safeguards involves the handling of intelligence, the UN has to rely on information provided by member states, since the UN does not have a general capacity to collect, as opposed to receive, international intelligence concerning certain individuals.⁷⁵ To facilitate the receipt of information, the UN must improve security protocols for the handling of information, security clearances for staff, and disciplinary procedures.⁷⁶ Third, the General Assembly's Fifth Committee may not be willing to endorse the operational costs associated with legal safeguards that could further legitimize the extension of the Security Council's exercise of authority.

The normative and pragmatic factors have led to various claims that certain fundamental rights have been jeopardized by the institutional practices of the Security Council and its subsidiary organs. First, a well-known criticism has been leveled against the Security Council's targeted sanctions. The sanctions regime against Al Qaeda in particular,⁷⁷ owing to the geographical proliferation of the targeted individuals, triggered criticism of the encroachment on the individuals' right to property,⁷⁸ a person's privacy, reputation, and family rights;⁷⁹ the right to a fair hearing;⁸⁰ and the right to an effective remedy.⁸¹

Second, one of the key concerns regarding the UN's territorial administrations was their compatibility with the residents' right of access to courts.⁸² Despite being deeply linked with inhabitants, the UN administrations were protected by jurisdictional immunities and the idea of functional necessity to justify them.⁸³ The aforementioned *Behrami and Saramati* case⁸⁴ was brought against states that are party to the ECHR, apparently because the applicants could not have brought comparable judicial proceedings against the UN itself. The ECtHR's inadmissibility decision in *Behrami and Saramati*, which

Advisory Opinion, 1954 I.C.J. Rep. 47, 61 (July 1954).

74. In the context of targeted sanctions, see Machiko Kanetake, *Enhancing Community Accountability of the Security Council Through Pluralistic Structure: The Case of the 1267 Committee*, 12 MAX PLANCK Y.B. UNITED NATIONS L. 113, 166–68 (2008).

75. See SIMON CHESTERMAN, *SHARED SECRETS: INTELLIGENCE AND COLLECTIVE SECURITY* 70–71 (2006).

76. *Id.* at 4, 33–35.

77. S.C. Res. 1989 (June 17, 2011); S.C. Res. 1390, ¶ 2 (Jan. 28, 2002); S.C. Res. 1333, ¶ 8(c) (Dec. 19, 2000); S.C. Res. 1267 (Oct. 15, 1999).

78. G.A. Res. 217 (III) A, Universal Declaration of Human Rights, art. 17 (Dec. 10, 1948).

79. International Covenant on Civil and Political Rights, art. 17, Dec. 16, 1966, 999 U.N.T.S. 171.

80. *Id.* art. 14; see Kanetake, *supra* note 71, at 283 n.59–60.

81. See International Covenant on Civil and Political Rights, *supra* note 79, art. 2(3).

82. See, e.g., Ombudsperson Institution in Kosovo, Special Report No. 1 on the Compatibility with Recognized International Standards (Apr. 26, 2001), http://www.ombudspersonkosovo.org/repository/docs/E4010426a_86354.pdf.

83. Special Representative to the Secretary-General, *On the Status, Privileges and Immunities of KFOR and UNMIK and Their Personnel in Kosovo*, UNMIK/REG/2000/47 (Aug. 18, 2000). For UNTAET, see Frederick Rawski, *To Waive or Not to Waive: Immunity and Accountability in UN Peacekeeping Operations*, 18 CONN. J. INT'L L. 103, 118 (2002).

84. *Behrami and Behrami v. France and Saramati v. France, Germany and Norway*, App. No. 71412/01, Eur. Ct. H.R. (2007).

emphasized the imperative nature of the Security Council's mandate,⁸⁵ therefore closed the limited possibility for the affected individuals to legally contest the human rights compatibility of the acts of member states and indirectly those of the UN.

Finally, the adequacy of human rights protection has also been questioned with regard to the ad hoc international criminal tribunals. Particularly disturbing was the ICTR, which addressed its own infringement of the accused's rights during arrest and detention.⁸⁶ In the *Semanza* case,⁸⁷ for instance, the ICTR's Appeals Chamber accepted that there were violations in the accused's right to be properly informed of the charges and the right to challenge the lawfulness of his detention. The review by the ICTR itself, however, is limited. This is because some of these human rights obligations were attributable to member states, and the ICTR does not have competence to determine the responsibility of member states for violating human rights during the process of arrest, detention, and imprisonment.⁸⁸

B. Supremacy Counterbalanced

In the absence of international judicial venues to which the affected individuals can successfully bring their human rights claims against the UN, some of the individuals, such as the applicants of *Behrami and Saramati*, resorted to domestic courts, regional human rights courts, or EU courts to challenge the compatibility of the implementing decisions of state authorities with constitutional safeguards and international human rights law. The judicial proceedings then provided the occasion to test the priority of the Security Council and the primacy of Charter obligations against the protection of those individuals' rights.

Judicial responses have taken multiple forms, ranging from acceptance, *jus cogens* review, avoidance, and the use of critical language, to consequential resistance. On the one hand, judges have indeed *accepted* the priority of the UN Security Council and the supremacy of relevant obligations. For instance, there have been several litigations concerning the orders of the ad hoc international criminal tribunals on the basis of the compatibility with domestic or international law of the national decisions that gave effect to the tribunals' orders.⁸⁹ Judicial review has generally been lenient. The District Court in The

85. See *supra* notes 26–28 and corresponding text.

86. For instance, the ICTR accepted the violations of the fundamental rights of the accused in *Barayagwiza* (1999, 2000). See *Barayagwiza v. Prosecutor*, Case No. ICTR 97-19-AR72, Decision (Nov. 3, 1999); *Barayagwiza v. Prosecutor*, Case No. ICTR 97-19-AR72, Decision (Prosecutor's Request for Review or Reconsideration) (Mar. 31, 2000).

87. *Semanza (Laurent) v. Prosecutor*, Decision, Case No. ICTR 97-20-A, Judgment, ¶¶ 87, 114 (May 31, 2000), <http://www.unict.org/sites/unict.org/files/case-documents/ict-97-20/appeals-chamber-judgements/en/050520.pdf>; *Semanza v. Prosecutor*, Case No. ICTR 97-20-A, Judgment, ¶¶ 323–39 (May 20, 2005). Likewise, the violations of the accused's rights were acknowledged in *Kajelijeli* (2005). *Prosecutor v. Kajelijeli*, Case No. ICTR 98-44A, Judgment, ¶¶ 251–53 (May 23, 2005).

88. E.g., *Prosecutor v. Kajelijeli*, Case No. ICTR 98-44A, Judgment, ¶ 252 (May 23, 2005).

89. See Jean D'Aspremont & Catherine M. Brölmann, *Challenging International Criminal*

Hague, in *Milošević v. ICTY*,⁹⁰ found no competence to assess the human rights compatibility of the ICTY's procedures, and in so holding, relied on the ICTY's primacy over national courts and Article 103 of the Charter.⁹¹ In the earlier case of *Dragan Opacić v. The Netherlands*, the Hague District Court likewise found itself unable to review the ICTY decisions.⁹² In *Lukić Milan s/Captura*, the Argentinian court affirmed the priority of the ICTY's request.⁹³ The Croatian Constitutional Court was also willing to accept the ICTY's primacy over domestic courts in the *Bobetko Report* case.⁹⁴ Likewise, in *Naletilić* the Croatian Constitutional Court found constitutional the surrender of the accused to the ICTY, ultimately based on the preference of the Tribunal over national courts.⁹⁵ The *Naletilić* case was subsequently brought before the ECtHR, which characterized the ICTY as offering "all the necessary guarantees including those of impartiality and independence."⁹⁶ The trust on the ICTY's impartiality was reiterated in *Milošević v. The Netherlands* before the Dutch court.⁹⁷

On the other hand, in several decisions, judges have deferred to the supremacy of the obligations under the UN Charter, yet still sent a critical signal to the Security Council and its subsidiary organs that there was some potential for judicial review. For instance, a Swiss court in the *Rukundo* case, which was brought against the state's decision to transfer Mr. Rukundo to the ICTY, did not decline to engage in a review.⁹⁸ Although the Swiss court ultimately deferred to the Security Council and its subsidiary organ by presuming the legality of the ICTY's establishment and procedure, the Court's indication might have served as a warning to the Security Council and its

Tribunals Before Domestic Courts, in CHALLENGING ACTS OF INTERNATIONAL ORGANIZATIONS BEFORE NATIONAL COURTS 111, 113–25 (August Reinisch ed., 2011).

90. Slobodan Milošević v. Int'l Criminal Tribunal for the Former Yugoslavia (ICTY), Hague District Court, Feb. 26, 2002, 41 I.L.M. 1310 (2002).

91. *Id.* at 1313–14. Similarly, Slobodan Milošević v. Neth, District Court of The Hague, Aug. 31, 2001, 41 I.L.M. 86, ¶ 3.5. (2001).

92. *Dragan Opacić v. Neth.*, District Court of The Hague, 30 May 1997, Kort Geding KG 97/742, cited in GÖRAN SLUITER, INTERNATIONAL CRIMINAL ADJUDICATION AND THE COLLECTION OF EVIDENCE: OBLIGATIONS OF STATES 144 (2002); Alfred H.A. Soons, *The Netherlands*, in NATIONAL IMPLEMENTATION OF UNITED NATIONS SANCTIONS: A COMPARATIVE STUDY 341, 369 (Vera Gowlland-Debbas ed., 2004).

93. International Criminal Tribunal for the Former Yugoslavia v. Lukić (Milan), Case No. 11807/05, Decision on Arrest, Surrender, and Extradition, ILDC 1083 (AR 2006) (Jan. 10, 2006).

94. Bobetko Report, Croatia, Review of Constitutionality and Legality, Case No. U-X-2271/2002, ILDC 383 (Nov. 12, 2002).

95. Decision No. U-III-854/1999, Constitutional Court of the Republic of Croatia (Oct. 21, 1999), [http://sljeme.usud.hr/usud/praksWen.nsf/29e2e5c6bdc241f4c1257de1004a9d1e/ec37116102ae7b6fc1257e5f003e56b3/\\$FILE/U-III-854-1999.docx](http://sljeme.usud.hr/usud/praksWen.nsf/29e2e5c6bdc241f4c1257de1004a9d1e/ec37116102ae7b6fc1257e5f003e56b3/$FILE/U-III-854-1999.docx).

96. Mladen Naletilić v. Croatia, 2000-V Eur. Ct. H.R. 489, ¶ 1(b).

97. Slobodan Milošević v. Neth., District Court of The Hague, Aug. 31, 2001, 41 I.L.M. 86 (2002). The *Milošević* case before the ECtHR was rejected on the basis of the nonexhaustion of domestic remedies. See *Milošević v. Neth.*, App. No. 77631/01, Eur. Ct. H.R. 2 (2002).

98. *Rukundo v. Federal Office of Justice*, Appeal Judgment, Bundesgericht [BGer] [Federal Supreme Court] Aug. 31, 2001, Cases No. 1A129/2001 and 1A130/2001, ILDC 348.

subsidiary organs to have respect for basic human rights.⁹⁹ A somewhat artificial *jus cogens* review should also be understood in a similar manner. In its 2005 decision in *Kadi I*, the General Court (then Court of First Instance) deferred to the UN Charter's primacy, which structurally limited the judicial review of Security Council resolutions.¹⁰⁰ Yet the General Court still managed to preserve its judicial scrutiny by resorting to *jus cogens*,¹⁰¹ which is often considered superior to UN Charter obligations.¹⁰²

Judges also do their best to *avoid* the conflicts and the question of Article 103 of the Charter,¹⁰³ circumventing the pronouncement of their deference to the supremacy of Charter obligations through multiple techniques. First, courts can simply refrain from addressing the question of supremacy at all. Although it is difficult to assess whether or not courts deliberately avoided the question, an example may be the *Ntakirutimana*¹⁰⁴ case before the U.S. Court of Appeals for the Fifth Circuit regarding the unconstitutionality of the surrender of the individual to the ICTR. There, the Fifth Circuit did not actively comment on the issue of whether the ICTR had the capacity to protect due process rights.¹⁰⁵

The second avoidance technique is to interpret Security Council resolutions in such a way that they are understood as leaving discretion to member states. The ECtHR in *Nada*, regarding the implementation of the Security Council's Al Qaeda sanctions regime, reinterpreted Council resolutions as if they had left certain latitude to a state.¹⁰⁶ This interpretation allowed the Strasbourg Court to find Switzerland in violation of the applicant's rights, on the basis that the state had the latitude to harmonize its international obligations under Security Council resolutions and its human rights obligations under the ECHR.¹⁰⁷

The third method of avoidance is to interpret Security Council resolutions with the rebuttable presumption that the Council acts in conformity with human rights. The ECtHR in the aforementioned *Al-Jedda* case applied "a presumption that the Security Council does not intend to impose any obligation on Member States to breach fundamental principles of human rights"¹⁰⁸ and observed that the Council's resolutions must be read "most in harmony"¹⁰⁹ with

99. See ERIKA DE WET, *THE INTERNATIONAL CONSTITUTIONAL ORDER: LECTURE 19* (2011).

100. Case T-315/01, *Kadi v. Council & Comm'n*, 2005 E.C.R. II-03649, ¶¶ 212–25.

101. *Id.* ¶¶ 226–90.

102. See, e.g., Andreas Paulus & Johann Ruben Leiß, *Article 103*, in *THE CHARTER OF THE UNITED NATIONS: A COMMENTARY*, *supra* note 18, at 2110, 2119–20, ¶ 19. Cf. Nico Krisch, *Introduction to Chapter VII: The General Framework*, in *THE CHARTER OF THE UNITED NATIONS: A COMMENTARY*, *supra* note 18, at 1237, 1259–60, ¶ 46.

103. Tzanakopoulos, *supra* note 37, at 52.

104. *Ntakirutimana v. Reno*, 184 F.3d 419 (5th Cir. 1999).

105. *Id.*

106. *Nada v. Switzerland*, 2012-V Eur. Ct. H.R. 213, 255, ¶¶ 176–80. Cf. *Nada*, 2012-V Eur. Ct. H.R. at 281–84 (Bratza, J., Nicolaou, J., Yudkivska, J., concurring); *Nada*, 2012-V Eur. Ct. H.R. at 286–88, ¶¶ 2–10 (Malinverni, J., concurring).

107. *Nada*, 2012-V Eur. Ct. H.R., ¶¶ 176–180.

108. *Al-Jedda v. U.K.*, 2011-IV Eur. Ct. H.R. 305, 373–74, ¶ 102.

109. *Id.* The presumption is rebuttable. *Nada*, 2012-V Eur. Ct. H.R. ¶ 172; Stichting Mothers of

human rights obligations. In *Al-Jedda*, the ECtHR managed to avoid a normative conflict by assuming the conformity of Security Council Resolution 1546 with Articles 1(3) and 24(2) of the UN Charter and therefore the resolution's human rights compatibility.¹¹⁰

Apart from the avoidance of normative conflicts, judges can use critical language in order to show their dissatisfaction with the UN. For instance, with regard to targeted sanctions, Justice Zinn of the Canadian Federal Court in the *Abdelrazik* case¹¹¹ criticized the sanctions' regime against Al Qaeda as "a denial of basic legal remedies and as untenable under the principles of international human rights,"¹¹² despite the fact that it was not strictly necessary to refer to the sanctions committee's procedure. In *A and Others* before the U.K. Court of Appeal, an English judge chose the powerful term "prisoners of the state"¹¹³ to characterize the state of those targeted, which was reiterated by the U.K. Supreme Court and further by the General Court of the EU in its 2010 decision in *Kadi II*.¹¹⁴ In *Kadi II*, the General Court also described targeted sanctions as "particularly draconian"¹¹⁵ for the targeted individuals.

In addition to the use of critical remarks, judges can contest the UN's decisionmaking by the consequences of judicial findings. This is possible for domestic and EU courts (but not international courts), which can resort to dualism and the autonomy of each legal order. By so doing, judges can both avoid the question of supremacy and consequentially challenge the UN's decisions. This was the method employed by the Court of Justice of the EU in its 2008 decision in *Kadi I*, in which the Court of Justice defended the autonomy of the EU legal order and did not fully invite a normative conflict under international law into its sphere of analysis.¹¹⁶ On this basis, the Court of Justice has found three-part infringement of Kadi's rights: to be heard, to an effective legal remedy, and to respect for property.¹¹⁷

In summary, from an overview of the judges' nuanced responses to the implementation of the decisions of the Security Council and its subsidiary organs, one can observe a certain level of hesitation among the guardians of regional human rights treaties and the domestic rule of law in fully accepting the priority of the Council's competence and the supremacy of related obligations within their judicial reasoning.

Srebrenica v. Netherlands, 2013-III Eur. Ct. H.R. 255 ¶ 145.

110. *Al-Jedda*, 2011-IV Eur. Ct. H.R. ¶ 102.

111. *Abdelrazik v. Canada*, [2009] F.C. 580 (Can.).

112. *Id.* ¶ 51.

113. *A and Others v. HM Treasury* [2008] EWCA Civ 1187, ¶ 125.

114. *HM Treasury v. Mohammed Jabar Ahmed and Others* [2010] UKSC 2, ¶¶ 4, 60 (appeal taken from EWCA Civ.); *Case T-85/09, Kadi v. Council & Comm'n*, 2010 E.C.R. II-05177, ¶ 149.

115. *Kadi*, 2010 E.C.R. II-05177, ¶ 149.

116. *Cases C-402/05 P and C-415/05 P, Kadi and Al Barakaat Int'l Found. v. Council & Comm'n*, 2008 E.C.R. I-06351.

117. *Kadi*, 2008 E.C.R. I-06351, ¶¶ 338-371.

C. *Bosphorus* for the UN

Domestic and regional litigation regarding decisions of the Security Council and its subsidiary organs is likely to continue in the immediate future. The human rights safeguards at the level of the Security Council and its subsidiary organs, despite certain incremental improvements, may not be satisfactory when compared to the domestic standards accepted by some member states. A question then arises as to whether international law itself justifies the competence of domestic courts (or other domestic authorities) to review the Security Council's decisionmaking, and, as a result of the review, to reject the decisions of the Council and its subsidiary organs.

One possible ground, albeit within a particular international treaty, is the applicability of an equivalent-protection test even to a state's obligation under Security Council resolutions or the decisions of its subsidiary organs. The test is notably formulated by the ECtHR in *Bosphorus v. Ireland*.¹¹⁸ In the case, the applicant, a Turkish airline, argued that Irish authorities infringed upon its right to property¹¹⁹ after the authorities had impounded the applicant's aircraft, which was leased from a Yugoslavian airline. The impoundment was based on the regulation of the EU (then-European Communities) derived from Security Council Resolution 820 on the Yugoslavia sanctions.¹²⁰ In dismissing the complaint, the ECtHR put forward the notion of equivalent protection; when states are obliged to abide by obligations based upon their membership of an international organization, such states are presumed to be in compliance with the ECHR "as long as the relevant organisation is considered to protect human rights" in a manner "equivalent" to the protection under the ECHR.¹²¹ The presumption is rebutted if the protection is "manifestly deficient."¹²² In *Bosphorus*, Ireland was presumed to be in compliance with the treaty because the European Court of Justice and national courts provided a remedy to individuals.¹²³

In principle, the equivalent-protection doctrine cannot readily be invoked when states must carry out the obligations under the Charter, which prevail over conflicting international obligations under Article 103.¹²⁴ While the *Bosphorus* case itself was about the implementation of the Security Council's economic sanctions to which Article 103 applies, the equivalent-protection doctrine was nonetheless invoked. This invocation was possible because, first,

118. *Bosphorus v. Ireland*, 2005-VI Eur. Ct. H.R. 107. The test was formulated based on: *M. & Co. & Matthews v. UK*. *M. & Co. v. The Federal Republic of Germany*, App No. 13258/87, 64 DR 138, 145 (Feb. 9, 1990); *Matthews v. The U.K.*, 1999-I Eur. Ct. H.R. 251.

119. Protocol No. 1 to the Convention for the Protection of Human Rights and Fundamental Freedoms art. 1, Mar. 20, 1952, 9 ETS 155.

120. Council Regulation (EEC) 990/93, art. 8, 1993 O.J. (L 102/14); S.C. Res. 820, ¶ 24 (Apr. 17, 1993).

121. *Bosphorus*, 2005-VI Eur. Ct. H.R. ¶ 155.

122. *Id.* ¶ 156.

123. *Id.* ¶¶ 163–65.

124. *See supra* Part II.A.3.

the ECtHR determined the balance between Ireland's obligation under the ECHR and the state's obligations under EU law, not the balance between the ECHR and the obligation under the Charter. Second, the Yugoslavia Sanctions Committee issued guidance to impound the aircraft in question in response to the Irish inquiry¹²⁵ and such guidance was less stringent and determinative than the sanctions committees' proactive designations of specific targeted individuals. Finally, the restriction on the right to property can be more flexible than the individuals' right to a fair hearing. The conflict between human rights obligations and the obligations relating to the UN sanctions was not as irreconcilable as it was in the case of the UN's targeted sanctions.

Owing to the special status of Charter obligations, the *Bosphorus* test initially had not been applied to the cases involving the implementation of the decisions of the UN Security Council and its subsidiary organs. The ECtHR in *Nada* regarding the Al Qaeda sanctions regime referred to *Bosphorus*, yet not in relation to equivalent protection.¹²⁶ The Strasbourg Court in *Al-Jedda* concerning the Security Council-authorized multinational force did not discuss *Bosphorus* despite the fact that the latter case was relied on by the applicant.¹²⁷ The ECtHR in *Behrami and Saramati*, concerning the UN's territorial administration and the Security Council-authorized multinational force, distinguished the case from *Bosphorus* on the grounds that the acts and omissions in *Behrami and Saramati* were carried out neither by state authorities nor within the territory of the states.¹²⁸

A sign of change emerged, however, with the decision of the ECtHR's Second Section in *Al-Dulimi*,¹²⁹ which is pending before the Grand Chamber as of December 1, 2015. In this case, the Court found a violation of the right to a fair hearing¹³⁰ of the applicants, who had been designated as targets by the Security Council's sanctions committee for the Iraq sanctions regime.¹³¹ The Second Section's decision was the first occasion on which the ECtHR explicitly applied the equivalent-protection test, not to the EU, which implemented the Security Council's resolutions, but to the UN itself.¹³² Having accepted that the listing and delisting procedures at the UN level do not provide equivalent protection,¹³³ four out of seven judges on the Court¹³⁴ found that the very

125. *Bosphorus*, 2005-VI Eur. Ct. H.R. ¶¶ 19–32.

126. *Nada v. Switzerland*, 2012-V Eur. Ct. H.R. 213, 255, ¶ 168.

127. *Al-Jedda v. U.K.*, 2011-IV Eur. Ct. H.R. 305, 373–74, ¶ 95.

128. *Behrami & Behrami v. France*, App. No. 71412/01, Eur. Ct. H.R. 43–44, ¶ 151 (2007).

129. *Al-Dulimi & Mont. Mgmt Inc. v. Switz.*, App. No. 5809/08, Eur. Ct. H.R. 57, 58, ¶ 118–21 (2013).

130. Convention for the Protection of Human Rights and Fundamental Freedoms art. 6(1), Nov. 4, 1950, ETS 5.

131. S.C. Res. 1518 (Nov. 24, 2003); S.C. Res. 1483, ¶ 23 (May 22, 2003).

132. Maurizio Arcari, *Forgetting Article 103 of the UN Charter? Some Perplexities on "Equivalent Protection" after Al-Dulimi*, 6 QIL QDI 31, 31–41 (2014).

133. *Al-Dulimi*, App. No. 5809/08, Eur. Ct. H.R. ¶¶ 118–121. On the equivalent protection, the Chamber distinguished *Al-Dulimi* from *Nada* on the basis of the lack of member states' discretion in *Al Dulimi* with regard to asset freeze measures. *Al-Dulimi*, App. No. 5809/08, Eur. Ct. H.R. ¶ 117. For the

essence of the right of access to a court was impaired due to the lack of effective and independent judicial review at the UN and domestic levels for a considerable period of time.¹³⁵ The ECtHR held that

for as long as there is no effective and independent judicial review, at the level of the United Nations . . . it is essential that [the listed] individuals and entities should be authorised to request the review by the national courts of any measure adopted pursuant to the sanctions regime.¹³⁶

This short passage in the decision of the Second Section manifests the claim of decentralization, or the idea of subsidiarity, discussed in this article. According to the Court, the lack of judicial review would justify and require domestic judicial review of the measures that give effect to the UN's sanctions regime.

It remains to be seen whether the equivalent-protection doctrine could potentially serve as a criterion with which to internationally justify the shift of competence from the Security Council to member states. Even if it does, the doctrine of equivalent protection itself has not yet been accepted outside the jurisprudence of the ECtHR. Finally, the doctrine might not even arise with regard to territorial administration if the claims instituted against member-state authorities are rejected via attributing the impugned conduct to the UN.

International law has yet to furnish a yardstick with which to balance the Security Council's exercise of authority for the effective maintenance of international peace and security with member states' competence to protect individuals' rights. Nevertheless, the preferential status of the Security Council and its mandate has been incrementally counterbalanced by avoidance and confrontational responses on the part of domestic and regional courts. This counterbalance contributes to the political deliberation concerning the allocation of competence.

IV CONCLUSION

As a treaty established “to save succeeding generations from the scourge of war,”¹³⁷ the UN Charter placed a priority on the effective maintenance of international peace and security and therefore on its guardian, the Security Council. The priority is based on the historically embedded assumption that the need for a swift international response to threats to the peace should override respect for each state's autonomous decisionmaking. Consistent with this

summary and analysis of *Al Dulimi* (2013), see generally Stephan Hollenberg, *The Diverging Approaches of the European Court of Human Rights in the Cases of Nada and Al-Dulimi*, 64 INT'L. COMP. L. Q. 445 (2015).

134. *Al-Dulimi*, App. No. 5809/08, Eur. Ct. H.R. ¶ 63 (Sajó, J., partly dissenting) (observing that the case should be inadmissible due to the lack of discretion left to member states and the supremacy of the UN).

135. *See id.* ¶¶ 129–34.

136. *Id.* ¶ 134.

137. U.N. Charter, *supra* note 13, ¶ 1.

assumption, the Charter strongly resists the idea of subsidiarity, which places greater importance on autonomy at a lower level of governance, in an essentially decentralized international legal order.

Especially since the 1990s, the UN Security Council and its subsidiarity organs have been exercising their centralized authority under the Charter in a way that has had significant impact on individuals and private entities, as illustrated by the extensive use of targeted sanctions, the direct administration of war-torn territories, and the establishment of ad hoc international criminal tribunals. Despite the extent of impact, international human rights law does not bind the UN in the same manner that it binds UN member states. Nor does the UN have a standing judicial body accessible to the affected individuals. The limited human rights protection at the level of the UN has invited growing calls to leave autonomy to the national level, which is generally assumed to be better equipped to safeguard individuals' rights. At present, international law provides little guidance on how to strike a balance between the competing claims of centralization and decentralization. The interpretation of the Charter or international institutional law applicable to the UN does not provide workable criteria.

The crux is that there are several pragmatic and normative difficulties even if the UN would be willing to decentralize some of its decision-making processes. Such difficulties limit the “supply of subsidiarity” discussed in this issue’s introduction.¹³⁸ One difficulty is determining the level of member states’ involvement that maintains centralized decisionmaking at the UN. The case of targeted sanctions reveals the difficulty in determining the most appropriate involvement of member states. A number of proposals have been discussed in order to create the space for member states’ decisionmaking and to better ensure respect for human rights.¹³⁹ One idea is to condition the Security Council’s initial designation to the indictment or equivalent decisions by domestic courts.¹⁴⁰ Yet due to the divergence among 193 states—in terms of their domestic courts’ procedures, admissible evidence, standards of proof, and degree of independence and impartiality—the member states cannot be obliged by the Security Council to mutually recognize other national courts’ decisions in their respective national legal order. An alternative idea is to allow states to subsequently review the designation initially made by the Security Council and its sanctions committees.¹⁴¹ Yet this means that the sanctions regimes effectively

138. Jachtenfuchs & Krisch, *supra* note 7, at 16–17.

139. See, e.g., Iain Cameron, *UN Targeted Sanctions, Legal Safeguards and the European Convention on Human Rights*, 72 *NORD. J. INT’L. L.* 159, 196–214 (2003); Peter Gutherie, *Security Council Sanctions and the Protection of Individual Rights*, 60 *N.Y.U. ANN. SURV. AM. L.* 491, 524–41 (2004); Kanetake, *supra* note 74, at 164–70.

140. See Cameron, *supra* note 139, at 204.

141. E.g., U.N. Secretary-General, *Promotion and protection of human rights and fundamental freedoms while countering terrorism*, ¶ 58, U.N. Doc. A/65/258 (Aug. 6, 2010).

lose their ability to oblige all states, not only like-minded states, to apply restrictive measures.¹⁴²

Another intricacy involves determining whether member states are indeed in a better position to protect human rights. The circumstances of ad hoc international criminal tribunals reveal this dilemma. Due to the dilution of political support and nonpayment of budget contributions by some UN member states, the Security Council decided to decentralize the criminal trial and utilize domestic judicial venues as part of the completion strategy proposed in 2000.¹⁴³ The use of national courts facilitates the prosecution of international crimes in a way that is possibly less costly for the UN itself. For this purpose, the Office of the High Representative for Bosnia and Herzegovina and the ICTY proposed the War Crimes Chamber of the State Court of Bosnia and Herzegovina, which the Security Council endorsed in 2003.¹⁴⁴

Yet the decentralization gave rise to the concerns as to whether national courts could fully conform to “internationally recognised standards of human rights and due process” in the trials of referred persons.¹⁴⁵ The possible interference by political bodies, the impartiality of judges, and the adequate protection to witnesses were some of the lingering concerns.¹⁴⁶ In fact, the ICTY rendered several decisions *not* to transfer cases to the Rwandan national courts, despite judicial reform, the abolishment of the death penalty, the enactment of domestic legislation regarding the transfer, and the extensive prosecution of crimes dealt with by the ICTR.¹⁴⁷ At the same time, a positive side of decentralization is that it subjects decisionmaking to judicial review by international courts. In fact, the Grand Chamber of the ECtHR in *Maktouf and Damjanović* held in 2013 that the War Crimes Chamber within the Court of Bosnia and Herzegovina, to which the ICTY referred its cases, breached Article 7 of the ECHR by retroactively applying the 2003 Criminal Code, as opposed to the 1976 Criminal Code of the former Socialist Federal Republic of Yugoslavia, without effective safeguards against the imposition of a heavier penalty.¹⁴⁸ Such

142. For some other difficulties of decentralized review, see Kanetake, *supra* note 74, at 165–66.

143. S.C. Res. 1534 (Mar. 26, 2004); S.C. Res. 1503 (Aug. 28, 2003); S.C. Pres. Statement 2002/21 (July 23, 2002); S.C. Res. 1329 (Dec. 5, 2000); Letter dated 17 June 2002 from the Secretary-General addressed to the President of the Security Council, U.N. Doc. S/2002/678 (June 19, 2002); Identical Letters dated 7 September 2000 from the Secretary-General addressed to the President of the General Assembly and the President of the Security Council, U.N. Doc. A/55/382–S/2000/865 (Sept. 14, 2000).

144. S.C. Res. 1503, ¶ 5 (Aug. 28, 2003).

145. Letter dated 17 June 2002 from the Secretary-General addressed to the President of the Security Council, ¶ 32, U.N. Doc. S/2002/678 (June 19, 2002).

146. *E.g.*, Letter dated 23 November 2004 from the President of the International Tribunal for the Prosecution of the Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991, addressed to the President of the Security Council, ¶¶ 27–32, U.N. Doc. S/2004/897, annex II (Nov. 23, 2004).

147. See Nicola Palmer, *Understandings of International Law in Rwanda: A Contextual Approach*, in *INTERNATIONAL LAW IN DOMESTIC COURTS: RULE OF LAW REFORM IN POST-CONFLICT STATES* 153 (André Nollkaemper et al. eds., 2012).

148. *Maktouf and Damjanović v. Bosnia and Herzegovina*, 2013-IV Eur. Ct. H.R. 1, 26, ¶ 70.

review might not have been possible had the decision been entirely made by the Security Council's subsidiary organ.

Overall, the UN Charter's initial attempts to resist the idea of subsidiarity may have been subject to modification. The proper allocation of competence should be assessed against the objectives sought in a given society, and in this sense, the relationships between the Security Council and member states should also be viewed "in symbiotic rather than antagonistic terms."¹⁴⁹ The Security Council and its subsidiary organs cannot readily escape the demand for greater utilization of member states in part because the protection of individuals' rights is becoming intrinsic to the concept of international peace and security. Given that both the Security Council and member states are committed to the maintenance of international peace and security and respect for fundamental rights, the allocation of competence between them should not be a static matter; instead, it should be amenable to a constant shift depending on the capacity of the UN and member states to materialize the shared objectives.

149. Nicholas Tsagourias, *Security Council Legislation, Article 2(7) of the UN Charter, and the Principle of Subsidiarity*, 24 LEIDEN J. INT'L. L. 539, 559 (2011).