Article 25

The Members of the United Nations agree to accept and carry out the decisions of the Security Council in accordance with the present Charter.

be derived from customary international law, but is also reflected in Art. 1 (3). Under the law as it stands, a definite list of international norms which constitute a legal limit for Security Council cannot be drawn up. Such a list would be abstract and inflexible and therefore unhelpful.[255]

151 Holding the Council bound to respect international law does not inevitably mean that the legal standards are identical as for States.[256] It is adequate to lower the standards for several reasons. First, the Council is a unique body. It has been established to maintain world peace. The relevant norms (such as human rights obligations) have not been formulated with a view to this actor. Also, the Council mostly decides in emergency situations which demand robust and flexible action. Legal limits must not unduly hamper the Council's fulfilment of its eminently important global public function. Finally, legal certainty would be undermined if the binding force of its decisions could be too easily called into question. So the very reason for which the Organization has been established in the first place suggests that only relaxed legal standards should apply to the UN (especially to the Council). The ECHR put it thus: 'any requirement that the organisation's protection [of human rights] be "identical" could run counter to the interest of international cooperation pursued'.[257] The question is then how the relaxation of standards should be construed.

152 The most obvious technique which accommodates, on the one hand, legitimate concerns of collective security and peace, and on the other hand, considerations of international legality, especially the need to respect human rights, is balancing.[258] A balancing approach suits the operation of Charter principles as a legal limit to Council action (Art. 24 (2)). The 'principles' make clear that the UN may pursue its purposes only with due respect for certain principles. Ends do not justify (all) means. In that view, balancing is required and recommendable, *both between means and ends, and between competing, mutually incompatible objectives ('purposes')*. Given the importance of the objective of securing and restoring peace, the means to reach it may be intrusive, but that objective must still be balanced against the partly incompatible objective of the UN itself to safeguard and promote human rights, and against the requirements of a global rule of law.[259]

VI. Who Decides on the Legality of a Council Decision?

153 Probably the most important question in the context of potentially illegal Security Council decisions is who is entitled to decide authoritatively whether a critical decision

[255] G Nolte, 'The Limits of the Security Council's Power and its Functions in the International Legal System—Some Reflections' in M Byers (ed), *The Role of Law in International Politics* (OUP 2000) 315, 321.

[256] This approach differs from binding the Council only to *ius cogens*. The peremptory norms of international law are only a very small circle of norms. In contrast, the idea to apply in principle all international law, but with somewhat lowered exigencies, does not leave large areas of law *a limine* irrelevant.

[257] ECHR, *Bosphorus* (n 212) para 155.

[258] See for a good discussion of the need for balancing Payandeh (n 252) 58–65. See also ECJ (3 September 2008) *Kadi and Al Barakaat*, Joined Cases C-402/05 P and C-415/05 P, ECR 2008, I-6351, para 344 (in the following 'ECJ, *Kadi I* (2008)').

[259] Third Annual Report on strengthening and coordinating United Nations' rule of law activities: Report of the Secretary-General, 'Strengthening the rule of law in the Organization' (8 August 2011) (UN Doc A/66/133, paras 67–68). See also the United Nations Security Council Open Debate on Justice and Rule of Law; concept note (29 June 2010); Record of the Security Council's Open Thematic Debate (2010)

is illegal or not.[260] In *Certain Expenses*, the ICJ stated that 'each organ must, *in the first place at least*, determine its own jurisdiction'.[261] The crucial question, left open by the Court, is whether this self-assessment is definite or whether, additionally, an external legal evaluation is possible and which authority it might have.

1. The Council Itself, but not as a Final Instance

The traditional view is that the Council itself may in a sovereign fashion appreciate the legality of its action.[262] Along this line, it has been pointed out that the procedural device to safeguard the legal limits of Security Council decision-making is the veto. From that perspective, the veto itself functions as a counter-weight and as a (sufficient) limit to the powers of the Council.[263] But the problem is, first, that the guardian of legality would not be the Security Council as a whole, but in fact each veto power for itself. Second and most importantly, the veto is mainly exercised on political grounds. It need not (and in most cases does not) comprise any legal scrutiny. The members' voting behaviour (including the permanent members' veto power) can only serve as a means of political control. But on the premise that the existing international legal order is based on the rule of law, the quest for some form of legal (not only political) control of political acts is well founded. 154

The legal appreciation by the Council itself cannot be the definitive and final one, because allowing the Council to be the final judge in its own cause would render any legal limits largely meaningless. Moreover, leaving the sole power of assessing a decision's conformity with the Charter to the Council itself would amount to granting this organ the power of an authentic interpretation of the Charter. Arguably, because of the blurry line between interpretation and amendment, the legality assessment even carries the option of giving a new meaning to some of the Charter's provisions and thereby of tacitly amending the Charter. However, the Security Council is authorized neither to undertake an authentic interpretation nor to amend the Charter. These powers are incumbent on the members as 'masters of the treaty'. 155

2. The ICJ

Obviously, international institutions would be best placed to judge the Council. The ICJ is not competent to review Security Council acts directly in contentious proceedings because neither the Council nor the UN have any *locus standi*. But the Court can pronounce itself on the legality of a Council decision, first, in a contentious proceeding against any State, if the question of the legality of a SC decision arises. Secondly, it can give an assessment in an advisory proceeding, either when the question of the legality is directly asked, or incidentally.[264] In any event such a determination by the ICJ would be binding neither on the UN nor on the SC. Judicial determination by the ICJ is not exclusive. 156

The fact that this forum exists, and even a seizure of the ICJ, in no way formally precludes a parallel judicial determination by domestic courts of members (except of member States 157

on the Rule of Law, Part 1 and Part 2; Statement by the President of the Security Council (UN Doc S/PRST/2010/11 of 29 June 2010): 'The Security Council expresses its commitment to ensure that all UN efforts to restore peace and security themselves respect and promote the rule of law.'

[260] As will be shown in s E. VII, MN 185–187, a finding of illegality will require a rebuttal of the presumption of legality (and validity) in the concrete case.

[261] cf also *Certain Expenses* (Advisory Opinion) (n 118) 168 (emphasis added).

[262] Degni-Segui and Cassan (n 131) 899.

[263] ibid, 900.

[264] See Peters on Art. 24 MN 28–31. See also Tzanakopoulos (n 106) ch 4.

who are or have been parties to a contentious proceeding and whose courts are bound by *res iudicata*). But the obligation of members to implement in good faith the obligations flowing from UN membership seem to require domestic courts to take into account a possible ruling of the ICJ. Should the ICJ find that a Security Council decision is illegal, the members would be relieved from their obligation to carry out that decision,[265] simply because a decision declared illegal (and invalid) by the ICJ deploys no binding force.[266]

3. Other International Institutions

158 Other international (quasi-)adjudicative bodies such as the Human Rights Committee,[267] the Committee on Economic, Social and Cultural Rights,[268] and the ECHR,[269] have assessed members' acts implementing Council decisions and have in that context incidentally pronounced themselves on the underlying Council decisions. Article 46 CCPR states that '[n]othing in the Covenant shall be interpreted as impairing the provisions of the Charter of the United Nations'. The historical objective of this provision was a procedural one, namely to clarify that the functions of the UN organs dealing with civil and political rights should not become obsolete with the entry into force of the Covenant.[270] The provision does not in itself prohibit the review of national implementation measures of Security Council decisions, eg by the Human Rights Committee, with a view to whether such an implementation measure violated rights enshrined in the CCPR.[271] Upon an international or regional human rights monitoring body's finding that an implementing measure constitutes a human rights violation, the concerned State must first try to find ways to carry out the Security Council decision in a way which is in conformity with the applicable legal standards. If this is not possible it must, from the human rights perspective, cease implementation of the decision. The ensuing question is whether non-implementation then necessarily constitutes a violation of the UN Charter and an internationally wrongful act, or whether the catch-22 situation in which the member finds itself is an extraordinary circumstance precluding wrongfulness. This will be discussed below (MN 190).

159 Currently, existing bodies *within the UN system* itself to monitor the appropriateness of Council decisions imposing sanctions are the ombudsperson for the Al-Qaida sanctions regime,[272] monitoring teams,[273] and panels of experts.[274] The mandates of these

[265] Herdegen (n 83) 38.

[266] See on the consequences of illegality for the binding force of the Security Council decision MN 175–191.

[267] UN Human Rights Committee, *Sayadi and Vinck v Belgium* (Communication No 1472/2006) (final views of 22 October 2008) reviewed the national implementation measure (transmission of names to the sanctions committee) and found a violation of Arts 12 and 17 CCPR.

[268] ICSCR, General Comment No 8 (1997) (n 200).

[269] ECHR, *Nada v Switzerland*, Appl No 10593/08, pending at the Grand Chamber.

[270] M Nowak, *UN Covenant on Civil and Political Rights* (2nd edn, NP Engel 2005) Art. 46 MN 3.

[271] UN Human Rights Committee, *Sayadi and Vinck* (n 267) para 10.3.

[272] Office established with UNSC Res 1904 (17 December 2009) UN Doc S/RES/1904 paras 20–27, first ombudsperson appointed by the SG with UN Doc S/2010/282 of 4 June 2010. The ombudsperson has the competence to make recommendations to the sanctions committee on the retention or removal of listed persons (mandate last renewed and extended by UNSC Res 1989 (17 June 2011) UN Doc S/RES/1989).

[273] See for UNSC Res 1267 the 'Analytical Support and Sanctions Monitoring Team', established by Res 1526 (30 January 2004) UN Doc S/RES/1526, para 6. The members of the monitoring teams have been appointed by the SG through successive letters of appointment.

[274] For example UNSC Res 1973 (17 March 2011) UN Doc S/RES/1973 on sanctions against Libya, foresees a 'panel of experts'. The panel's mandate is, inter alia, to 'make recommendations on actions the Council

entities do not explicitly foresee any review of legality of the Council decisions, but do not exclude such assessments either.[275] Possible other legal control mechanisms might be a Security Council sub-group, an advisory panel, an arbitral tribunal,[276] or even judicial review, eg by a new body created within the Council.[277] But such mechanisms have not been established so far. Were such mechanisms with a power to review Council decisions created, their findings could possibly lead to a rebuttal of the presumption of lawfulness and validity of a Council decision. Upon such a finding, the member State's obligation to carry out the impugned decision would arguably cease (see on this question MN 188–191).

4. UN Members

160 In recent years, domestic courts have reviewed members' implementing measures. This activity partly encompassed a decentralized, incidental, indirect or 'de facto' assessment of Council decisions. The result of some of these reviews has been that UN members have occasionally refused to carry out the (directly or indirectly) impugned Security Council decisions, especially sanctions, either explicitly or implicitly through evasion. This section analyses both the logics and the practice of the review activity, and its legal consequences for the members' obligation to carry out the decisions.

(a) Object of Review and Standards of Review

161 Domestic courts can—as a rule—not directly review Council decisions because this normally does not fall within their jurisdiction.[278] Therefore they normally only review the domestic implementing measures. Another legal obstacle for directly reviewing Council acts is the immunity of the UN. The intensity of judicial review is furthermore influenced by (judicial) respect for the Security Council's special position.[279]

162 The legal standards the domestic courts apply to assess these implementing measures are those available to them within the confines of their jurisdiction as defined by (domestic) laws on the judiciary. This may be, eg only constitutional rights, all domestic law, or domestic law including incorporated international law. That means that the courts' ('domestic') standard of review will be typically different from any substantive standard of legality of the Council decisions. Normally, however, the courts will interpret their domestic international law in the light of international law (harmonizing interpretation, 'indirect effect' of international law). But there still is the probability that domestic courts (and for this matter, the ECJ) emphasize the separateness of their own legal order

… may consider to improve implementation of the relevant measures' (para 24 lit c). The Secretary-General successively appointed the experts through letters of appointment.

[275] See for the 1267 monitoring team the mandate in Annex to UNSC Res 1526 (30 January 2004) UN Doc S/RES/1526 prolongated and extended by UNSC Res 1904 (17 December 2009) UN Doc S/RES/1904 Annex I. The enumerated tasks are not exhaustive. The main task of the 1267 team, as of similar bodies within other sanction regimes, is to improve compliance. Arguably, addressing and removing concerns of legality furthers this overall objective.

[276] Bowett (n 146) 99 suggested an 'arbitral tribunal, or even a Commission of Jurists, to act as a kind of "constitutional court"'.

[277] See for review mechanism options on the national, regional, or UN level TJ Biersteker, *Addressing Challenges to Targeted Sanctions: An Update of the 'Watson Report'* (UN Academia 2009) 25–29.

[278] See eg UK S Ct, *Ahmed* (n 168) Lord Mance: '217. The appellants did not challenge—indeed they said expressly that they accepted—the legitimacy of Resolution 1373 under article 41 of the United Nations Charter. In any event, the legitimacy of such measures is not as such justiciable at a domestic level.'

[279] Most courts have shown at least 'nominal' respect (Watson report (n 277) 18.