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**JUDICIAL REVIEW OF THE UNITED NATIONS SECURITY COUNCIL  
RESOLUTIONS IN THE INTERNATIONAL COURT OF JUSTICE: THE CASE OF  
SANCTIONS AGAINST NORTH KOREA**

Master thesis

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## INTRODUCTION

This thesis deals with the question whether the International Court of Justice (*hereinafter the ICJ*) has the competence to carry out a judicial review of the United Nations Security Council's (*hereinafter the SC*) resolutions. The following is the problem of this thesis. The SC has been given almost unlimited range of powers to adopt resolutions regarding matters related to international peace and security, but there is no clear power for a court to carry out a judicial review over the resolutions. This could lead to violations of rights of the people influenced by these resolutions and them being deprived of a possibility to protect their rights in a judicial institution.

This thesis concentrates on the possibility of judicial review in the ICJ as the resolutions could have influence on countries that for example do not belong to the European Union (*hereinafter the EU*) and therefore an international court needs to have this type of power. The purpose of this thesis is to identify whether the ICJ could have the competence to carry out a judicial review over the SC resolutions. This is analyzed through the example of the resolutions that were adopted against the Democratic People's Republic of Korea (*hereinafter the DPRK*) in 2017 and 2018 (*hereinafter collectively the Resolutions*). The purpose is not to conclude whether these resolutions were, in fact, legal or illegal, but conclude whether the possible issues could be dealt with in the ICJ.

The starting point for this master thesis is that there are no clear legal grounds for reviewing the legality of the SC's resolutions in the ICJ. Although there have been some cases where ICJ has given opinions and instructions regarding the competence of reviewing the actions of the SC, there are still divergent understandings regarding this matter amongst lawyers. However, the hypothesis of this thesis is that the ICJ has the competence to exercise judicial review of the SC's resolutions. This hypothesis has been set because as the ICJ is the closest judicial organ to the SC regarding the territorial aspect and global system of the UN, it could be the most competent court to carry out the judicial review.

Globalization in nowadays' society is mainly heard in the context of business and culture but it can actually be seen in law as well. Namely, as the biggest and most influential decisions of today's world politics are made by international authorities and they are considered to reflect the standings of the whole world it is clear that the importance and relevance of these organizations has rapidly increased. Thus, it has become more topical than ever to question how

these global organizations work, whether their actions are lawful and entail the parties to act in accordance with their statements. Especially due to the importance of security matters it is even more important to question the actions taken by organs that deal with these matters.

In the course of the San Francisco Conference in 1945 the SC was given remarkable responsibilities regarding international security matters. According to Article 24 of the UN Charter<sup>1</sup> (*hereinafter Charter*) the SC has the main responsibility in the area of peace and security in the UN and in carrying out these responsibilities the SC acts on behalf of the entire UN membership.<sup>2</sup> In order to fulfil its obligations the SC was given a wide range of powers to make decisions regarding usually the most politically important security issues from all parts of the world that influence different countries and their peoples.

After the establishment of the SC there have been a number of discussions regarding the limits of the actions taken by the SC, *inter alia* the review of legality of the SC's resolutions. 73 years ago the Member States of the United Nations (*hereinafter Member States*) did not specify in the Charter what are the legal restrictions to the action of the SC and whether there is an institution that consistently carries out supervision over the actions taken by the SC or has the right to review the legality of the decisions by the SC to secure that there is no misuse of power. Although it may therefore seem that the SC has unlimited power to decide what course of action to take to fulfil its responsibilities, it is widely recognized by different authorities<sup>3</sup> that the SC is not, in fact, the supreme institution<sup>4</sup>.

Several concerns have been raised regarding the powers of the SC. Firstly, many are worried that the SC is a body with a growing power and dominated by only a few states without any control<sup>5</sup>, but too much of one power is not welcomed because the gross potentiality of misuse<sup>6</sup>.

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<sup>1</sup> The Charter of the United Nations. San Francisco: 26.06.1945 – <http://www.un.org/en/charter-united-nations/index.html>.

<sup>2</sup> A. Orakhelashvili. *Collective Security*. New York: Oxford University Press 2011, p 22.

<sup>3</sup> I. Hurd. *The UN Security Council and the International Rule of Law*. – *The Chinese Journal of International Politics*. 2014, p 15.

<sup>4</sup> R. Wolfrum. *12th Commission on Judicial Control of Security Council Decisions (UNO)*. Yearbook of Institute of International Law. Tallinn Session 2015. Volume 76, p 417.

<sup>5</sup> I. Rajčić. *Legal Control over Decisions Taken by the UN organs and Judicial Review of the SC Decisions*. 2014, p 109.

<sup>6</sup> *Ibid*, p 115.

Due to the wide margin of discretion of the SC members in general and the five permanent members in particular a major concern has been expressed that the SC's decisions reflect the scenario of international relations and diplomatic interactions between members of the international community and this, in turn, suggests that the actions taken by the SC are tainted by selection bias.<sup>7</sup> The only real limit to the powers seem to be that the resolutions do not either receive enough votes or are vetoed.

Secondly, the measures taken by the SC, and especially against individuals and entities in the form of targeted sanctions, have been criticized for violating internationally protected human rights such as the right to property, right to free movement and the right to privacy. Moreover, it has been argued that the system of targeted sanctions is violating the right to fair trial since the addressees do not have sufficient means to challenge the facts and assumptions on which their designation as being associated with terrorism was based.<sup>8</sup> Moreover, even when the targeted sanctions were not developed the sanctions adopted under Chapter VII of the Charter that imposed sanctions on States, the rights of individuals or groups of individuals of such a State are not directly affected, even though the indirect effect of such sanctions on the population of the targeted States has been also criticized by human rights bodies.<sup>9</sup>

All of the abovementioned concerns have put the involved parties in front of many questions, which concern the legality of the SC's resolutions and ultimately lead to the need to review whether the resolutions made by the SC are lawful or not and whether they should therefore be followed or not. However, the solution to this problem could lie within the question whether the other institutions of the collective security system – the General Assembly (*hereinafter GA*) and ICJ as the principal judicial organ of the UN – have or should have the power to exercise control over the SC and its resolutions. Although the drafters of the Charter assumed that the SC would be making its own judgments on legal issues that might arise in its work, and did not find it necessary to give these authorities any right of review of the SC's decisions,<sup>10</sup> the

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<sup>7</sup> R. Deplano. The Use of International Law by the United Nations Security Council: an Empirical Framework for Analysis. – *Emory International Law Review*. Volume 29. 2015., p 2097.

<sup>8</sup> B. Fassbender. Targeted Sanctions and Due Process. Study Commissioned by the United Nations. Office of Legal Affairs 2006.

<sup>9</sup> R. Wolfrum, *supra* fn 4, p 420.

<sup>10</sup> M. J. Matheson. ICJ Review of Security Council Decisions. – *George Washington International Law Review*. 2004, p 619.

possibility has been widely discussed not only in theory, but even the ICJ itself has discussed its competence. The standings will be dealt with in this thesis as well.

In a typical judicial dispute where the parties are not able to reach an agreement an independent third party like a court or a mediator is involved, but there is no specific regulation for this in terms of the SC's resolutions either in the Charter or the International Court of Justice's Statute<sup>11</sup> (*hereinafter Statute*). Having a third party involved in a legal issue is said to have a good influence in solving a conflict through peaceful means. An international court having the competence to exercise supervision over the SC could be the solution to the concerns that have been raised regarding the SC but this also needs to have legal grounds. Especially, after the *Lockerbie*<sup>12</sup> cases in the ICJ the judicial review of the SC's resolutions by the ICJ has become under the attention of the international community.

As the SC adopts several resolutions every month, but there is no clear view regarding the possibility to execute judicial review over these resolutions, the problem remains actual. Moreover, the competence has been widely discussed in legal literature and there have been a few instances where the judicial institutions have expressed their standings regarding whether this possibility exists or should be provided. This thesis is built upon the most recent document that has been compiled regarding the jurisdiction of the ICJ having carrying out a judicial review over the SC's resolution, which is Rüdiger Wolfrum's Report on the 12<sup>th</sup> Commission on Judicial Control of Security Council Decisions (UNO).

Moreover, the author analyses several other legal scholars opinions on this matter and additionally brings out the most important statements from the relevant case law. The analysis is carried out using the resolutions that were adopted against the DPRK and using the inductive method concluding whether the ICJ could review these resolutions and therefore has the competence. This thesis uses a new angle to review this question due to the fact that it carries out an analysis of through the example of adopted resolutions towards the DPRK in order to detect what are the practical aspects of reviewing resolutions. Among other things, the author

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<sup>11</sup> The Statute of the International Court of Justice. – <http://www.icj-cij.org/en/statute>.

<sup>12</sup> *Case Concerning Questions of Interpretation and Application of the 1971 Montreal Convention Arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v United Kingdom)*. Preliminary Objections. ICJ Reports. 1998; *Case Concerning Questions of Interpretation and Application of the 1971 Montreal Convention Arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v United States)*. Preliminary Objections. ICJ Reports. 1998.

detects what are the 6 elements of judicial review in case of the SC's Resolutions and conclude whether the judicial review in ICJ would therefore be achievable.<sup>13</sup>

In order to conclude whether the ICJ can carry out a judicial review over the SC's resolutions this thesis has been divided into 6 chapters, which firstly detect the mechanism of adopting the resolutions and what are the legal aspects regarding it and secondly detect the mechanism of solving potential disputes over the SC's resolutions in the ICJ. The first chapter sets out the basis and purpose of the competence of the SC to be a decision-making body. The second chapter analyses the mechanism of adopting resolutions and analyses the sanctions posed with the Resolutions adopted against the DPRK. The third chapter sets out what laws and principles the SC has to follow when taking action and what are the possible legal difficulties with the Resolutions. The fourth chapter analyses the competence of the ICJ to evaluate the aspects of the SC's Resolutions that were brought out in the first three chapters. The fifth chapter sets out the elements of the disputes in the ICJ and whether they are fulfilled regarding the Resolutions. The sixth chapter sets out what is or could be the outcome of reviewing the resolutions of the SC in the ICJ.

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<sup>13</sup> According to Kaiyan Homi Kaikobad the judicial review usually includes the following elements: the decision-making body; the nature or general class or category of the act or decision; grounds of nullity and other legal difficulties with the act or decision; the tribunal of review; the parties before the tribunal or court; nature and effect of the court's decision. (K. H. Kaikobad. *The International Court of Justice and Judicial Review. A Study of the Court's Powers with Respect to Judgments of the ILO and UN Administrative Tribunals*. Hague: Kluwer Law International 2000.)

## 1. THE UNITED NATIONS SECURITY COUNCIL AS A DECISION-MAKING BODY

Every case of judicial review firstly involves a decision and therefore there always exists a decision-making body. The UN comprises of different bodies that have the power to adopt decisions. However, the SC and the GA are the two principal organs that constitute the most important decision-making bodies in the contemporary international legal system.<sup>14</sup> This chapter focuses on the SC as a decision-making body analyzing the legal basis of the SC to have this kind of power and how the SC adopts its resolutions, which is necessary in order to detect the competence of the SC and determine the legal nature of its actions.

There is no doubt that there exists legal framework that gives the SC the right to adopt decisions. The operation of the SC is mainly regulated by the three following sources: the UN Charter, the Provisional Rules of Procedure of the Security Council<sup>15</sup> and Note S/2017/507 by the President of the Security Council<sup>16</sup>. These sources give the SC the legal basis for existing and operating in the international field. Chapter V-VIII and XII of the Charter lay out the purpose and general working mechanisms of the SC, while the Provisional Rules and the Note by the President are more specified guidelines regulating how the SC has to adopt its decisions. Therefore, these sources lay out the technical aspects on how the SC needs to adopt its decisions and could be regarded as the procedural regulation of the SC's actions.

The Charter confers the primary responsibility for the maintenance of international peace and security on the SC for the purpose of ensuring fast and effective action by the UN.<sup>17</sup> To carry out this responsibility the SC has been given a decision-making power. According to Article 39 of the Charter, the SC shall determine the existence of any threat to the peace, breach of the peace, or act of aggression and shall make recommendations, or decide what measures shall be taken by Article 41 and 42, to maintain or restore international peace and security. The SC has the right to make recommendations and decisions to tackle situations that jeopardize the world peace. Moreover, the Charter gives the SC the right to firstly, determine whether there even

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<sup>14</sup> K. H. Kaikobad, *supra* fn 13, p 33.

<sup>15</sup> The Provisional Rules of Procedure of the Security Council. United Nations. New York: 1983.

<sup>16</sup> Note S/2017/507 by the President of the Security Council. United Nations. 30.08.2017.

<sup>17</sup> B. Simma (ed), H. Mosler, A. Randelzhofer, C. Tomuschat, R. Wolfrum and others. The Charter of the United Nations. A Commentary. 2<sup>nd</sup> edition. Volume I. New York: Oxford University Press 2002, p 437.



exists a security issue and a need to respond to it internationally and secondly, decide what could be the appropriate measures to solve this issue.

Additionally, the Charter states what are the purpose and primary responsibility of the SC. There have been wide discussion on the different interpretations of “the primary responsibility”<sup>18</sup>, but it is clear that the SC has the right to make decisions in its discretion to maintain the international peace and security. This is the most important purpose that an organ has in the international field and therefore the SC has an immense responsibility to fulfil. This could also be one of the reasons why the decisions of the SC often involve drastic measures, which bring about significant influence to the addressees. There are great expectations towards the SC and its important role on the international level and the SC acts in pursuance of fulfilling these expectations and securing the safety of the entire world.

In order to adopt resolutions the SC has a panel of representatives of the Member States. This panel consists of ten non-permanent members that are elected by the GA for a term of two years and five permanent members – the United States of America, Russia, the Republic of China, the United Kingdom of Great Britain and Northern Ireland and France – who have the right to veto a resolution.

In case an important issue regarding peace and security has emerged somewhere in the world the SC calls upon a meeting with its members to address the international concern and discuss the standing of the SC. Although the SC adopts its decisions according to a procedure set out in the Provisional Rules of Procedure of the SC and the Charter and the resolutions are adopted through voting, in nature this decision-making procedure is still a complex negotiation between the Member States in order to reach a standing in a certain matter.<sup>19</sup> Although the resolutions are not formally designated as treaties, they are still agreements on which the Member States concerned can place reliance.<sup>20</sup>

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<sup>18</sup> B. Simma (ed) and J. Delbrück, *supra* fn 17, p 445-449.

<sup>19</sup> A. Orakhelashvili, *supra* fn 3, p 39.

<sup>20</sup> *Ibid*, p 32.

The Resolutions that are under review regarding the topic of this thesis were an outcome of the SC using its decision-making power. In 2017 the SC adopted 5 resolutions<sup>21</sup> against the DPRK and in 2018 the SC has adopted 1 resolution<sup>22</sup> against the DPRK so far. Therefore, the first element of judicial review regarding the Resolutions, the decision-making body<sup>23</sup>, is the United Nations Security Council.

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<sup>21</sup> S/RES/2345. The United Nations Security Council. 7904<sup>th</sup> Meeting of the United Nations Security Council. 23.03.2017 – [http://undocs.org/S/RES/2345\(2017\)](http://undocs.org/S/RES/2345(2017)); S/RES/2356. The United Nations Security Council. 7958<sup>th</sup> Meeting of the United Nations Security Council. 02.06.2017 – [http://undocs.org/S/RES/2356\(2017\)](http://undocs.org/S/RES/2356(2017)); S/RES/2371. The United Nations Security Council. 8019<sup>th</sup> Meeting of the United Nations Security Council. 05.08.2017 – [http://undocs.org/S/RES/2371\(2017\)](http://undocs.org/S/RES/2371(2017)); S/RES/2375. The United Nations Security Council. 8042<sup>nd</sup> Meeting of the United Nations Security Council. 11.09.2017 - [http://undocs.org/S/RES/2375\(2017\)](http://undocs.org/S/RES/2375(2017)); S/RES/2397. The United Nations Security Council. 8151<sup>st</sup> Meeting of the United Nations Security Council. 22.12.2017. – [http://undocs.org/S/RES/2397\(2017\)](http://undocs.org/S/RES/2397(2017)).

<sup>22</sup> S/RES/2407. The United Nations Security Council. 8210<sup>th</sup> Meeting of the United Nations Security Council. 21.03.2018. – [http://undocs.org/S/RES/2407\(2018\)](http://undocs.org/S/RES/2407(2018)).

<sup>23</sup> K. H. Kaikobad, *supra* fn 13, p 33-34.

## 2. THE RESOLUTIONS OF THE UNITED NATIONS SECURITY COUNCIL

There are 3 layers of the decision made by the SC. The first layer consists of the decision of the SC under Article 39 Charter that something constitutes a threat to international peace and security.<sup>24</sup> On the second layer, the SC decides which sanctions are to be taken. Both of the decisions have a predominantly standard setting character since in the context of targeted sanctions they are not directly implementable as long as the list of individuals or entities does not specify against whom they are to be addressed.<sup>25</sup> On the third layer, the SC needs to identify the persons and entities to be listed with the view that the sanctions decided upon by the SC on the 2nd layer be applied against them. Member States are obliged under the S/RES 1267/1989/2253 system to make such nominations, but it is for them to decide whom to identify and what to produce as the basis for such designation.<sup>26</sup>

This chapter focuses on the resolutions that the SC has the power to adopt, analyzing the adoption of resolutions and stating what the Resolutions have imposed on the addressees. This chapter is divided in to two subchapters. The first deals with the nature of the decisions of the SC and the mechanism of the 3 layers of adopting resolutions of the SC. The second deals with the Resolutions that were adopted against the DPRK and the imposed sanctions on the State, individuals and entities. This is done in order to establish what is the second element of judicial review, the nature of the act or decision<sup>27</sup> in case of the Resolutions. Judicial review could only be carried out in case there is an act or decision that could be reviewed, therefore it its necessary for this chapter to set out how the SC adopts its resolutions and what they include. Moreover, to detect what the Resolutions impose on the parties, so that the accordance with necessary requirements for the them could be reviewed later on.

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<sup>24</sup> R. Wolfrum, *supra* fn 4, p 455-456.

<sup>25</sup> *Ibid*, p 455-456.

<sup>26</sup> *Ibid*, p 455-456.

<sup>27</sup> K. H. Kaikobad, *supra* fn 13, p 34-35

## 2.1. The Nature and Adoption Mechanism of the Resolutions of the United Nations Security Council

The nature of the act or decision adopted by the SC sets out how the act has been adopted and what the consequences to the addressees are. The set of rules mentioned in the previous chapter allows the SC to adopt a variety of decisions, including resolutions, Presidential Statements, notes by the SC President, press statements and letters from the SC President that all have a different type of effect on the addressees. This subchapter detects what the legal nature of the resolutions is, how they are adopted and what they can impose in order to carry out an analysis on the Resolutions in the second subchapter.

When the Charter was created, the creation of binding decision-making power for the organization, or the SC respectively, was to be the core element of the concept of the UN organization.<sup>28</sup> According to Article 25 of the Charter the SC has the authority to adopt binding decisions. However, it was affirmed in the *Namibia*<sup>29</sup> case that Article 25 makes the SC's decisions binding, whether they are adopted under Chapter VII or not. Moreover, as the binding nature of the decisions has been widely analyzed, it has also been found that the decisions taken under Chapter VII, which are not couched in terms of recommendation, and decisions under Chapter VIII, are both binding under Article 25.<sup>30</sup> The binding nature of decisions is derived from the agreement brought out in Article 25 of the Charter, which states that the members have to accept and carry out the decisions of the SC.<sup>31</sup>

From the abovementioned list of actions the SC can adopt, the resolutions are recognized as the type of SC decision endowed with the greatest political relevance. This is believed because the resolutions must be obeyed by the UN Member States<sup>32</sup>, which means that in nature they are binding on the parties involved and therefore bring about certain consequences to the addressees and possibly the other parties involved. Although the Charter itself does not give the definition of a resolution, they are differentiated from other acts by their binding nature. Therefore, the second element of judicial review regarding the Resolutions, the nature of the act or decision,

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<sup>28</sup> B. Simma (ed) and J. Delbrück, *supra* fn 17, p 454.

<sup>29</sup> *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)*. Advisory Opinion. ICJ Reports. 1971, p 53.

<sup>30</sup> B. Simma (ed) and J. Delbrück, *supra* fn 17, p 457.

<sup>31</sup> *Ibid*, p 458.

<sup>32</sup> R. Deplano, *supra* fn 7, p 2088-2089.

is a binding nature.<sup>33</sup> Since 1946 when the SC was created, it has adopted 2410 resolutions towards the Member States and therefore it has had a significant influence of the Member States.

The resolutions themselves usually consist of two main parts: a preamble and an operative part. The preamble describes the events that have taken place and the concerns that these events have raised in the SC. Articles 41 and 42 of the Charter regulate what the possible measures that would help the SC to restore the peace and security are. The operative part states what are the measures that are to be taken in order to address these concerns and restore the peace and security. The operative part can also be divided into two different parts. The first part states the general sanctions that mainly influence the whole economy of the State. The second part states the concrete sanctions on individuals and entities, which are also known as targeted or “smart” sanctions and have been established since the late 1990s to tackle problems more effectively and hit only those who are responsible for the breach, not the innocent bystanders.<sup>34</sup> Additionally, the resolutions have annexes that list the individuals and entities that will be the addressees of the targeted sanctions.

Therefore, the primary emphasis of the resolutions lies in the sanctions that it imposes on the addressees and that the Member States have to cooperate to carry them out effectively. Due to the Cold War that took place 1947-1991, only a few sanctions were adopted before 1990. For example, the only ones regarding the DPRK were related to the Korean war, but many others were also associated with wars, and therefore they were mainly military sanctions that sought to solve war situations in different parts of the world.

Originally the sanctions of the SC were directed against particular Member States while addressing the Member States or only a group thereof to implement the sanctions.<sup>35</sup> Due to the growing involvement of non-state groups in conflicts to which the Security Council increasingly turned its attention to it modified its practice, but did not develop a clear pattern.<sup>36</sup>

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<sup>33</sup> K. H. Kaikobad, *supra* fn 13, p 34-35.

<sup>34</sup> L. Kanji. Moving Targets. The Evolution and Future of Smart Sanctions. – Harvard International Review. 04.01.2017. – <http://hir.harvard.edu/article/?a=14138>; B. Simma (ed) and N. Krisch, *supra* fn 17, p 738.

<sup>35</sup> R. Wolfrum, *supra* fn 4, p 439.

<sup>36</sup> N. Melzer. Interpretative Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law. Geneva: International Committee of Red Cross 2009, p 31-32.

It increasingly directed its sanctions against non-state actors alone or together with particular Member States.<sup>37</sup> The forerunners of targeted sanctions were meant to establish or to restate substantive obligations for particular groups whereas targeted sanctions require the addressed Member States to implement sanctions against particular individuals or groups; they also emphasized that also non-state entities may have obligations under public international law and from there to take enforcement measures against such groups is just an additional step.<sup>38</sup> The number of non-military sanctions increased after the Cold War and in this process the sanctions system has undergone significant changes and refinement, which finally led to targeted sanctions against particular individuals or groups.<sup>39</sup> However, this does not mean that sanctions against Member States as such have become obsolete.

The objective of the sanction concerned varies. Sanctions may intend to coerce the addressee constrain it or send a signal; however, targeted sanctions mainly may have the further objective to prevent certain activities. Although all non-military sanctions ultimately aim at influencing the behaviour of individuals, albeit by addressing Member States, targeted sanctions modify this approach.<sup>40</sup> The latter specifically target named individuals or entities involved in armed conflict, terrorism, systematic and widespread violations of human rights as well as international crimes, all qualified as threats to peace and security, with the objective to make them comply with international law in general or with adopted SC resolutions; however, in respect of military sanctions the SC has to seek the co-operation of Member States willing to engage militarily.<sup>41</sup>

There are different measures that the sanctions entail. Article 41 of the Charter states that the SC may decide what measures not involving the use of armed force are to be employed to give effect to its decisions, and it may call upon the members of the UN to apply such measures. These may include complete or partial interruption of economic relations and of rail, sea, air,

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<sup>37</sup> R. Wolfrum, *supra* fn 4, p 439.

<sup>38</sup> R. Wolfrum, *supra* fn, p 439-440.

<sup>39</sup> D. Cortright, G. A. Lopez and L. Gerber. *Sanctions and the Search for Security: Challenges to UN Action*. 2002; D. Cortright and G. Lopez (eds). *Smart Sanctions. Towards Effective and Humane Sanctions Reform*. 2002; D. Cortright and G. A. Lopez. *Responses to the Global Terrorist Threat*. 2007; G. C. Hufbauer, J. Schott, K. Elliott and B. Oegg, *Economic Sanctions Reconsidered*. 3<sup>rd</sup> expanded edition. Peterson Institute for International Economics. 2009; A. Charon. *UN Sanctions and Conflict: Responding to Peace and Security Threats*. London and New York: Routledge 2010.

<sup>40</sup> R. Wolfrum, *supra* fn 4, p 441.

<sup>41</sup> *Ibid.*

postal, telegraphic, radio, and other means of communication, and the severance of diplomatic relations. Should the SC consider that measures provided for in Article 41 would be inadequate or have proved to be inadequate, it may take such action by air, sea, or land forces as may be necessary to maintain or restore international peace and security. Such action may include demonstrations, blockade, and other operations by air, sea, or land forces of members of the UN. But in order to impose military measures, the SC must consider non-military enforcement measures to be, or to have been, inadequate. This does not mean that it is necessary to order and implement non-military measures prior, but rather that they have to be considered and deemed not effective.<sup>42</sup>

The abovementioned implies that the sanctions imposed by the SC have ranged from comprehensive economic and trade sanctions to more targeted measures such as arms embargoes, travel bans, and financial or commodity restrictions.<sup>43</sup> These are the most typical and widely used sanctions in the SC's resolutions but there are many more types.<sup>44</sup> As it is left to the discretion of the SC, which measures will be the most effective in order to restore and maintain the peace and security of countries the range of sanctions that have been imposed is wide. The SC has applied different sanctions to support peaceful transitions, deter non-constitutional changes, constrain terrorism, protect human rights and promote non-proliferation.

In order to administer each sanctions regime adopted by the SC better and secure that the sanctions are targeted carefully and adequately, the SC has established sanctions committees and delegated several of its responsibilities to them.<sup>45</sup> Each sanctions committee is tailored to a particular sanctions regime.<sup>46</sup> Today there are 14 ongoing sanctions regimes, which focus on supporting political settlement of conflicts, nuclear non-proliferation, and counter-terrorism. Each regime is administered by one committee, which is chaired by a non-permanent member

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<sup>42</sup> B. Simma (ed) and N. Krisch, *supra* fn 17, p 753.

<sup>43</sup> The homepage of the United Nations Security Council. – <https://www.un.org/sc/suborg/en/sanctions/information>.

<sup>44</sup> See more in T. Biersteker. Types of UN Targeted Sanctions and their Effectiveness: Research Note. 2014.

<sup>45</sup> A. Orakhelashvili, *supra* fn 3, p 61.

<sup>46</sup> R. Wolfrum, *supra* fn, p 448.

of the SC. There are 10 monitoring groups, teams and panels that support the work of the sanctions committees.<sup>47</sup>

The sanction committees working mechanism is similar to the SC itself. The sanction committees are composed of representatives of the Member States of the SC, they meet in closed sessions, and they take decisions by consensus.<sup>48</sup> The sanction committees receive and examine reports regarding the implementation of sanctions, respond to violations, consider requests under admitted exceptions, and report on all these matters to the SC.<sup>49</sup> The primary task is listing the addressees of the sanctions. Having special committees to deal with each sanctions regime has made it easier to identify and administer whom the targeted persons and entities for sanctions should be. Listing is also one of the main sources of disputes as there have often been listed people that do not agree with being on this list. In reaction to criticism concerning the lack of transparency of targeted sanctions the SC adopted detailed resolutions<sup>50</sup> to develop a procedure concerning the listing of individuals and entities.<sup>51</sup> Additionally, to deal with the listing problem, the SC has also established the office of an Ombudsman. The primary purpose of the Office of the Ombudsman is to deal with requests for de-listing from individuals and entities by procedures outlined in an annexe to the resolution.<sup>52</sup>

The SC sanctions are implemented by the Member State or the Member States to whom they are addressed.<sup>53</sup> The DPRK is one of two Member States whom a resolution has been directed to.<sup>54</sup> After making a resolution and adopting it, it is vital to co-operate with the Member States to fulfil these sanctions, among other things the implementation of the listing rests with the Member States concerned and that in doing so the Member States have to respect the rights and

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<sup>47</sup> The homepage of the United Nations Security Council. – <https://www.un.org/sc/suborg/en/sanctions/1267/monitoring-team/work-and-mandate>.

<sup>48</sup> R. Wolfrum, *supra* fn 4, p 448.

<sup>49</sup> A. Orakhelashvili. *supra* fn 3, p 61.

<sup>50</sup> S/RES/1456. The United Nations Security Council. 4688<sup>th</sup> Meeting of the United Nations Security Council. 20.01.2003. - [http://www.un.org/en/ga/search/view\\_doc.asp?symbol=S/RES/1456\(2003\)](http://www.un.org/en/ga/search/view_doc.asp?symbol=S/RES/1456(2003)). S/RES/1526. The United Nations Security Council. 4908<sup>th</sup> Meeting of the United Nations Security Council. 30.01.2004. [http://www.un.org/en/ga/search/view\\_doc.asp?symbol=S/RES/1526\(2004\)](http://www.un.org/en/ga/search/view_doc.asp?symbol=S/RES/1526(2004)).

<sup>51</sup> R. Wolfrum, *supra* fn 4, p 450.

<sup>52</sup> *Ibid*, p 481.

<sup>53</sup> *Ibid*, p 436.

<sup>54</sup> S/RES/1718. United Nations Security Council. 5551<sup>st</sup> Meeting of the United Nations Security Council. 14.10.2006, paras 8-10.



standards of the targeted individuals and entities. In implementing this obligation, the Member States are guided by the SC, but they act under their responsibility.<sup>55</sup> Therefore the SC remains an active supervisor of the fulfilment of these obligations, but the primary responsibility to act accordingly lies with the Member States.

As the Member States, therefore, bring the decisions into reality, it is impossible for the UN to impose sanctions and collective enforcement measures without the participation of sovereign states that therefore could also have some legal control. Some argue that the execution and effectiveness depend crucially on the goodwill of the members, which depends, in turn, on their conviction of the legality of the SC resolutions.<sup>56</sup> The Member States are not allowed to breach international law while implementing these sanctions.

Therefore, the SC has the power to adopt resolutions that are binding on the parties and impose different types of sanctions on the addressees. Moreover, the fulfilment of the resolutions is carried out in co-operation with the Member States.

## **2.2. The Resolutions against the Democratic People's Republic of Korea**

It has been previously established that the resolutions are the only type of decisions that will influence the actions of both the addressees and the other Member States. Therefore, due to the binding nature of the resolutions and the number of resolutions that are adopted and executed every year, it is especially necessary to review the legality of resolutions to conclude whether they are lawful or not and whether they should bring specific consequences or not to the parties that are involved.

This chapter sets out the resolutions adopted against the DPRK regarding the nuclear tests, but focusing on the resolutions that were adopted in 2017 and 2018<sup>57</sup> and state all of the sanctions that were imposed with these resolutions. This is necessary in order to further analyse whether these Resolutions entail the legal aspects that the ICJ could judicially review and to analyze these sanctions and what are the legal issues with them in the next chapter. This subchapter has

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<sup>55</sup> R. Wolfrum, *supra* fn 4, p 452.

<sup>56</sup> I. Rajčić, *supra* fn 5, p 112.

<sup>57</sup> S/RES/2345. The United Nations Security Council. 23.03.2017; S/RES/2356. The United Nations Security Council. 02.06.2017; S/RES/2371. The United Nations Security Council. 05.08.2017; S/RES/2375. The United Nations Security Council. 11.09.2017; S/RES/2397. The United Nations Security Council. 22.12.2017. S/RES/2407. United Nations Security Council. 21.03.2018.

been divided into two: firstly, the general sanctions and secondly, the targeted sanctions, which means sanctions against specific individuals and entities.

The SC has adopted 10 resolutions regarding the nuclear tests the DPRK has carried out. In October 2006 the SC passed the first resolution against the DPRK regarding nuclear activity. The Resolution 1718<sup>58</sup> condemned the country's first nuclear test and imposed sanctions on the DPRK, including the supply of heavy weaponry, missile technology and material, and select luxury goods. In June 2009 the SC adopts Resolution 1874<sup>59</sup>, which strengthens sanctions against the DPRK after the second nuclear explosion. In January 2013 the SC passes Resolution 2087<sup>60</sup> condemning the DPRK 2012 satellite launch and proliferation activities. The same year, in March the SC passed Resolution 2094<sup>61</sup> imposing harsher sanctions in response to the DPRK's third nuclear test that took place one month earlier. In March 2016 the SC adopts Resolution 2270<sup>62</sup> condemning the DPRK's fourth nuclear test and its 2015 submarine-launched missile test. Sanctions were enhanced, including banning states from supplying aviation fuel to the DPRK. The same year, in November the SC passes Resolution 2321<sup>63</sup> expanding sanctions after the DPRK's fifth nuclear test, including a ban on mineral exports such as copper and nickel, and the selling of statues and helicopters.

Resolution 2345<sup>64</sup> and Resolution 2407<sup>65</sup>, which are the first and the last resolutions that have been adopted during the last year merely recalled all the previous resolutions and PRSTs against the DPRK regarding the nuclear tests issue with determining that proliferation of nuclear, chemical and biological weapons, as well as their means of delivery, continues a threat to international peace and security. Moreover, it extended the mandate of the Panel of Experts to

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<sup>58</sup> S/RES/1718. The United Nations Security Council. 5551<sup>st</sup> Meeting of the United Nations Security Council. 14.10.2006. – [http://www.un.org/en/ga/search/view\\_doc.asp?symbol=S/RES/1718\(2006\)](http://www.un.org/en/ga/search/view_doc.asp?symbol=S/RES/1718(2006)).

<sup>59</sup> S/RES/1874. The United Nations Security Council. 6141<sup>st</sup> Meeting of the United Nations Security Council. 12.06.2009. – [http://www.un.org/en/ga/search/view\\_doc.asp?symbol=S/RES/1874\(2009\)](http://www.un.org/en/ga/search/view_doc.asp?symbol=S/RES/1874(2009)).

<sup>60</sup> S/RES/2087. The United Nations Security Council. 6904<sup>th</sup> Meeting of the United Nations Security Council. 22.01.2013. - [http://www.un.org/en/ga/search/view\\_doc.asp?symbol=S/RES/2087\(2013\)](http://www.un.org/en/ga/search/view_doc.asp?symbol=S/RES/2087(2013)).

<sup>61</sup> S/RES/2094. The United Nations Security Council. 6932<sup>nd</sup> Meeting of the United Nations Security Council. 07.03.2013. [http://www.un.org/en/ga/search/view\\_doc.asp?symbol=S/RES/2094\(2013\)](http://www.un.org/en/ga/search/view_doc.asp?symbol=S/RES/2094(2013)).

<sup>62</sup> S/RES/2270. The United Nations Security Council. 7638<sup>th</sup> Meeting of the United Nations Security Council. 02.03.2016. [http://undocs.org/S/RES/2270\(2016\)](http://undocs.org/S/RES/2270(2016)).

<sup>63</sup> S/RES/2321. The United Nations Security Council. 7821<sup>st</sup> Meeting of the United Nations Security Council. 30.11.2016. [http://undocs.org/S/RES/2321\(2016\)](http://undocs.org/S/RES/2321(2016)).

<sup>64</sup> S/RES/2345. The United Nations Security Council. 23.03.2017.

<sup>65</sup> S/RES/2407. The United Nations Security Council. 21.03.2018.

take action regarding this matter and provide a program for work and urged all Member States to fully cooperate with the Committee established pursuant to Resolution 1718 and the Panel of Experts by supplying information at their disposal on the implementation of the measures imposed by the previous resolutions.

The other 4 resolutions, however, adopted in 2017 also refer to the Resolution 1718<sup>66</sup>, but are more specific than Resolution 2345<sup>67</sup> and Resolution 2407<sup>68</sup> and add some sanctions. Namely, they impose specific sanctions on the DPRK in general, but also sanctions on both individuals and entities of the DPRK. Therefore, it could be stated that the basis of the new resolutions was Resolution 1718<sup>69</sup> that was adopted in 2006 and some aspects were added to it taking into account the resolutions that had been adopted so far, including the new lists of individuals and entities that would be sanctioned with these resolutions. The following subchapter gives an overview of the sanctions that were imposed on the addressees with these 4 resolutions in order to show what type of consequences these binding sanctions could have on the subjects and to further analyze them in the next chapter.

### ***2.2.1. General Sanctions***

The general sanctions that were imposed related to the activity in the DPRK were economic sanctions that restricted the movement of products that were related to the production of nuclear weapons and ballistic missiles. Mainly these products were related to different materials, like iron, oil etc. Additionally, there were restrictions regarding the work by the people of the DPRK outside the DPRK, movement of luxury goods, ventures with the DPRK entities, trading with seafood.

The following subchapter has been divided according to the 4 resolutions that add special sanctions to Resolution 1718<sup>70</sup> and set out the general sanctions that will be imposed on the DPRK as a State.

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<sup>66</sup> S/RES/1718. The United Nations Security Council. 14.10.2006.

<sup>67</sup> S/RES/2345. The United Nations Security Council. 23.03.2017.

<sup>68</sup> S/RES/2407. The United Nations Security Council. 21.03.2018.

<sup>69</sup> S/RES/1718. The United Nations Security Council. 14.10.2006.

<sup>70</sup> S/RES/1718. The United Nations Security Council. 14.10.2006.

The sanctions in Resolution 1718<sup>71</sup> that were referred to in the Resolutions, were the following:

8 (a): All of the Member States shall prevent the direct or indirect supply, sale or transfer to the DPRK, through their territories or by their nationals, or using their flag vessels or aircraft, and whether or not originating in their territories, of:

(i) Any battle tanks, armoured combat vehicles, large calibre artillery systems, combat aircraft, attack helicopters, warships, missiles or missile systems, or related materiel including spare parts, or items;

(ii) All items, materials, equipment, goods and technology, as well as other items, materials, equipment, goods and technology, which could contribute to the DPRK's nuclear-related, ballistic missile-related or other weapons of mass destruction-related programmes;

(iii) Luxury goods.

8 (b): The DPRK shall cease the export of all items covered in subparagraphs (a) (i) and (a) (ii) above and that all Member States shall prohibit the procurement of such items from the DPRK by their nationals, or using their flagged vessels or aircraft, and whether or not originating in the territory of the DPRK;

8 (c): All Member States shall prevent any transfers to the DPRK by their nationals or from their territories, or from the DPRK by its nationals or from its territory, of technical training, advice, services or assistance related to the provision, manufacture, maintenance or use of the items in subparagraphs (a) (i) and (a) (ii) above;

8 (f): In order to ensure compliance with the requirements of this paragraph, and thereby preventing illicit trafficking in nuclear, chemical or biological weapons, their means of delivery and related materials, all Member States are called upon to take, in accordance with their national authorities and legislation, and consistent with international law, cooperative action including through inspection of cargo to and from the DPRK, as necessary.

#### **(a) Resolution 2356 (June 2017)**

Resolution 2356<sup>72</sup> recalled the measures imposed by paragraph 8 of Resolution 1718<sup>73</sup> as modified by subsequent resolutions and did not impose any additional sanctions on the State.

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<sup>71</sup> S/RES/1718. The United Nations Security Council. 14.10.2006.

<sup>72</sup> S/RES/2356. The United Nations Security Council. 02.06.2017.

<sup>73</sup> S/RES/1718. The United Nations Security Council. 14.10.2006.

**(b) Resolution no 2371 (August 2017)**

The sanctions in Resolution 2371<sup>74</sup> were the following:

4: Adjust the measures imposed by paragraph 8 of Resolution 1718<sup>75</sup> and this resolution through the designation of additional goods;

5: Adjust the measures imposed by paragraph 7 of Resolution 2321<sup>76</sup> through the designation of additional conventional arms-related items, materials, equipment, goods, and technology;

6: Prohibit vessels related to the activities regarding the nuclear tests to enter into their ports. Additionally, requires Member States to prohibit nationals, persons subject to their jurisdiction and entities incorporated in their territory or subject to their jurisdiction from owning, leasing, operating any vessel flagged by the DPRK;

8: The DPRK shall not supply, sell or transfer, directly or indirectly, from its territory or by its nationals or using its flag vessels or aircraft, coal, iron and iron ore, and that all Members States shall prohibit the procurement of such material from the DPRK by their nationals, or using their flag vessels or aircraft, and whether or not originating in the territory of the DPRK;

9: The DPRK shall not supply, sell or transfer directly or indirectly, from its territory or by its nationals or using its flag vessels or aircraft, seafood (including fish, crustaceans, mollusks, and other aquatic invertebrates in all forms), lead or lead ore, and that all States shall prohibit the procurement of such items from the DPRK by their nationals, or using their flag vessels or aircraft, whether or not originating in the territory of the DPRK;

11: It also limited the number of the DPRK nationals who work in other Member States. The Member States are not allowed to exceed the total number of work authorizations for the DPRK nationals provided in their jurisdictions unless the Committee approves on a case-by-case basis;

12: It also obligated the Member States to prohibit, by their nationals or in their territories, the opening of new joint ventures or cooperative entities with the DPRK entities or individuals, or the expansion of existing joint ventures through additional

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<sup>74</sup> S/RES/2371. The United Nations Security Council. 05.08.2017.

<sup>75</sup> S/RES/1718. The United Nations Security Council. 14.10.2006.

<sup>76</sup> S/RES/2321. The United Nations Security Council. 30.11.2016.

investments, whether or not acting for or on behalf of the government of the DPRK, unless such joint ventures or cooperative entities have been approved by the Committee in advance on case-by-case basis.

(c) **Resolution 2375 (September 2017)**

The sanctions in Resolution 2375<sup>77</sup> were the following:

4: Adjusts the measures imposed by paragraph 8 of resolution 1718<sup>78</sup> through the designation of additional WMD-related dual-use items, materials, equipment, goods, and technology. Decides to adjust the measures imposed through the designation of additional conventional arms-related items, materials, equipment, goods, and technology;

5: Decides to adjust the measures imposed by paragraph 8 (a), 8 (b) and 8 (c) of resolution 1718<sup>79</sup> through the designation of additional conventional arms-related items, materials, equipment, goods, and technology;

6: Application of the measures in paragraph 6 of Resolution 2371<sup>80</sup> on vessels transporting prohibited items from the DPRK. Obligates the Member States to inspect vessels with the consent of the flag State if they have information that provides reasonable grounds to believe that the cargo of such vessels contains items the supply, sale, transfer and export has been prohibited with the previous resolutions;

11: Additionally, all Member States shall prohibit their nationals, persons subject to their jurisdiction, entities incorporated in their territory or subject to their jurisdiction, and vessels flying their flag, from facilitating or engaging in ship-to-ship transfers to or from the DPRK-flagged vessels of any goods or items that are being supplied, sold, or transferred to or from the DPRK.

14: Additionally, all Member States shall prohibit the direct and indirect supply, sale or transfer to the DPRK, through their territories or by their nationals, or using their flag vessels or aircraft, and whether or not originating in their territories, of all refined petroleum products and refined petroleum products in the amount of up to 500,000 barrels until 31 December 2017 and then 2,000,000 barrels. Member States will be

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<sup>77</sup> S/RES/2375. The United Nations Security Council. 11.09.2017.

<sup>78</sup> S/RES/1718. The United Nations Security Council. 14.10.2006.

<sup>79</sup> S/RES/1718. The United Nations Security Council. 14.10.2006.

<sup>80</sup> S/RES/2371. The United Nations Security Council. 05.08.2017.

notified when an aggregate amount of refined petroleum products of the yearly amounts have been reached and they must cease supplying etc. Moreover, the supply, selling and transfer of crude oil was limited.

16: The DPRK shall not supply, sell or transfer, directly or indirectly, from its territory or by its nationals or using its flag vessels or aircraft, textiles (including but not limited to fabrics and partially or fully completed apparel products), and that all Member States shall prohibit procurement of such items from the DPRK by their nationals, or using their flag vessels or aircraft.

17: Member States shall not provide work authorizations for the DPRK nationals in their jurisdictions in connection with admission to their territories unless the Committee determines on a case-by-case basis that the employment is required for other purposes.

18: The Member States shall also prohibit, by their nationals or in their territories, the opening, maintenance, and operation of all joint ventures or cooperative entities, new and existing, with the DPRK entities or individuals, whether or not acting for on behalf of the government of the DPRK, unless also assessed by the Committee on a case-by-case basis.

**(d) Resolution 2397 (December 2017)**

The sanctions in Resolution 2397<sup>81</sup> were the following:

4: All Member States shall prohibit the direct and indirect supply, sale or transfer to the DPRK, through their territories or by their nationals, or using their flag vessels, aircraft, pipelines, rail lines, or vehicles and whether or not originating in their territories, of all crude, unless the Committee approves on a case-by-case basis. This also applies to petroleum products.

6: The DPRK shall not supply, sell or transfer, directly or indirectly, from its territory or by its nationals or using its flag vessels or aircraft, food and agricultural products, machinery, electrical equipment, earth and stone including magnesite and magnesia, wood, and vessels, and that all Member States shall prohibit the procurement of the above-mentioned commodities and products from the DPRK by their nationals, or using their flag vessels or aircraft, whether or not originating in the territory of the DPRK. Also it was clarified that the full sectoral ban on seafood prohibits the DPRK from selling or transferring, directly or indirectly, fishing rights, and further decides that for

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<sup>81</sup> S/RES/2397. The United Nations Security Council. 22.12.2017.

sales of and transactions involving all commodities and products from the DPRK whose transfer, supply, or sale by the DPRK are prohibited.

7: Member States prohibit the direct and indirect supply, sale or transfer to the DPRK, through their territories or by their nationals, or using their flag vessels, aircraft, pipelines, rail lines, or vehicles and whether or not originating in their territories, of all industrial machinery, transportation vehicles, and iron, steel, and other metals.

### **2.2.2. *Sanctions against Individuals and Entities***

The targeted sanctions that were imposed on people related to the activity in the DPRK were travel bans and asset freezes against individuals and asset freezes against entities. The targeted individuals were the DPRK's government officials, military officials, major corporations and bank representatives.

The sanctions in Resolution 1718<sup>82</sup> that were referred to in the Resolutions, were the following:

8 (d): All Member States shall, in accordance with their respective legal processes, freeze immediately the funds, other financial assets and economic resources which are on their territories at the date of the adoption of this resolution or at any time thereafter, that are owned or controlled, directly or indirectly, by the persons or entities designated by the Committee or by the Security Council as being engaged in or providing support for, including through other illicit means, the DPRK's nuclear-related, other weapons of mass destruction-related and ballistic missile-related programmes, or by persons or entities acting on their behalf or at their direction, and ensure that any funds, financial assets or economic resources are prevented from being made available by their nationals or by any persons or entities within their territories, to or for the benefit of such persons or entities;

8 (e): All Member States shall take the necessary steps to prevent the entry into or transit through their territories of the persons designated by the Committee or by the Security Council as being responsible for, including through supporting or promoting, the DPRK policies in relation to the DPRK's nuclear-related, ballistic missile-related and other weapons of mass destruction-related programmes, together with their family members, provided that nothing in this paragraph shall oblige a state to refuse its own nationals entry into its territory.

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<sup>82</sup> S/RES/1718. The United Nations Security Council. 14.10.2006.



**(a) Resolution 2356 (June 2017)**

Resolution 2356<sup>83</sup> recalled the same sanctions as in Resolution 1718<sup>84</sup>, but added a new list of individuals and entities that will be affected by the sanctions. Namely, there were 12 individuals against who travel bans and asset freezes were imposed and 4 entities whose assets were frozen with this resolution.

**(b) Resolution 2371 (August 2017)**

Resolution 2371<sup>85</sup> also refers to Resolution 1718<sup>86</sup> and states that the same measures specified in paragraph 8 (d) shall apply to the individuals that are listed in the annex of this resolution.

It imposed travel bans and asset freezes upon 9 people and asset freezes upon 4 entities. Additionally, it was stated that the individuals and entities that are associate with the sanctioned, should be addressed to these restrictions.

**(c) Resolution 2375 (September 2017)**

Resolution 2375<sup>87</sup> also adds people in the list of the sanctions provided in Resolution 1718<sup>88</sup>. Namely, travel ban and asset freeze was imposed on 1 additional person and asset freeze was imposed on 1 additional entity.

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<sup>83</sup> S/RES/2356. The United Nations Security Council. 02.06.2017.

<sup>84</sup> S/RES/1718. The United Nations Security Council. 14.10.2006.

<sup>85</sup> S/RES/2371. The United Nations Security Council. 05.08.2017.

<sup>86</sup> S/RES/1718. The United Nations Security Council. 14.10.2006.

<sup>87</sup> S/RES/2375. The United Nations Security Council. 11.09.2017.

<sup>88</sup> S/RES/1718. The United Nations Security Council. 14.10.2006.

**(d) Resolution 2397 (December 2017)**

Resolution 2397<sup>89</sup> also poses the same sanctions as in Resolution 1718<sup>90</sup> upon another 16 individuals in the form of travel ban and asset freeze. As for the entities, 1 more entities' assets were frozen: the Ministry of the People's Armed Forces (MPAF).

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<sup>89</sup> S/RES/2397. The United Nations Security Council. 22.12.2017.

<sup>90</sup> S/RES/1718. The United Nations Security Council. 14.10.2006.

### 3. LEGAL DIFFICULTIES WITH THE RESOLUTIONS OF THE UNITED NATIONS SECURITY COUNCIL

The possible grounds of nullity and other legal difficulties with the act or decision are central to the concept of judicial review because it sets out the concept and process of appeal.<sup>91</sup> In order to carry out a judicial review, there needs to exist legal requirements that the SC has to follow when adopting its resolutions and imposing obligations to the Member States. Only then it is possible for a court to analyze whether the SC's action has been either legal or illegal.

There a number of difficulties that could arise from the SC's resolutions. For example, difficulties may raise from the adoption of a resolution under Chapter VII without determining the existence of a threat to the peace under Article 39, or where the determination is not at least readily inferred from the text of the relevant resolution, or where the determination is not at least readily inferred from the text of the relevant resolution, or even where the determination that there exists a threat to the peace is questionable.<sup>92</sup>

Another example of a problematic SC's conduct would be a case where the SC passes (or keeps in force) a binding resolution under Chapter VII which is contrary to the international law.<sup>93</sup> The keeping in force of a sanctions regime that results in inhuman or degrading treatment of the population of the target State or of certain individuals may, by analogy, be deemed conduct that will give rise to the UN's responsibility.<sup>94</sup> In regard to the P5 power, there could also come into question the legality of omissions, not just actions.

There is a conceptual and normative difference between a violation of the SC's resolution that is valid and in force, and a refusal to carry out a SC decision that exceeds its competence, which needs to be taken into consideration as well.<sup>95</sup> This brings about the question of analyzing whether the SC has acted *ultra vires*. According to the *ultra vires* doctrine the SC should keep itself within the powers vested to it under the Charter. The Member States are legitimators of

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<sup>91</sup> K. H. Kaikobad, *supra* 13, p 35.

<sup>92</sup> A. Tzanakopoulos, *Disobeying the Security Council: Countermeasures against Wrongful Sanctions*. Oxford and New York: Oxford University Press 2011, p 22.

<sup>93</sup> *Ibid.*

<sup>94</sup> *Ibid*, p 23.

<sup>95</sup> A. Orakhelashvili, *supra* fn 3, p 45.

the UN, ones that should always question whether the measure is in accordance with the Charter and thus whether it is (un)lawful.<sup>96</sup> It could be argued that an act adopted by a political organ of the UN is manifestly *ultra vires* if it breaches the law or exceeds its powers.<sup>97</sup>

The promulgation of a decision delegating certain Chapter VII powers to Member States or other international organizations in a manner that is in violation of the Charter also constitutes conduct that could potentially engage the SC's international responsibility. The SC has the option to also create subsidiary organs as measures to maintain or restore international peace; however, the conduct of these subsidiary organs need to be proper as well.<sup>98</sup>

The first subchapter maps the law and principles that the SC has to follow when carrying out its responsibilities in order to analyze in the second subchapter, which are the possible infringements or violations of rights or principles that could add up the Resolutions being illegal and therefore perhaps null. As judicial review could only be carried out in case there are legal requirements to an act or decision, this chapter aims to detect what are the laws and principles that the SC has to follow and then analyze what are the potential infringements of these laws and principles in the Resolutions. The aim of this analysis is to show whether there are laws and principles that the SC has to follow and therefore this would fall in the competence of a court and with the example of the Resolutions show whether these could be applied to the Resolutions as well.

### **3.1. Law and Principles that the United Nations Security Council Has To Act in Accordance with**

There are two different approaches to whether the SC has to act in accordance with law or not. Some authors have concluded that the SC's function is to maintain international peace and security and that places it above the law.<sup>99</sup> Others insist however, that the actions of the SC are

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<sup>96</sup> T. Sato. J.-M. Coicaud and V. Heiskanen (eds). *The Legitimacy of Security Council Activities under Chapter VII of the Charter after the End of Cold War. The Legitimacy of International Organizations*. United Nations University Press 2001, p 311.

<sup>97</sup> M. S. M. Amr, *The Role of the International Court of Justice as the Principal Judicial Organ of the United Nations*. Hague: Kluwer International Law 2000, p 299.

<sup>98</sup> A. Tzanakopoulos, *supra* 91, p 22-23.

<sup>99</sup> C. Eagleton. *International Government*. New York: Ronald Press 1932.; G. H. Oosthuizen. *Playing the Devil's Advocate: The Security Council is Unbound by Law*. – *Leiden Journal of International Law*. 1999, p 549; H. Kelsen. *The Law of the United Nations: A Critical Analysis of its Fundamental Problems*. 1951, p 294; *Case*

subject to legal limitations, which have their basis in the Charter as well as in international law and it is not above the law.<sup>100</sup>

However, the Member States have reaffirmed their solemn commitment to the purposes and principles of the Charter of the United Nations, international law and justice, and to an international order based on the rule of law, which are indispensable foundations for a more peaceful, prosperous and just world; also they have recognized that the rule of law applies to all States equally, and to international organizations, including the United Nations and its principal organs, and that respect for and promotion of the rule of law and justice should guide all of their activities and accord predictability and legitimacy to their actions; moreover, they recognized that all persons, institutions and entities, public and private, including the State itself, are accountable to just, fair and equitable laws and are entitled without any discrimination to equal protection of the law<sup>101</sup>. Moreover, the SC itself emphasized in its Resolution 2178<sup>102</sup> the obligations of Member States to respect obligations under international law and in particular human rights law as well as respect for the rule of law rather than its own, the SC's obligations. It stated that "It is safe to state that respect for international law, in particular respect for international human rights law as well as rule of law have to play a role concerning initiating, deciding on and implementing targeted sanctions."<sup>103</sup>

Although the SC is influenced by political aspects, it is established by law and its powers, functions, and the degree to which it can take political considerations into account are also

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*Concerning Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*. Judge Schwebel Dissenting Opinion. Merits. ICJ Reports. 1986. p 14; H. Neuhold, W. Hummer, C. Schreuer (eds). *Die Grundregeln der zwischenstaatlichen Beziehungen*. Österreichisches Handbuch des Völkerrechts. 1997, p 319, 326.

<sup>100</sup> M. Bedjaoui. *The New World Order and the Security Council: Testing the Legality of its Acts*. 1994, p 14; G. Nolte. *The Limits of the Security Council's Powers and its Functions in the International Legal System: Some Reflections*. Michael Byers ed. *The Role of Law in International Politics*. 2000, p 315-326; J. Crawford. *Brownlie's Principles of International Law*. 8<sup>th</sup> edition. 2012, p 184; V. Gowlland-Debbas, *The Security Council and Issues of Responsibility under International Law*. 2011, p 13; C. Michaelsen. A. Byrnes, M. Hayashi (eds). *The Competence of the Security Council Under the UN Charter to Adopt Sanctions Targeting Private Individuals, International Law in the New Age of Globalization*. 2013, p 14.

<sup>101</sup> *The Declaration of the High-level Meeting of the General Assembly on the Rule of Law at the National and International Levels*. The United Nations General Assembly. 30.11.2012, p 1-2.

<sup>102</sup> S/RES/2178. *The United Nations Security Council*. 7272<sup>nd</sup> Meeting of the United Nations Security Council. 24.09.2014. - [http://www.un.org/en/ga/search/view\\_doc.asp?symbol=S/RES/2178%20\(2014\)](http://www.un.org/en/ga/search/view_doc.asp?symbol=S/RES/2178%20(2014)).

<sup>103</sup> *The Declaration of the High-level Meeting of the General Assembly on the Rule of Law at the National and International Levels*, *supra* fn 101, p 3.

determined by law.<sup>104</sup> The ICJ confirmed in the *Admissions*<sup>105</sup> case that the political character of an organ does not release it from a duty to observe the law, let alone place it above the law. If there are states that have to carry out their obligations deriving from the resolutions of the SC in accordance with international law, it is not possible that what happens beyond that, including in the SC, can invoke international law. Moreover, as far as discretionary powers of the SC are concerned it has to be pointed out that to have discretionary powers is not tantamount to being beyond law.<sup>106</sup> This means that although the SC is regarded as political organ, it still need to follow laws.

Although the SC is mostly controlled by political means, there is no ground for conclusion that SC is free to completely disregard the Charter and deny the acting under international law. The SC must consider all possible rules of international law before using its powers and taking measures. However, the further the SC is from enforcement activities the more consideration must be given to the international law and principles of justice. The SC is not released from the laws and claiming that it operates above the law would surely cause “denying the relevance of the law to the governance of world affairs”.<sup>107</sup>

There are many different grounds on which a claim, that the resolution of the SC could be illegal, could be based on. These grounds include the SC acting *ultra vires*<sup>108</sup>, procedural irregularities and procedural impropriety in terms of a breach of principles of natural justice, of which *nemo iudex in sua causa*<sup>109</sup> and *audi alteram partem*<sup>110</sup> are particularly noteworthy; included in this general list is the illegality of the resolution in the sense of a breach of a rule of international law, including *ius cogens*, coercion, duress and corruption in the decision-making process, abuse of power, lack of good faith, bias, material error and the absence of a statement of reasons for the decision.<sup>111</sup> This also derives from the concept of rule of law, which includes

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<sup>104</sup> A. Orakhelashvili. *Collective Security*, p 23.

<sup>105</sup> *Conditions of Admission of a State to Membership in the United Nations*. Advisory Opinion. ICJ Reports, 1948, p 64.

<sup>106</sup> R. Wolfrum, *supra* fn 4, p 456.

<sup>107</sup> I. Rajčić, *supra* fn 5, p 110.

<sup>108</sup> Latin phrase, which means acting beyond the powers or authority a person or organization which took it.

<sup>109</sup> Latin phrase for a principle, which means that nobody can judge their own lawsuit, otherwise there would be no fair justice.

<sup>110</sup> Latin phrase for a principle, which means that in case there is a dispute the parties have to be heard on equal terms.

<sup>111</sup> K. H. Kaikobad, *supra* fn 13, p 36.

accountability of law, fairness in its application, procedural transparency and respect for human rights.<sup>112</sup> It is argued that the principle of rule of law requires that the exercise of such authority by whosoever exercised must be open to some form of judicial or other review and additionally the protection of human rights requires a judicial control of the measures in question.<sup>113</sup>

In *Certain Expenses*<sup>114</sup> it was stated that “There is no possibility of applying the concept of voidability to the acts of the United Nations. If an act of an organ of the UN had to be considered as an invalid act, such invalidity could constitute only the absolute nullity of the act. In other words, there are only two alternatives for the acts of the Organization: either the act is fully valid, or it is an absolute nullity, because absolute nullity is the only form in which invalidity of an act of the Organization can occur.” The nullity of an act would derive from it being unlawful and therefore, it would not create any obligations to the Member States or the addressees.

As the UN Charter is the origin of the UN organization and limits the competence of it, the legality and constitutionality of the activities of the SC should mainly be based on interpreting the Charter and this is so even though the SC rarely indicates the Charter provision on which it has founded its acts.<sup>115</sup> Article 24 of the Charter states that the SC shall act in accordance with the purposes and principles of the UN. The main purposes of all the UN organs are dealt with in Article 1 and 2 of the Charter. Although this thesis does not aim to analyse the substance of each of the principles in depth, it is important to state them as this is a clear indication what are the main principles that the SC has to follow when fulfilling its responsibilities and that have to be taken into consideration when evaluating the accordance of the Resolutions with these principles. The background and meaning of these principles has been widely discussed in jurisprudence.<sup>116</sup>

The principles named in the Charter are:

1. maintaining international peace and security;

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<sup>112</sup> The Rule of Law and Transitional Justice in Conflict and Post-conflict Societies: Report of the Secretary-General. 2004, para 6.

<sup>113</sup> R. Wolfrum, *supra* fn, p 420.

<sup>114</sup> *Certain Expenses* 1962, ICJ Reports. p 222.

<sup>115</sup> I. Rajčić, *supra* fn 5, p 110-111.

<sup>116</sup> For example see B. Simma (ed), R. Wolfrum, A. Bleckmann, B. Fassbender, J. A. Frowein, R. Kolb, N. Krisch, J. P. Müller, G. Nolte, A. Randelzhofer, C. Tomuschat, W. G. Vitzthum, *supra* fn 17, p 39-171.

2. developing friendly relations;
3. achieving international co-operation in solving international problems and promoting and encouraging respect for human rights and for fundamental freedoms;
4. harmonizing the actions of nations;
5. sovereign equality of all its Members;
6. fulfilment of obligations in good faith;
7. solving international disputes by peaceful means;
8. refraining from the threat or use of force against the territorial integrity or political independence of any state;
9. giving assistance;
10. ensuring that non-member states act in accordance with these principles;
11. non-intervention to matters of domestic jurisdiction.

Account also will have to be taken of upon the Charter that they have developed over time and that the drafters of the Charter did not anticipate that the SC would direct its sanctions against individuals and private entities rather than States.<sup>117</sup>

Although the Charter is the origin of the SC as it was created with it, there are other aspects that the SC has to take into consideration when carrying out its obligations. Additionally, being an international organization based on constitution created by the agreement of Member States with its institutions would mean that the SC is subject of international law and bound by it.<sup>118</sup> In literature, peremptory rules of international law have been referred to as possible limits for SC sanctions.<sup>119</sup> The proponents of this view argue that these norms are so important for the international community that SC decisions violating them are *ab initio* null and void.

Although it is possible to disregard *ius dispositivum*<sup>120</sup> if that was the intention of the Member States, then *ius cogens*<sup>121</sup> cannot be disregarded and the states cannot derogate from that

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<sup>117</sup> R. Wolfrum, p 464.

<sup>118</sup> A. Orakhelashvili. The Impact of Peremptory Norms on the Interpretation and Application of United Nations Security Council Resolutions. – The European Journal of International Law. Volume 16. 2005, p 63.

<sup>119</sup> *Ibid.*

<sup>120</sup> Latin phrase, which means positive law or law capable of creation or modification by agreement.

<sup>121</sup> Latin phrase, which means compelling law, a fundamental principle of international law that is accepted by the international community of states as a norm from which no derogation is permitted.



inherent limitation of any organization's powers. Not only the peremptory norms are embodied in the Charter and they apply to treaty-based organs through the law of treaties, but they also have a direct and autonomous effect on decisions of the organs.<sup>122</sup> Therefore, among others the SC also has to follow these norms. Violation of *ius cogens* should be regarded as an attempt to establish a new legal regime and acts contrary to it as *ultra vires*, either by express clauses or by the manner of exercise of rights and duties.

Although in practice jurists have attempted to classify certain rules, but while there is near-universal agreement for the existence of the category of *ius cogens* norms, there is far less agreement regarding the actual content of this category. However, examples of *ius cogens* norms include:

1. prohibition on the use of force;
2. the law of genocide;
3. principle of racial non-discrimination;
4. crimes against humanity;
5. rules prohibiting trade in slaves or human trafficking.<sup>123</sup>

Although they might overlap to some extent with the peremptory norms, the SC should still act in accordance with human rights law as a part of international law. Promotion and respect for human rights is one of the purposes of the UN in general and Article 55 of the Charter proclaims the obligation to act in accordance with human rights.

It is also said that the UN is bound by the existing human rights instruments under the principle of good faith or finally by considering international human rights to be part of customary international law, which is binding upon the UN.<sup>124</sup> It has also been argued that human rights are binding upon the UN due to the fact that its members are committed.<sup>125</sup> Resolution 1456<sup>126</sup> emphasized that States were obliged to ensure that any measure taken to combat terrorism

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<sup>122</sup> I. Rajčić, *supra* fn, p 113.

<sup>123</sup> Wex Legal Dictionary.

<sup>124</sup> E. de Wet and A. Nollkaemper, *Review of Security Council Decisions by National Courts*. 2002, p 195.

<sup>125</sup> M. Bedjaoui, *supra* fn 100, p 7; A. Reinisch, *Developing Human Rights and Humanitarian Law Accountability of the Security Council for the Imposition of Economic Sanctions*. – *American Journal of International Law*. Volume 95. 2001, p 858.

<sup>126</sup> S/RES/1456. The United Nations Security Council. 20.01.2003.

comply with all their obligations under international law, in particular international human rights.

With regard to the human rights that need to be followed, the author refers to the Universal Declaration of Human Rights, which is the most universal document stating human rights. This Declaration was proclaimed by the GA in Paris on 10 December 1948 as a common standard of achievements for all peoples and all nations.<sup>127</sup> The Declaration is not, in itself, a legally binding instrument. However, it contains a series of principles and rights that are based on human rights standards enshrined in other international instruments that are legally binding – such as the International Covenant on Civil and Political Rights. Moreover, the Declaration was adopted by consensus by the GA and therefore represents a very strong commitment by States to its implementation.<sup>128</sup> There are several human rights that it states and that could apply to the SC. Among others the following human rights could be under the review when it comes to the resolutions:

1. right to remedy by competent tribunal;
2. right to fair public hearing;
3. right to free movement in and out of the country;
4. right to own property;
5. right to desirable work and to join trade unions;
6. right to adequate living standard;

These rights and principles that were brought out in this chapter could be reviewed as the substantial regulation of the SC's activities. This meaning that the different principles and rights named in this chapter indicate what are the limitations to for the SC in carrying out its responsibilities in maintaining and restoring peace.

These requirements do not apply just on deciding, but also applying the resolutions. This means that the SC reaffirmed that Member States must ensure that any measure taken to counter terrorism comply with all their obligations under international law, in particular international human rights law, underscoring that respect for human rights, fundamental freedoms and the rule of law are complementary and mutually reinforcing with effective counter-terrorism

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<sup>127</sup> The homepage of the United Nations. - <http://www.un.org/en/universal-declaration-human-rights/>.

<sup>128</sup> The homepage of the United Nations Human Rights Office of the High Commissioner. <http://www.ohchr.org/EN/Issues/SRHRDefenders/Pages/Declaration.aspx>.

measures and noted the importance of respect for the rule of law so as to effectively prevent and combat terrorism.<sup>129</sup>

Therefore, we have established that there could be certain laws and principles that the SC has to follow when adopting its resolutions. Although, the traditional view regarding the powers of the SC is that the powers are rather unlimited and the only restrictions to it is the number of votes every resolution needs to receive and the right to veto, the author of this thesis finds that this subchapter showed that there could be certain laws and principles in the international law that should be followed even if there are no clear statements that these are additional restrictions to the power of the SC.

This approach is reasonable as it secures that the SC acts in accordance with the most important values of the Member States that it represents. However, this could also mean that it would be adequate to give a court the right to carry out a judicial review whether the SC follows the necessary legal requirements in practice as well.

### **3.2. Analysis About the Accordance of the Resolutions against the DPRK with Law and Principles**

As the previous subchapter set out the primary laws and principles that the SC needs to follow, this subchapter aims to analyze, which parts of the Resolutions by the SC could cause potential disputes and add up to either infringements or violations. In judicial review the validity of an measure, policy, or decision, or legislative enactment could be before the court. Therefore, this analysis is carried out in pursuance of providing an example of the judicial review that could be carried out in court over the SC resolutions regarding the legality of the measures taken by the SC.

However, it is important to state at this point that although this analysis touches upon the possible infringements and violations of laws and principles, the legality of these Resolutions will not be exhaustively assessed as this would not be achievable due to the lack of public information about the addressees involved in the Resolutions and the exact events that have occurred in that matter.

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<sup>129</sup> S/RES/2178. The United Nations Security Council. 24.09.2014.

This subchapter aims firstly, to show that there could be the legal necessity to have an international court that has the power and knowledge to decide whether the SC acts in accordance with the necessary rights and principles and secondly, to analyze clear legal aspects in the Resolutions that can be assessed by a court and therefore substantially it could be possible for a court to have this sort of authority over the SC.

As there are certain legal requirements that the resolutions have to follow, there is a possibility to review whether these resolutions are lawful or not. Special emphasis in this subchapter is put upon the proportionality of infringement of different rights that should be one of the main aspects that the a court should analyze when reviewing these resolutions. There are certain ethical difficulties with the resolutions, and the proportionality of infringing different rights and balancing it with the SC's purpose of maintaining and restoring peace and security needs to be evaluated.

The principle of proportionality prescribes that all statutes that affect human rights should be proportionate or reasonable.<sup>130</sup> The analysis of proportionality is made up of three sub-principles: adequacy, necessity, and proportionality *stricto sensu*. These are the main subprinciples will also be analyzed regarding the Resolutions. Firstly, the adequacy, which establishes that the measure, which affects a human right, must be suitable to achieve the purpose that was sought. Secondly, through necessity it is evaluated if the decision-maker has chosen, among the measures capable of obtaining the desired outcome, the one, which is the least restrictive of the human rights. And thirdly, if the first two principles have been fulfilled, it needs to be determined whether the measure is reasonable *stricto sensu*, which means that the application of the instrument could achieve a given end or the objective should not be unreasonable in its reciprocal relationships.<sup>131</sup>

Moreover, the accordance with the proportionality principle was under the attention in the *Nicaragua*<sup>132</sup> case where the ICJ stated that before examining the concrete measures at hand that the parties also agree in holding that whether the response to the attack is lawful depends on observance of the criteria of the necessity and the proportionality of the measures taken in

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<sup>130</sup> J. Cianciardo. The Principle of Proportionality: The Challenges of Human Rights. –Journal of Civil Law Studies. Volume 3. Number 1. 2010, p 179.

<sup>131</sup> *Ibid*, p 180.

<sup>132</sup> *Case Concerning Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*. Judge Schwebel Dissenting Opinion. Merits. ICJ Reports. 1986, p 194.

self-defence. Therefore, the counter measurements for different security problems have to be decided in accordance with these principles and therefore, it is relevant to assess this aspect further regarding the Resolutions. The following analyses what are the problems that the Resolutions have raised and what are the legal assessments regarding them.

When it comes to the problems that have been discussed regarding the Resolutions posed on the DPRK, there are 2 main aspects: one regarding the general influence on the country and one regarding the influence on the individuals and entities. It is clear that the resolutions have had an influence on the country, but not the desired outcome as the government of the DPRK still continuously resists to follow the resolutions and end the nuclear tests in the interest of the safety of not merely Japan, South Korea and United States of America, which seemed to be the main potential targets, but the whole world.<sup>133</sup>

Firstly, the influence of the general sanctions against the State on the population of the DPRK. Rather than having an effect on the sanctioned officials, it is said that the general population of the DPRK is bearing the severe consequences in the form of hunger and poverty. The influence on the ordinary people has raised the gravest concern in international community.<sup>134</sup> Additionally, the concern has been expressed by the UN expert Tomas Ojea Quintana who is the special rapporteur for human rights in North Korea.<sup>135</sup>

Previously the SC's strict embargo against commerce with Saddam Hussein's regime in Iraq was also seen a depriving ordinary civilians while doing little to pressure those in power.<sup>136</sup> The failure of sanctions against the DPRK is due to the fact that Kim Jong-un has made his nuclear program a centrepiece of his domestic legitimacy, and so the political costs of agreeing to denuclearize have outweighed the economic benefits of doing so. It has been stated that for

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<sup>133</sup> S. D. Sagan. The Korean Missile Crisis. Why Deterrence Is Still the Best Option. – Foreign Affairs. Volume 96. Number 6. November/December 2017, p 79.

<sup>134</sup> K. B. Park. Hunger in North Korea Is Devastating. And It's Our Fault. – The New York Times. 17.12.2017; R. Gladstone. Proposed UN Resolution Would Toughen Sanctions on North Korea. – The New York Times. 21.12.2017; K. Gray. Tighter Sanctions on North Korea Could Have a Harsh Humanitarian Impact. The Conversation. 22.09.2017; L. Kanji. Moving Targets. The Evolution and Future of Smart Sanctions. – Harvard International Review. 04.01.2017.; D. Bandow. Sanctions Against North Korea Hurt the People Rather Than the Government. – Huffington Post. 15.06.2017.

<sup>135</sup> F. Fassihi. UN Expert Warns of Effects of Sanctions on North Korean Public. – The Wall Street Journal. 27.10.2017.

<sup>136</sup> E. Fishman. Even Smarter Sanctions. How to Fight in the Era of Economic Warfare. – Foreign Affairs. Volume 96. Number 6. November/December 2017, p 103.

sanctions to change the DPRK's behaviour, they must allow leaders on the receiving end to save face while acceding to the United States' demands.<sup>137</sup> It has been questioned whether economic pressure will actually change the target country's policies. All governments, even autocracies, care to some degree about their people's livelihoods, as plunging living standards can spark political unrest. But in general, it has also been stated that the more politically active a target's population is, the more likely sanctions are to work.<sup>138</sup> However, the people of the DPRK cannot be politically active and therefore the sanctions do not have an influence that is necessary.

The concern about the state of the population in the DPRK raised in the SC itself. The SC has stated in its resolutions that the purpose of the Resolutions is not to influence and moreover, harm the well-being of the ordinary people. In Resolution 2371<sup>139</sup> the SC underlined that measures imposed by this resolution are not intended to have adverse humanitarian consequences for the civilian population of the DPRK.

In Resolution 2371<sup>140</sup> the SC noted the findings of the UN Office for the Coordination of Humanitarian Assistance that well over half of the people in the DPRK suffer from major insecurities in food and medical care, including very large number of pregnant and lactating women and under-five children who are at risk of malnutrition and nearly a quarter of its total population suffering from chronic malnutrition. Moreover, in Resolution 2375<sup>141</sup> the SC reiterated its deep concern at the grave hardship that the people in the DPRK are subjected to and condemned the DPRK for pursuing nuclear weapons and ballistic missiles instead of the welfare of its people while people in the DPRK have great unmet needs, and emphasized the necessity of the DPRK respecting and ensuring the welfare and inherent dignity of the people in the DPRK.

However, as the SC has acknowledged that the proceeds of the DPRK's trade in sectoral goods, including but not limited to coal, iron, iron ore, lead, lead ore, textiles, seafood, gold, silver, rare earth minerals, and other prohibited metals, as well as the revenue generated from the

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<sup>137</sup> *Ibid*, p 108.

<sup>138</sup> *Ibid*, p 106.

<sup>139</sup> S/RES/2371. The United Nations Security Council. 05.08.2017.

<sup>140</sup> S/RES/2371. The United Nations Security Council. 05.08.2017.

<sup>141</sup> S/RES/2375. The United Nations Security Council. 11.09.2017.

DPRK workers overseas, among others, contribute to the DPRK's nuclear weapons and ballistic missile programs.<sup>142</sup> Therefore, it has continued to tackle the issue with nuclear tests with additional resolutions that pose more sanctions on the country. However, these resolutions may have led to infringements or even violations of rights of the people of the DPRK and especially the addressees.

On the one hand we have the people of the DPRK who have the right to adequate living standard and who are negatively influenced by the economic sanctions imposed on the country. On the other hand we have the SC who has the authority to take measures in its own discretion to restore the security of its Member States. Although the SC has a wide discretion, we established in the previous chapter that the SC still has to respect human rights. However, these two sides have to be balanced as the infringement of human rights could be justified with the purpose of securing the safety of all the other Member States.

The SC has stated that the purpose of its sanctions is to influence the government for them to end the nuclear tests. However, the average person in the DPRK will also bear the brunt of the sanctions. For instance, restrictions on the minerals trade will directly hit engineers, miners, truck drivers, and those serving mining communities.<sup>143</sup> The SC has adopted the general sanctions against the DPRK, which have influenced the people of having enough work and products that would provide the well-being of people and their family in fulfilment of the basic human needs like water, food and clothes. It has also been said that the hunger continues to stalk much of the land and health care is lamentable.<sup>144</sup> As the SC has adopted several resolutions the latest round of sanctions has increased the hardships. Choi Ha-young, who is the chairman of the Love North Korean Children Charity, has complained: "Currently, due to the UN sanctions, people in the lowest class are really impacted."<sup>145</sup>

Although the purpose of the measures has not been to influence the ordinary people, it seems to have this type of influence. Therefore, there exists an infringement of the right to adequate living standard. However, this infringement could be justified. For that, it is necessary to detect the proportionality of the measure. The first element for that is the adequacy of the measure,

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<sup>142</sup> S/RES/2397. The United Nations Security Council. 22.12.2017.

<sup>143</sup> D. Bandow, *supra* fn 138.

<sup>144</sup> *Ibid.*

<sup>145</sup> *Ibid.*

which means that it is suitable for dealing with the problem. It can be stated that usually a country puts all of its people first and therefore, the imposed sanctions would be adequate in dealing with the problem of the DPRK carrying out the nuclear tests in order to secure the safety of the whole world.

However, the time has shown so far that even the most restrictive measures on the DPRK's economy have not ended the nuclear tests. Although there are different security problems that the DPRK has dealt with for a much longer period of time, it should still be assessed whether the imposed measures are adequate at this point or they bring more harm than benefit. As the sanctions have not had any influence on the nuclear tests, but the elite of the DPRK continues to live a thriving life and the middle class is suffering, the adequacy of the sanctions could be the most problematic aspect regarding the sanctions.

The next infringement of right that would be put under the questions are travel bans, which are a common measure for targeted sanctions. Travel bans are applied to individuals who are either part of a regime or they are applied more independently. They mean to restrict the efficiency of terrorist networking.<sup>146</sup> In the Resolutions the SC has imposed travel bans on 38 different individuals. Travel bans have been one of the most criticised sanctions as there is a clear infringement of rights. If the sanction under analysis is travel bans then the relevant human right that is opposed to it is freedom of movement. In case of every single travel ban that has been imposed on a person it needs to be analyzed whether the travel ban was proportional or not.

All of the travel bans imposed with the Resolutions means that any travelling of the listed persons or their family to any of the Member States is prohibited. In order to decide who the people are that are not allowed to travel to any other countries, the SC has to carry out a thorough investigation regarding these people. They have been listed in case there is a connection to the events that have taken place. Therefore, the SC has to carry out this investigation with regard to the possible infringement or violation that it may add up to.

In order to carry out this measure the Member States have to effectively co-operate and make sure that these people do not have the opportunity to travel to other countries. This means that not only the SC may infringe this right with its resolution, but the executing Member State

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<sup>146</sup> R. Wolfrum, p 447.



could violate a right when carrying out its obligations under the SC resolutions. Therefore, there are many parties to this sanction and possible question under the international law.

Although, the SC has to respect the freedom of movement of every person but opposed to it is the international peace and security, which should be balanced. The first element again is the adequacy of the measure. Unless the person listed in the resolution does not have anything to do with the nuclear tests and is still punished for it, the sanction is adequate to deal with this issue. The persons listed are mostly people that have some sort of power and therefore, this could have more influence on the government's actions. This is one of the reasons that the targeted sanctions were invented as well – in order to address the people, who are actually responsible for the events.

Secondly, is the element of necessity, which means that there are less restrictive measures. As the two opposed interests that need to be balanced are the freedom of movement of only a few people and the peace of security of the whole world, the second element of proportionality is also fulfilled. It is proportional because this measure is not so restrictive to the people. And thirdly, is the element of proportionality *stricto sensu*. This element is fulfilled as well as the people do not actually suffer from this measure, but it will create inconvenience, which could lead to actual changes in the behaviour of the addressees and as they are more from the elite of the DPRK, then it could influence the decisions regarding the nuclear tests.

The next sanction to be analyzed is the freezing of assets of both individuals and entities. One of the most common measures of targeted sanctions is the freezing of financial assets. The freezing of financial assets is decreed and implemented with a view to denying or depriving particular entities (individuals, groups, companies or institutions) of their assets or property so as to render their activities impossible or at least more difficult or ineffective. The first decision to concentrate on exemptions from financial sanctions, thus ameliorating some of the economic consequences of the targeted sanctions was made in 2002. It thus acknowledged that the implementation of these sanctions resulted in the infringement of the rights of individuals and such sanctions, although justified, must not have totally disproportionate effect. This approach prevailed.<sup>147</sup>

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<sup>147</sup> R. Wolfrum, *supra* fn 4, p 52-53.

The right that we have opposed to the purposes of the SC is the individuals and entities right to own property. When people do not have access to their own property they are deprived of this right and this could also add up as a violation of a basic human right. However, just like with travel bans, this violation could be reasoned and on a very similar basis. It is vital that they are not disproportionate and addressed to the correct persons as well. The first element of proportionality – adequacy – is fulfilled as this could potentially also influence the people that are involved with the nuclear tests. The element of necessity is also fulfilled. Although the infringement could be more extensive than with travel bans, because freezing of assets is also in connection with the living standard of people, then they are also targeted only to people that should have a connection to the activities of the country regarding the nuclear tests. Therefore, the important aspect again is that the right people are sanctioned and if so, then the third element is also fulfilled.

Additionally, it is important to point out that when the SC has imposed the sanctions, it has brought out on some occasions that there are exceptions in some cases regarding the sanctions for the purpose of not punishing people that are not involved. The sanctions are often evaluated on a case-by-case basis and when someone is deprived of right a Member State could ask an assessment from the a Committee of the SC that has been created to deal with the sanctions of the SC. For example, in case it is banned to work outside of the DPRK, then it could be evaluated by the Committee whether this should be still allowed to some people or not.<sup>148</sup>

Therefore, the possible rights that have been invoked with the SC Resolutions are right to adequate living standard in the sense of the DPRK population in general and freedom of movement and right to own property. As there are clear legal aspects to the resolutions of the SC, it can be assessed that the third element of judicial review regarding the Resolutions, legal difficulties of the resolution<sup>149</sup>, could be not being in accordance with international law and principles. However, as there are certain legal difficulties that may raise, a judicial institution, such as the ICJ could evaluate on the basis of the evidence provided to it whether the sanction was justified against the person who does not agree with it.

When the ICJ would be also provided with the information about the aspects of imposed an asset freeze then it could also analyze the proportionality of this sanction, *inter alia* whether the

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<sup>148</sup> S/RES/2397. The United Nations Security Council. 22.12.2017, para 7.

<sup>149</sup> K. H. Kaikobad, *supra* fn 13, p 35-43.

person who was imposed with such sanction was the correct and reasoned addressee. Therefore, both the individuals and entities would have the opportunity to protect themselves against arbitrary action regarding the sanctions. However, although there are fundamental rights and freedoms that need to be taken into consideration when making resolutions, it is clear that no right is absolute, especially when it comes to security matters. This could be the task of the court who has the competence to evaluate the proportionality of human rights and other types of principles that are related to it.

However, it is important to address the violation of the right to fair public hearing in order to protect one's rights and have the possibility to peacefully settle a disagreement with the protection of human rights. If there are certain rights that need to be followed, it would be necessary that there is a court that could assess the situation in case the sanctions have been posed upon a person who has, in fact, nothing to do with the events that have initiated the adoption of resolutions in the first place. Not having an effective judicial organ that reviews the resolutions deprives the addressees from one of the most basic right of having the protection of a court against the violations of the person's rights.

However, it could be concluded that in case of sanctions and their proportionality the targeted sanctions are better as they could possibly influence the elite of the DPRK and that could possibly have the influence regarding the nuclear tests. From a general assessment that was conducted in this subparagraph it could said that the travel bans and asset freezes could be proportional in case the addressees have been assessed thoroughly and would not add up to unlawful sanctions, unless they are made against people who are not involved. In that case there would still exist a need for the people to have a right to exercise their right to fair trial and challenge these sanctions.

Also another example for effective targeted sanctions is targeting particular goods in the arms embargoes adopted in most targeted sanctions.<sup>150</sup> In the Resolutions the ban on the import of luxury goods has been issued. Such a ban is meant to target political elite in particular and could also have a better effect.<sup>151</sup> Additionally, there is no right that particularly protects the people to have this type of products. Therefore, there are measures that do not add up to violations of

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<sup>150</sup> See the report D. Fruchart (ed). United Nations Arms Embargoes: Their Impact on Arms Flows and Target Behaviour. Report. 2007.

<sup>151</sup> R. Wolfrum, *supra* fn 4, p 448.

rights, but could still have an influence on a country that is posing threat to international peace and security.

These were also the possible grounds of declaring a resolution of the SC null and therefore mean that this does not have to be followed by either the addressees and also the Member States that usually have to carry out the resolutions of the SC and sanctions posed.

#### 4. INTERNATIONAL COURT OF JUSTICE AS THE TRIBUNAL OF JUDICIAL REVIEW OF THE UNITED NATIONS SECURITY COUNCIL'S RESOLUTIONS

According to several studies at least 160 of the countries in the world acknowledge some type of constitutional supervision in practice or theory.<sup>152</sup> This extensive spread could implicate that political institutions, *inter alia* the SC, need to have clear boundaries and mechanisms for supervision regarding the legality of the decisions. This increases the trust in political institutions through legal certainty and trust.<sup>153</sup> It is even stated that judicial review of SC's decisions might strengthen rather than weaken the powers of the SC. In particular, it is said, it would make sure that more powerful States would not have excessive influence on the SC decision concerned.<sup>154</sup>

The exercise of the power of the judicial review by a court would contribute to the UN's credibility and would generate a feeling of confidence and trust in the UN's acts because the purposes and objectives of the UN would be safeguarded.<sup>155</sup> Judicial review is regarded as probably the most important (de)legitimator of the SC's activities and the question whether SC resolutions can be subjected to judicial review by a court remains a crucial importance to the constitutional system of the UN.<sup>156</sup>

According to Article 92 of the Charter, the ICJ is declared to be the principal judicial organ of the UN. The ICJ is playing a similar role within the UN to that of the constitutional courts in the domestic domain as a guardian of the law applied by providing judicial review of the acts of the organization.<sup>157</sup> As the SC is one organ of the UN, this could also mean that the ICJ could review the acts of the SC. Additionally, according to Article 34 of the Charter, international organizations, such as the SC, have the right to ask for an opinion from the ICJ. In addition, the

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<sup>152</sup> E. de Wet. *The Chapter VII Powers of the United Nations Security Council*. Hart Publishing 2004, p 117; J. E. Alvarez. *Judging the Security Council*. – *American Journal of International Law*. 1996, p 24-25.

<sup>153</sup> E. Kodar. *Järelevalve ÜRO julgeolekunõukogu otsuste üle. Kohtulikud ja kohtuvälised võimalused*. – *Juridica VI/2005*, p 420.

<sup>154</sup> E. de Wet, *supra* fn 127, 77/8 with further references; J. Dugard. V. Gowlland-Debbas (ed). *Judicial Review of Sanctions. United Nations Sanctions and International Law*. 2001, p 85.

<sup>155</sup> M. S. M. Amr, *supra* 97, p 340.

<sup>156</sup> I. Rajčić, *supra* 5, p 115.

<sup>157</sup> M. S. M. Amr, *supra* 97, p 279-280.

ICJ has the authority to ask international organizations information necessary to solve a dispute. Therefore, the ICJ and SC are acting in accordance with each-other in pursuance of the same purposes.

Although there are other organizations in the UN that are also part of the collective security system, it is clear that because the Charter does not declare any institution to be competent to review the legality of the resolutions by the SC and as the principal judicial organ of the UN is the ICJ, it is the most relevant organ to have some competence in regard to the judicial review over the SC.

However, it is important to note that the Charter does not explicitly give the ICJ the power to carry out the judicial review and this needs to be taken into account. The drafters of the Charter did not intend to provide for a process of judicial review by the ICJ over the SC.<sup>158</sup> Such a solution was proposed but not accepted at the time of the Charter's drafting.<sup>159</sup> Additionally, it would be somewhat difficult, to not say impossible, to amend the Charter with this type of clause. It could be argued that as Member States did not intend to give the SC a *competence de la competence*, when it was created, it is plausible to express a wish that the ICJ engages more extensively in the interpretation of the Charter.<sup>160</sup>

However, this competence has not been explicitly excluded either. There is, in fact, no rule, which could prevent the ICJ from dealing with the same proceedings simultaneously with the SC and the fact that Article 12 of the Charter that prevents the GA from parallel proceedings supports the conclusion that it was not predicted to prevent the ICJ since it would be also expressly proclaimed in the Charter.<sup>161</sup>

Additionally, although there are no powers given to the ICJ to review the resolutions under the Charter or the Statute, this question could be approached based on the meaning of judicial review. Although the power of judicial review has not been vested in the ICJ, it has been expressly given a competence to rule in contentious cases and to give advisory opinions and has exercised its power in numerous cases. Consequently, it is deemed that it has a significant

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<sup>158</sup> M. J. Matheson, *supra* fn 162, p 620.

<sup>159</sup> M. J. Matheson, *supra* fn 162, p 620.

<sup>160</sup> I. Rajčić, *supra* fn 5, p 111.

<sup>161</sup> *Ibid*, p 118.

power of “incidental judicial review”, especially when judging the legality of the SC’s acts, when those are bearing on a case before the ICJ, however implicit it is.<sup>162</sup>

The ICJ could possibly review the SC acts for conformity with the “higher” law, that is, the Charter law and applicable general international law.<sup>163</sup> Although the main objection to this is that ICJ and SC are coordinate organs, that is, there is no hierarchy between them, the exercise of review by the ICJ would not, however, necessarily render it hierarchically superior to the other principal organs. Review is undertaken to test an act’s conformity with “higher law” rather than against the subjective opinion of the organ undertaking the review. As such, it is conceivable that the ICJ could undertake judicial review of the SC’s acts, even if not explicitly so empowered, for conformity with hierarchically superior law.<sup>164</sup>

But as it is a generally recognized principle of international judicial settlement that a tribunal has the power to decide on the existence and extent of its own jurisdiction in respect of any dispute brought before it, and such a decision is binding on the parties to that dispute<sup>165</sup>, this could be the case of the SC as well. This chapter aims to analyse what has been stated regarding the competence of the ICJ regarding the judicial review over the SC resolutions both by legal scholars and in relevant case-law as there has been some form of judicial review exercised by courts already.

Most of the judicial review of SC decisions exercised until now has been of an indirect nature – considering the implementation rather than the decision itself – and undertaken by national courts, the European Court of Justice, regional human rights courts and international criminal courts.<sup>166</sup> But mainly the ICJ and the ECJ have showed flexibility concerning an indirect review of the SC’s resolutions, i.e. reviewing the consequences of a decision in question. Although, in the *Lockerbie* and *Namibia* case, it was expressly stated that it cannot be accepted that the decisions of the SC are inherently politically sensitive determinations, are not suitable for

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<sup>162</sup> I. Rajčić, *supra* fn 5, p 115.

<sup>163</sup> A. Tzanakopoulos, *supra* fn 91, p 99.

<sup>164</sup> *Ibid*, p 99-100.

<sup>165</sup> H. Thirlway, *The International Court of Justice*. New York: Oxford University Press 2016, p 38.

<sup>166</sup> R. Wolfrum, *supra* fn 4, p 422

judicial review<sup>167</sup> and that Article 39 determinations are final and non-reviewable<sup>168</sup>. However, usually the judicial review has been rejected or avoided by the court early on.

Moreover, the authority of the ICJ may arise by implication if an inter-state legal dispute hinges on some action of the SC. This is precisely the situation that arose in the *Lockerbie*<sup>169</sup> cases at the ICJ in the 1990s. These cases were initiated by Libya against the UK and the US in response to those countries advancing sanctions against Libya through the SC. Libya argued that its obligations regarding the bombing suspects were governed by the Montreal Convention on air terrorism, and that the US and UK could not lawfully demand something different through the SC that what was set out in the Convention. Thus, it argued, UN sanctions were unlawful. As the SC could not be named as a party in an ICJ case, Libya instead complained that the UK and US were violating obligations owed to Libya under the Montreal Convention by enforcing these sanctions.

Although the ICJ did not try a case directly against the SC, lack of power of judicial review was not even mentioned by the ICJ as a possible objection to the jurisdiction of the ICJ.<sup>170</sup> The “jurisdiction” of a court is essentially the power to decide according to law a dispute of a particular nature between specific parties. The ICJ has two types of jurisdiction according to the Charter: the first is solving disputes between Member States (contentious cases) and the second is giving advisory opinions to international organizations upon their request. The following subchapters analyse the different elements regarding the jurisdiction in solving legal disputes. The aim is to conclude what could be the possible grounds for the ICJ to have this type of competence indirectly as it was concluded from the last chapter that there is a need to review these resolutions, but stated that there are no clear legal grounds to having this kind of power.

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<sup>167</sup> 24. N. Rasiah. University of Cambridge: The International Court of Justice Should Not Have the Power to Review UN Security Council Resolutions under the Aegis of Chapter VII, An Article Drawing, *Inter Alia*, from the Scope of Judicial Review in the United Kingdom International Law Competition. 2006, p 57.

<sup>168</sup> 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. 1997, p 338.

<sup>169</sup> *Case Concerning Questions of Interpretation and Application of the 1971 Montreal Convention Arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v United Kingdom)*. Preliminary Objections. ICJ Reports. 1998; *Case Concerning Questions of Interpretation and Application of the 1971 Montreal Convention Arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v United States)*. Preliminary Objections. ICJ Reports. 1998.

<sup>170</sup> *Case Concerning Questions of Interpretation and Application of the 1971 Montreal Convention Arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v United States)* Preliminary Objections, ICJ Reports 1998.. Judge Rezek, p 4.



Therefore, this chapter established that it is believed that the SC does have some limits to its control and this could be in the form of judicial review. This was necessary in order to find general grounds that the judicial review of the SC's resolutions in the ICJ do not conflict with the basic nature and interest of the UN in general and its Member States. The judicial review is supported by both several legal scholars and the ICJ itself. The next chapter, however, implies to the actual mechanism of its disputes and analyzes whether the Resolutions fulfil the basic elements of the disputes in the ICJ.

## **5. DISPUTES IN THE INTERNATIONAL COURT OF JUSTICE OVER THE UNITED NATIONS SECURITY COUNCIL'S RESOLUTIONS**

As is was set out in the previous chapter the ICJ has two types of jurisdiction. One of the types of the jurisdiction of the ICJ is solving disputes between Members States. This thesis concentrates on this type of jurisdiction. This thesis sets aside the second jurisdiction of giving advisory opinion to international organizations upon their request. This selection has been made due to the interest arising from the Resolutions. The potential need to carry out a legal analysis raises from the fact that there have been parties that are sanctioned or influenced by the sanctions and they have the interest that the infringement or violation would end and they could protect their rights through a court-proceedings where they have challenged a certain resolution or part of it.

The following chapter analyses the elements of a dispute in the ICJ. Firstly, it sets out what is regulated regarding these disputes and then it parallels the Resolutions to these elements in order to conclude whether the elements are fulfilled and if not, then what are the alternatives to solve the issues and have the elements fulfilled. There are 3 main elements that will be analyzed in the first three subchapters. The forth subchapter concludes what are the most important aspects regarding the fulfilment of the elements altogether. This is done in order to conclude whether the disputes regarding the SC's resolutions could fall in the scope of the disputes in the ICJ.

### **5.1. Parties to the Dispute**

The first element is that the parties to the dispute are Member States. Article 34 of the Statute sets forth that only States may be parties in cases before the ICJ. Although it is also stated that public international organizations have to provide the ICJ with relevant information when requested and can also do it on their initiative, this does not constitute them being parties to a proceeding.<sup>171</sup>

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<sup>171</sup> K. H. Kaikobad, *supra* fn 13, p 43.

There does not exist any other legal basis, which sets forth that there could be any other parties to the disputes and there is no case-law that would depart from this element. Therefore, this element is one of the most problematic when it comes to reviewing the resolutions of the SC as this already presumes that at least one of the parties is the SC.

When we parallel this element with the Resolutions, it is clear that it would have parties that are not both States. The potential parties are the SC from the one side and a Member State, an individual or an entity from the other side as the latter has the interest to initiate a case against the SC for adopting a resolution that allegedly violates the rights of the person. When it comes to the targeted sanctions it would mainly be an individual or an entity. However, if there is a general interest from the side of the Member State or a Member State has to carry out the resolution and finds it violating the rights, then there could come into question the possibility of a State being a party from one side as well.

However, this problem could be overcome with the next element of the disputes in the ICJ, which is through the consent of the parties that have a dispute and have a common interest to solve this dispute peacefully. Although this option has not been provided in the legal documents of the UN, this could be an option to be assessed and interpreted through the general idea of the next element.

## **5.2. Consent of the Parties to the Dispute**

The second element is that the parties to the dispute need to have expressed their consent to be subject to the ICJ as the ICJ is competent to try cases between the Member States if they refer the matter to it. The jurisdiction of the ICJ arises from an international treaty, a special agreement between states or *ipso facto*. In case of ICJ the jurisdiction is *in rem*, which means that it's the product of the consent of the parties, and exists only to the extent that that consent has conferred it.<sup>172</sup>

In order to solve a dispute in the ICJ, the disputing states have either agreed *ad hoc* or *ante hoc* to jurisdiction and only due to that they can be regarded as parties before the ICJ. This means that the ICJ solves disputes where the parties have mutual agreement regarding the ICJ having the jurisdiction to solve their dispute and adopt a decision that will bring consequences to them.

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<sup>172</sup> H. Thirlway, *supra* fn 167, p 35.

This could be one probable aspect in giving the ICJ the power to solve disputes regarding the resolutions of the SC. If the disputing party and the SC both agree that the ICJ will solve the matter, then the ICJ could have the competence to do it. Although this possibility is not regulated, it could merely be an option to be assessed.

In case there is a clear interest from both of the disputing sides that and the parties both agree with solving it in the ICJ, then this could be regarded as mutual agreement, which is separately entered into in every case. As usually these matters are of great influence either directly in case of a Member State or indirectly through a Member State and the SC itself as well then it would be relevant to state that both of the parties should have the same interest and therefore concluding a mutual agreement would not be impossible to enter into.

The ICJ itself concluded in *US Diplomatic and Consular Staff in Tehran*<sup>173</sup> case that it is for the ICJ, the principal judicial organ of the UN, to resolve any legal questions that may be in issue between the parties to a dispute; moreover, the resolution of such legal questions by the ICJ may be an important, sometimes, decisive factor in promoting the peaceful settlement of the dispute.<sup>174</sup> Therefore, the ICJ would help the parties find a solution that both of the parties would benefit from and this would be done in a peaceful manner.

Therefore, through a mutual agreement the ICJ would be given a special jurisdiction to deal with issues that arise from the SC's resolutions. This does not mean that from this point on all of the organs and individuals could be parties to a dispute in the ICJ, but the special jurisdiction regarding problems about the actions of the SC could only be discussed in the ICJ. This moreover eliminates the problem that all the national courts could start taking standings on whether they should follow the resolution or not.

It has been analyzed whether there should be other courts who will have this power, but it has been stated that it would be wise to give one centralized court the competence to review the legality, not every Member States' national court. The latter could lead to chaos and complete

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<sup>173</sup> *Case Concerning United States Diplomatic and Consular Staff in Tehran (United States of America v. Iran)*. Judgment. ICJ Reports. 1980, p 40.

<sup>174</sup> H. Thirlway, *supra* fn 167, p 6.

legal and political uncertainty and give an easy excuse to not comply with their obligations under the Charter.<sup>175</sup>

However, it has been also stated that it would be rather difficult to reach to a mutual agreement between the parties regarding the sanctions of the SC.<sup>176</sup> As this type of agreement has not been regulated in the legal documents and this is merely an option to be assessed, then at the moment we are still at a point where this type of option does not exist and cannot be exercised by the parties.

### **5.3. Matters of the Dispute**

The third element is that the matters of the dispute fall in the scope of the ICJ. Mainly, the legality of actions of the SC can be analyzed in the light of being in accordance with the Charter, Rules of Procedure, international law (*inter alia* human rights law) and *ius cogens* that were analyzed in the second and third chapter. As most of these are legal aspects, it means that the judicial review regarding the evaluation of the legality of the SC's actions could fall in the primary purpose of a court.

Article 38 of the Statute states that the function is to decide in accordance with international law such disputes as are submitted to it. Moreover, according to Article 38 (1) the ICJ applies:

1. international conventions, whether general or particular, establishing rules expressly recognized by the contesting countries;
2. international custom, as evidence of general practice accepted as law;
3. the general principles of law recognized by civilized nations;
4. subject to the provisions Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.

Therefore, it could be stated that the issues that could rise regarding the SC fall in the scope of the ICJ according to Article 38. As the SC has to act in accordance with the law and principles of international law and the ICJ applies the latter, it is relevant to say that the ICJ is competent

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<sup>175</sup> I. Rajčić, *supra* fn 5, p 116.

<sup>176</sup> A. L. Strauss. Cutting the Gordian Knot: How and Why the United Nations General Assembly Should Expand the Jurisdiction of the International Court of Justice. – University of Dayton School of Law Publications. 2011, p 340.

to review whether the Resolutions are legal or illegal through evaluating whether they have followed the rights and principles and evaluated the proportionality as well. In the example of the Resolutions, there are possible international law aspects that the ICJ could reach a conclusion.

Additionally, according to the Statute Article 36 (2) the ICJ solves legal disputes regarding the following:

1. the interpretation of a treaty;
2. any question of international law;
3. the existence of any fact which, if established, would constitute a breach of an international obligation;
4. the nature or extent of the reparation to be made for the breach of an international obligation.

In case the ICJ has adopted Resolutions, we analyzed that there are clear legal aspects regarding whether the Resolutions are in accordance with human rights, principles and other aspects of international law. Therefore, the case could fall in the scope of Article 36 (2) of the Charter. As the ICJ solves disputes regarding international law and the resolutions create disputes regarding international law, whether it has been followed and how to follow it when executing these Resolutions, the matters regarding the SC Resolutions are relevant to the type of disputes in the ICJ.

However, dealing with a SC resolution in the ICJ could possibly raise questions that concern the fact that the SC is a political institution and this has to be taken into account. In regard to this aspect, it is important to differentiate legal disputes from political disputes in order to declare that this could also be in the competence of the ICJ. One approach is that legal disputes seek to interpret or apply certain valid legal norms, but political disputes seek to change the valid legal norms.<sup>177</sup> Therefore the political disputes stay out of the scope of the ICJ because solving these questions does not fall in the methodology of a court.<sup>178</sup> However, the fact that the SC is a political organ, does not exclude it from the scope.

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<sup>177</sup> M. Kiviorg. K. Land, K. Miil, H. Vallikivi. *Rahvusvaheline õigus*. Tallinn: Juura 2004, p 154.

<sup>178</sup> M. Naagel. ÜRO Rahvusvahelise Kohtu jurisdiktsioon ja seda mõjutavate poliitiliste tegurite peegeldumine kohtu otsustes. – *Juridica* 2005/6.

As the ICJ is referred to as the supreme judicial body in the UN system, some have argued that because of this characterization, the ICJ should have the right to review the validity of the acts of political organs, at least whenever such an act is relevant to a case before the ICJ.<sup>179</sup> The judicial work of the ICJ is generally quite distinct from the operations of the other principal organs; but there have been occasions when it has found itself involved in a matter of which the SC has also been seized.<sup>180</sup> Despite the fact that neither the Charter nor the Statute refers to the power of the ICJ to review the acts of the UN organs, the ICJ has explicitly and in some cases implicitly reviewed the acts of the UN political organs as there have been cases where an addressee of the resolution has requested the ICJ to take a standing on the adopted resolution or imposed sanctions.

#### **5.4. Fulfilment of the Elements of a Dispute**

At the moment the elements of a legal dispute in the ICJ were not fulfilled, especially regarding the matter of the disputing parties. However, this could be achieved when the parties explicitly agree to solving the dispute in the ICJ as generally the matters in ICJ deal with international law and this is the most important aspect as this shows that the ICJ has the competence to evaluate the international matters that are in the focal point of the disputes around the resolutions of the SC.

The last option is the most likely as the ICJ and SC should work together in harmony to provide that the collective security system would bring about the necessary consequences in terms of restoring and maintaining the international peace and security. The ICJ shares with the SC, but not the GA, the quality of having power to decide, to settle definitively any appropriate issue regularly brought before it; and such decision is binding on the parties to the dispute, and on them only.<sup>181</sup> Even more activist forms of judicial review than have appeared to date may prove to be neither utopian nor calamitous, especially if the permanent members of the SC come to appreciate that they have long-term interests in pursuing peace through law.<sup>182</sup>

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<sup>179</sup> M. J. Matheson, *supra* fn 162, p 619-620.

<sup>180</sup> H. Thirlway, *supra* fn 167, p 6.

<sup>181</sup> *Ibid*, p 5.

<sup>182</sup> A. Krishnamurthy. The Lockerbie Incident Cases: Judicial Review By The ICJ. 5th year Symbiosis Societies Law College. <http://www.legalserviceindia.com/articles/lock.htm>.

However, there is some relief regarding the people of the EU. In the *Kadi*<sup>183</sup> case the ECJ stated that it has no jurisdiction to review the legality of the SC's resolutions, but it could review the EU regulation, which was adopted to effect the obligations of the Member States regarding the sanction that the SC ordered – to freeze the assets of Mr Kadi and Mr Al Barakaat due to alleged connections to Osama bin Laden, Al-Qaida and Taliban.

Although under international law the SC resolutions are superior, under the EU law the hierarchy of norms differs and therefore, it was found that the EU regulation can be disputed on the basis of infringement of fundamental rights like the right to respect for property, the right to be heard before a court of law and the right to effective judicial review. It is within the jurisdiction of the courts of member states of the EU to review measures adopted by the European Community that give effect to resolutions of the SC. The EC courts have the power to review the legality of all Community acts, including the contested regulations that aim to give effect to resolutions adopted by the SC under the Charter. A judgment by an EU court that an EC measure is not in consonance with a higher rule of law in the EC legal order would not implicate a challenge to the legitimacy of that resolution in international law.

However, this does not solve the problem with countries outside of the EU, such as the DPRK that was under review regarding the Resolutions. Although the Kadi case revealed that there could be measures for the people in the EU, there are no options for the people outside of the EU, and in the DPRK for this matter.

In regard to the elements of the judicial review it could be concluded that the forth element regarding the Resolutions, tribunal of review<sup>184</sup>, could indirectly be the ICJ as they deal with this type of matters and it does not inflict with any general principles. Moreover, this approach is very supported by legal specialists that see the necessity of judicial review. However, this should still be clearly regulated in order to have legal basis for it as well. At the moment it does not.

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<sup>183</sup> Judgment of 21 September 2005, *Yassin Abdullah Kadi v. Council and Commission*, Case T-315/01, ECLI:EU:T:2005:332.

<sup>184</sup> K. H. Kaikobad, *supra* fn 13, p 43.



Additionally, the fifth element regarding the Resolutions, parties to the dispute<sup>185</sup>, are the SC and either a State, an individual or an entity, which inflicts with the Charter as at the moment only the states could be the parties and this is not the case with the SC's resolutions. It is definite that in every case regarding the SC's resolutions, at least one of the parties would be the SC. Therefore, the ICJ cannot exercise judicial review over the Resolutions.

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<sup>185</sup> *Ibid*, p 43-44.

## 6. INFLUENCE OF THE INTERNATIONAL COURT OF JUSTICE'S DECISIONS

The nature and effect of the ICJ's decisions is the last element of judicial review and it is dealt with in order to map what is the influence of the ICJ in general and to the SC at the moment and what could be the nature in case the ICJ is given the authority to carry out the judicial review of the SC's resolutions.

In general, the ICJ can write a judgment in a contentious case, and an opinion in its advisory competence.<sup>186</sup> The decision made after the proceeding is binding, but the recommendation is not binding. The necessary effect of the ICJ's decision is that it would be binding on the parties, both the SC and others. This means that in case the SC has the pressure that it could be subjected to a decision by the ICJ, it analyzes and acts more in accordance with prescribed international law.

At the moment it is recognized that the ICJ does not have the power to annul a SC's resolution due to the fact that it does not have jurisdiction to analyze the SC's resolutions. This was also concluded in the previous chapter. The ICJ itself stated in the *Northern Cameroons*<sup>187</sup> case that the judgments of the ICJ do not have a binding force for the political organs of the UN. Whereas courts in many municipal legal systems, especially the superior courts, are empowered by law, constitutional or otherwise, to pronounce as invalid and proceed to annul an act adopted by the executive, legislative and judicial branches of government, the ICJ has does not have such powers.<sup>188</sup>

When the term "judicial review" is used with specific reference to review of SC action it seems to be understood as a process, the outcome of which may be the SC decision being illegal or void. For such an outcome to constitute judicial review, it must be binding on the UN and the Council. In this sense, there can be no judicial review of SC action by the ICJ. It has been noted that if by the term is meant a constitutional process of judicial review, with compulsory effect,

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<sup>186</sup> K. H. Kaikobad, *supra* fn 13, p 44.

<sup>187</sup> *Case Concerning the Northern Cameroons (Cameroon v. United Kingdom)*. Judgment. ICJ Reports. 1963, p 33.

<sup>188</sup> K. H. Kaikobad, *supra* fn 13, p 44.

it is clear that no analogous procedure is to be found in the structure of the UN.<sup>189</sup> Indeed even the ICJ has accepted as much, not only through its explicit statement in *Namibia*.<sup>190</sup>

However, even though it has been stated that if a decision of the ICJ is unable to annul or suspend the impugned act, the practical, legal consequences of such a decision may bring about effective annulment.<sup>191</sup> Thus, where the ICJ find its contentious proceedings that an act of an international body is invalid in terms of *ultra vires*, the act will, of course, continue to exist in law in fact because in contentious cases the decision is final and binding only on the litigating States, and no other entity, State or otherwise.<sup>192</sup> For that very reason, however, the disputing, affected State may be heard to argue that act is not any more opposable to it. In short, the act will almost certainly be void between the parties, as opposed to being null and void towards everyone.<sup>193</sup>

In case the jurisdiction of the ICJ will be given legal basis for competence, the aspect of the nature and consequences of the decision should also be clarified. It is important to set out what are the consequences and how severe they can be. What would be the purpose of the court's decision? Whether it is to end the violation of the human rights, provide any damages for the loss that the incorrect resolution has generated or to discipline the SC for their actions? However, the last element of judicial review, the nature of the decision<sup>194</sup>, is not binding as the ICJ does not have the competence at the moment, but if that problem is solved, then the nature could possibly be binding.

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<sup>189</sup> V. Gowlland-Debbas, *supra* fn 154.

<sup>190</sup> A. Tzanakopoulos, *supra* fn 91, p 104.

<sup>191</sup> K. H. Kaikobad, *supra* fn 13, p 46.

<sup>192</sup> *Ibid.*

<sup>193</sup> *Ibid.*

<sup>194</sup> *Ibid.*, p 44-50.

## CONCLUSION

The SC has been given the power to adopt binding resolutions that impose sanctions on the Member States that are not acting in accordance with the international agreements and pose a threat to international peace and security. The initial purpose of creating the SC was that it would be fairly independent and has wide power in order to carry out its responsibility to restore and maintain international peace and security. However, since the creation there have been wide discussions by legal scholars regarding international law as the limits of the SC and some countries have even tried to dispute a resolution in court.

It has been widely recognized in jurisprudence that the SC's power could be limited with the power of a judicial institution having the competence to review the legality of its resolutions. As the decisions of the organs of the SC could influence most of the world, it is necessary that an international court would deal with the legality of the resolutions. The closest judicial organ for the SC is the ICJ as together they form the collective security system of the UN. However, there are no clear legal basis in the documents of the UN that would state that the ICJ will carry out a judicial review over the actions taken by the SC. This has been stated by the ICJ as well, when a party has wanted to dispute the resolution, but the ICJ refused to analyze the legality due to having no legal grounds for this type of competence.

This thesis analyzed from the perspective of the resolutions adopted against the DPRK, whether these type of resolutions could possibly be reviewed by the ICJ. As it was confirmed, there are no legal grounds for this type of competence as it has been stated in the Statute that only states can be parties to a dispute in the ICJ. This turned out to be the main issue regarding the ICJ having the competence to review the resolutions. However, this problem could possibly be solved with a separate agreement between the parties (e.g. the SC and the addressee of the resolution). This problem seems to be the only aspect that clearly excludes the ICJ from dealing with the resolutions of the SC. Other aspects of judicial review are fulfilled by interpretation and purposes of both of the institutions. However, the option of mutual agreement might be excluded as well as the UN acts do not explicitly offer this option.

More specifically it was firstly analyzed what is the competence of the SC in making resolutions. It was concluded that the SC has been given a decision-making power and the most influential part of it is issuing binding resolutions that impose different sanctions. This is a measure how the SC is allowed to tackle international security problems. However, it was also concluded that the SC does not have completely unlimited powers as the basic rules of international law apply even to the SC. Firstly, the SC has to act in accordance with the Charter and its principles, the Provisional Rules of Procedure of the Security Council and the Note by the President of the SC. Secondly, the SC has to respect international law (inter alia human rights, *ius cogens*).

Moreover, the analysis established that the sanctions that the SC poses with its resolutions may infringe basic human rights, which also means that there is a need to guarantee that people are protected from disproportional infringements of rights and that people have a basic right of having the opportunity to seek the protection of one's rights in court. The resolutions against the DPRK showed that the possible rights that could be violated are the right to adequate living standard, right to own property, freedom of movement and right to fair trial. These are all important rights to be protected and it is possible to carry out the proportionality test whether the sanctions are proportional or not. This could fall in the competence of an international court as the influenced parties could be from anywhere.

It was analyzed whether an international court, such as the ICJ, has the competence to carry out this type of judicial review. From the substantive point of the matters that the ICJ deals with, it could be stated that the infringements that could take with the resolutions are in the competence of the ICJ as the ICJ deals with all types of questions regarding international law and it applies laws and principles of international law. From the example of the resolutions against the DPRK it was clear that the questions regarding the actions of the SC are questions regarding international law as all of the resolutions influence rights in one way or another as their idea is to pressure the addressees into acting in a way that would not pose a threat to the peace and security of the world. This means that there could be potential violations of international law by the SC.

However, it was concluded that in case there is interest to allow the ICJ to decide different matters regarding international law, the participants have to overcome the issue of the Statute

clearly stating that the parties of the dispute in the ICJ could only be states. The author suggests that this problem could be overcome with giving the ICJ a special jurisdiction regarding the matters of the SC with a mutual agreement of the parties that are involved. This means that the SC and the addressee of the resolution agree on the ICJ on having the competence to decide the matter.

Although the author agrees that this is not a conclusive solution as it has not been regulated in the UN acts, but could support the interests of all of the parties. Therefore, reaching to a mutual agreement is more possible than changing the Charter in order to have legal basis to involve the SC to a dispute. Otherwise, it would be rather irrational that although it could be interpreted that the ICJ has the competence to deal with the matters of the SC, the disputes cannot be solve in the ICJ as the only impediment for this is that the Charter sets forth that only States can be parties to a dispute in the ICJ.

Moreover, in case the ICJ would have the competence through this type of agreement, there also remains a question what would be the outcome and influence of the court decision on the parties involved. This needs to be clarified. At the moment the ICJ cannot issue binding decisions regarding the SC resolutions. However, if the ICJ will be given this competence and would have the right to adopt a decision that would be binding on the parties, the aspects of a court award and what it could state and impose on the SC, for example, should also be taken into consideration when the ICJ would start assessing the legality of the SC's resolutions.

The author agrees with the legal discussions that state that the judicial review in the ICJ over the SC's resolutions would not weaken the authority of the SC, but rather makes it stronger. Having a clear recourse how to dispute these resolutions could also attribute to helping solve the issues between the Member States in a more peaceful manner and would also show that the UN is the forerunner of securing the rights of everyone.<sup>195</sup> This does not mean that there could not be any infringements if they are reasoned, but in case they have been adopted on grounds that are not reasoned, then a person does have the opportunity to protect him or herself from the arbitrary actions of the SC.

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<sup>195</sup> B. Martenczuk. *The Security Council, the International Court and Judicial Review: What Lessons from Lockerbie?* – *The European Journal of International Law*. 1999, p 547.

In conclusion, the ICJ does not have competence to solve disputes regarding the SC's resolutions and therefore the hypothesis was rejected. However, there are two aspects to this conclusion that the author found. Firstly, the only hindrances of the competence are the initial purpose and that the Charter states that only States can be parties to a dispute. Secondly, it could be interpreted that this issue could be overcome through mutual agreement. When considering that there is a need to review the legality of the SC's resolutions and it is widely supported that the SC's powers are not unlimited, the ICJ could be given special competence to deal with matters regarding the SC although this is not specifically regulated.

## RESUME IN ESTONIAN

### **ÜRO JULGEOLEKUNÕUKOGU RESOLUTSIOONIDE ÕIGUSLIK KONTROLL RAHVUSVAHELISES KOHTUS: PÕHJA-KOREALE MÄÄRATUD SANKTSIOONIDE NÄIDE**

Käesolev magistritöö tegeles küsimusega kas Rahvusvahelisel kohtul on pädevus, et teostada ÜRO Julgeolekunõukogu resolutsioonide üle õiguslikku kontrolli. Töö probleem seisnes selles, et puuduvad selged õiguslikud alused sellise kontrolli teostamiseks, kuid kuna ÜRO võib oma tegevusega riivata või lausa rikkuda isikute õigusi ja neil puudub otsene võimalus pöörduda kohtu poole, et oma õigustele kaitset saada, esineb vajadus, et oleks kohus, kes saaks teostada resolutsioonide õiguspärasuse kontrolli.

Käesolev magistritöö analüüsis antud olukorda võttes aluseks Rüder Wolfrumi raporti ÜRO Julgeolekunõukogu õiguslikust järelevalvest Rahvusvahelises kohtus, kuna see on kõige hiljutisem dokument antud probleemi kohta, mis koondab ÜRO Julgeolekunõukogu ja Rahvusvahelise kohtu senise tegevuse antud küsimuse raames ning arendas diskussiooni ja tegi järeldused Põhja-Korea suhtes 2017. ja 2018. aastatel tehtud resolutsioonide näitel ehk kasutati induktiivset meetodit, Lisaks sellele toetas autor erinevaid lähenemisi Rahvusvahelise kohtu pädevusele nii erinevate õigusteoreetikute arvamustega kui ka tuues välja olulisema Rahvusvahelise kohtu praktikast.

Magistritöö eesmärk oli välja selgitada, kas analüüsidest õigusliku kontrolli elementidest võiks Rahvusvahelisel kohtul siiski esineda selline pädevus ning mis on hetkel peamiseks takistusteks, et sellist pädevust praktikas järjepidevalt teostada. Töö eesmärk ei olnud sedastada kas vastavad resolutsioonid on õiguspärased või mitte. Töö hüpotees oli, et Rahvusvahelisel kohtul eksisteerib pädevus teostada õiguspärasuse kontrolli. Seda põhjusel, et territoriaalselt katab Rahvusvaheline kohus samu alasid, mida Julgeolekunõukogu ning nad kuuluvad ühte julgeoleku tagamise süsteemi.

Esimene peatükk käsitles ÜRO Julgeolekunõukogu pädevust võtta vastu otsuseid selleks, et teha kindlaks kas tal on olemas pädevus teha otsuseid ning mis on selle pädevuse teostamise



eesmärk ning sedastas, et Põhja-Korea suhtes tehtud resolutsioonide näol teostas ÜRO temale antud võimu.

Teine peatükk käsitles mehhanismi, kuidas resolutsioone vastu võetakse ja milliseid tagajärgi need endaga kaasa võivad tuua ning analüüsis Põhja-Korea resolutsioone selles osas, milliseid sanktsioone need pooltele kaasa tõid. Järeldusena leidis töö autor, et Julgeolekunõukogu tööd reguleerib ÜRO Harta, Julgeolekunõukogu protseduurilised reeglid ja presidendi märkused. Vastavalt nendele võtab Julgeolekunõukogu vastu resolutsioone, mis on siduva iseloomuga tema adressaatidele ja sisaldavad endas mitmeid erinevaid sanktsioone, millel võivad olla ulatuslikud tagajärjed. Põhja-Korea resolutsioonide näitel selgus analüüsist, et sanktsioone on väga palju erinevat tüüpi ning seega võivad nad tuua ulatuslikke tagajärgi nii riigile kui ka üksikisikutele ja ettevõtetele.

Kolmas peatükk käsitles õiguslike probleeme, mis võivad kaasnedada Julgeolekunõukogu resolutsioonidega. Esimene pool tõi välja kas ja millised õigusi ja printsiipe peab Julgeolekunõukogu järgima ning teine pool analüüsis milliseid nendest õigustest ja printsiipidest võivad olla riivatud või rikutud Põhja-Korea resolutsioonide puhul. Käesoleva töö analüüsi käigus leidis autor, et ÜRO Julgeolekunõukogu peaks järgima rahvusvahelist õigust, kuid eelkõige Hartas toodud printsiipe, inimõigusi ja *ius cogens*'it. See omakorda viis autori analüüsini, kas mõni nendest õigustest või printsiipidest võib olla riivatud või rikutud Põhja-Korea suhtes tehtud resolutsioonides. Analüüsiti proportsionaalsust ühelt poolt Julgeolekunõukogu huvi osas taastada ja tagada maailma julgeolek ning teiselt poolt õigust varale, liikumisvabadust, õigust saada kohtulikku kaitset ning õigust inimväärikale elule. Autor järeldas, et kuna on olemas õigused ja õigusprintsiibid ning nendele vastavuse küsimus tõusetub seoses vastu võetud resolutsioonidega, võiks tulla kõne alla õiguslik järelevalve.

Neljas peatükk käsitles Rahvusvahelise kohtu pädevuse suhtes võetud seisukohti selles osas, kas tal võiks olla üldistest rahvusvahelise õiguse printsiipidest tulenevalt pädevust kontrollida Julgeolekunõukogu resolutsioonide õiguspärasust. Autor järeldas, et vastava pädevuse suhtes on rohkem positiivseid toetuspunkte ja sellist järelevalvet teotavad üldised printsiibid vastava süsteemi osas. Samuti toetab vastavat lähenemist ka kohtupraktika.

Viies peatükk käsitles Rahvusvahelises kohtus lahendatavate vaidluste protseduuri ning elemente, mis iseloomustavad asjaolu, kas pooltel on võimalik lahendada omavaheline vaidlus Rahvusvahelises kohtus. Vaadeldavaid elemente oli kolm: vaidluste pooled, poolte nõusolek ja vaidluste tüüp. Käesoleva töö autor järeldas, et kõige suurem takistus hetkel lahendada Julgeolekunõukogu resolutsioonide õiguspärasuse üle vaidlusi on asjaolu, et Harta nimetab, et poolteks saavad olla üksnes riigid. Küll aga leidis autor, et juhul kui läheneda vastavas kohtus vaidlevate poolte puhul asjaolust, et vajalik on nõusolek, võiks antud probleemi ületada poolte ühise nõusolekuga. Kuna aga hetkel pole reguleeritud, et selline võimalus eksisteerib, jääb see hetkel siiski takistama Rahvusvahelise kohtu pädevust.

Oluline aspekt, mida autor järeldas vastavast analüüsist, on asjaolu, et kuna Rahvusvaheline kohus lahendab küsimusi rahvusvahelise õiguse kohta ja kohaldab rahvusvahelist õigust ning selle printsiipe, oleks asjakohane lahendada küsimusi Julgeolekunõukogu resolutsioonide kohta just selles kohtus. Kuigi mõningane kaitse on olemas Euroopa Liidu liikmesriigi kodanikel, siis see ei taga kolmandate riikide isikute õigusi, kes võivad samuti olla mõjutatud nagu see on ka juhul, kui resolutsioon on tehtud Põhja-Korea või selle riigi kodanike suhtes. Seetõttu peaks võimalike poolte probleemi siiski ületama igakordse eraldi kokkuleppega ja seega andma selle kaudu Rahvusvahelisele kohtule eripädevuse.

Viimane peatükk käsitles küsimust seoses Rahvusvahelise kohtu otsuste mõju, et teha kindlaks, millised tagajärjed on Rahvusvahelise kohtu potentsiaalsel otsusel. Autor järeldas, et kuna hetkel ei ole Rahvusvahelisel kohtul pädevust, siis ole võimalik siduvaid otsuseid teha. Küll aga kui selline pädevust antaks, peaksid kohtuotsused olema pooltele siduvad. Küll aga tähendaks see, et oleks vaja selgelt reguleerida ka aspektid, mida Rahvusvaheline kohus saab pooltele vaidluse tulemusena määrata.

Kokkuvõttes lükati hüpotees ümber, kuna kuigi Rahvusvaheline kohus lahendab küsimusi, mis võiksid tekkida seoses Julgeolekunõukogu resolutsioonidega, takistab pädevuse olemus selge klausel Hartas, mis nimetab, et poolteks saavad olla üksnes riigid. Kuna aga vaidlus resolutsiooni üle eeldab, et vähemalt üks pool on Julgeolekunõukogu, on välistatud see võimalus. Küll aga pole see autori hinnangul ületamatu probleem, kui Rahvusvahelises kohtus vaidlemiseks on üks tingimus ka poolte nõusolek ning seda oleks võimalik autori hinnangul

saavutada, kuna mõlemad pooled tegutsevad üldiselt selle eesmärgi nimel, et vaidlus saaks rahumeelselt lahendatud, siis võiks tõlgendada, et selle kaudu võiks tekkida Rahvusvahelisele kohtule eripädevus Julgeolekunõukogu resolutsioone puudutavate asjade osas.

## **ABBREVIATIONS**

Charter – the Charter of the United Nations

DPRK – the Democratic People’s Republic of Korea

ICJ – International Court of Justice

Member States – the Member States of the United Nations

Resolutions – S/RES/2345. The United Nations Security Council. 7904th Meeting of the United Nations Security Council. 23.03.2017; S/RES/2356. The United Nations Security Council. 7958th Meeting of the United Nations Security Council. 02.06.2017; S/RES/ 2371. The United Nations Security Council. 8019th Meeting of the United Nations Security Council. 05.08.2017; S/RES/2375. The United Nations Security Council. 8042nd Meeting of the United Nations Security Council. 11.09.2017; S/RES/2397. The United Nations Security Council. 8151st Meeting of the United Nations Security Council. 22.12.2017.

SC – United Nations Security Council

Statute – the Statute of the International Court of Justice

## BIBLIOGRAPHY

### United Nations Documents

1. The Charter of the United Nations. San Francisco: 26.06.1945 – Available at: <http://www.un.org/en/charter-united-nations/index.html>.
2. The Note by the President of the Security Council. United Nations Security Council 30.08.2017.
3. The Provisional Rules of Procedure of the Security Council. United Nations. New York: 1983.
4. The Statute of the International Court of Justice. – Available at: <http://www.icj-cij.org/en/statute>.

### Other United Nations references

1. The Declaration of the High-level Meeting of the General Assembly on the Rule of Law at the National and International Levels. The United Nations General Assembly. 30.11.2012.
2. The Rule of Law and Transitional Justice in Conflict and Post-conflict Societies: Report of the Secretary-General. 2004.
3. The homepage of the United Nations Security Council. – <https://www.un.org/sc/suborg/en/sanctions/1267/monitoring-team/work-and-mandate>. and <https://www.un.org/sc/suborg/en/sanctions/information>.

### Resolutions of the United Nations Security Council

1. S/RES/1456. The United Nations Security Council. 4688th Meeting of the United Nations Security Council. 20.01.2003. – [http://www.un.org/en/ga/search/view\\_doc.asp?symbol=S/RES/1456\(2003\)](http://www.un.org/en/ga/search/view_doc.asp?symbol=S/RES/1456(2003)).
2. S/RES/1526. The United Nations Security Council. 4908th Meeting of the United Nations Security Council. 30.01.2004. – [http://www.un.org/en/ga/search/view\\_doc.asp?symbol=S/RES/1526\(2004\)](http://www.un.org/en/ga/search/view_doc.asp?symbol=S/RES/1526(2004)).
3. S/RES/1718. The United Nations Security Council. 5551st Meeting of the United Nations Security Council. 14.10.2006. – [http://www.un.org/en/ga/search/view\\_doc.asp?symbol=S/RES/1718\(2006\)](http://www.un.org/en/ga/search/view_doc.asp?symbol=S/RES/1718(2006)).

4. S/RES/1874. The United Nations Security Council. 6141st Meeting of the United Nations Security Council. 12.06.2009. – [http://www.un.org/en/ga/search/view\\_doc.asp?symbol=S/RES/1874\(2009\)](http://www.un.org/en/ga/search/view_doc.asp?symbol=S/RES/1874(2009)).
5. S/RES/2087. The United Nations Security Council. 6904th Meeting of the United Nations Security Council. 22.01.2013. – [http://www.un.org/en/ga/search/view\\_doc.asp?symbol=S/RES/2087\(2013\)](http://www.un.org/en/ga/search/view_doc.asp?symbol=S/RES/2087(2013)).
6. S/RES/2094. The United Nations Security Council. 6932nd Meeting of the United Nations Security Council. 07.03.2013. [http://www.un.org/en/ga/search/view\\_doc.asp?symbol=S/RES/2094\(2013\)](http://www.un.org/en/ga/search/view_doc.asp?symbol=S/RES/2094(2013)).
7. S/RES/2178. The United Nations Security Council. 7272nd Meeting of the United Nations Security Council. 24.09.2014. - [http://www.un.org/en/ga/search/view\\_doc.asp?symbol=S/RES/2178%20\(2014\)](http://www.un.org/en/ga/search/view_doc.asp?symbol=S/RES/2178%20(2014)).
8. S/RES/2270. The United Nations Security Council. 7638th Meeting of the United Nations Security Council. 02.03.2016. [http://undocs.org/S/RES/2270\(2016\)](http://undocs.org/S/RES/2270(2016)).
9. S/RES/2321. The United Nations Security Council. 7821st Meeting of the United Nations Security Council. 30.11.2016. [http://undocs.org/S/RES/2321\(2016\)](http://undocs.org/S/RES/2321(2016)).
10. S/RES/2345. The United Nations Security Council. 7904<sup>th</sup> Meeting of the United Nations Security Council. 23.03.2017 – [http://undocs.org/S/RES/2345\(2017\)](http://undocs.org/S/RES/2345(2017)).
11. S/RES/2356. The United Nations Security Council. 7958<sup>th</sup> Meeting of the United Nations Security Council. 02.06.2017 – [http://undocs.org/S/RES/2356\(2017\)](http://undocs.org/S/RES/2356(2017)).
12. S/RES/ 2371. The United Nations Security Council. 8019<sup>th</sup> Meeting of the United Nations Security Council. 05.08.2017 – [http://undocs.org/S/RES/2371\(2017\)](http://undocs.org/S/RES/2371(2017)).
13. S/RES/2375. The United Nations Security Council. 8042<sup>nd</sup> Meeting of the United Nations Security Council. 11.09.2017 - [http://undocs.org/S/RES/2375\(2017\)](http://undocs.org/S/RES/2375(2017)).
14. S/RES/2397. The United Nations Security Council. 8151<sup>st</sup> Meeting of the United Nations Security Council. 22.12.2017. – [http://undocs.org/S/RES/2397\(2017\)](http://undocs.org/S/RES/2397(2017)).
15. S/RES/2407. The United Nations Security Council. 8210<sup>th</sup> Meeting of the United Nations Security Council. 21.03.2018. – [http://undocs.org/S/RES/2407\(2018\)](http://undocs.org/S/RES/2407(2018)).

## **Case-law of the ICJ**

1. *Case Concerning Questions of Interpretation and Application of the 1971 Montreal Convention Arising from the Aerial Incident at Lockerbie* (Libyan Arab Jamahiriya v United Kingdom) Preliminary Objections. ICJ Reports. 1998.
2. *Case Concerning Questions of Interpretation and Application of the 1971 Montreal Convention Arising from the Aerial Incident at Lockerbie* (Libyan Arab Jamahiriya v United States) Preliminary Objections. ICJ Reports. 1998.
3. *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)*. Advisory Opinion. ICJ Reports. 1971.
4. *Conditions of Admission of a State to Membership in the United Nations*. Advisory Opinion. ICJ Reports, 1948.
5. *Case Concerning United States Diplomatic and Consular Staff in Tehran (United States of America v. Iran)*. Judgment. ICJ Reports. 1980.
6. *Case Concerning the Northern Cameroons (Cameroon v. United Kingdom)*. Judgment. ICJ Reports. 1963.
7. *Case Concerning Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*. Judge Schwebel Dissenting Opinion. Merits. ICJ Reports. 1986.

## **Case-law of the ECJ**

1. Judgment of 21 September 2005, *Yassin Abdullah Kadi v. Council and Commission*, Case T-315/01, ECLI:EU:T:2005:332.

## **Books**

1. A. Charon. *UN Sanctions and Conflict: Responding to Peace and Security Threats*. London and New York: Routledge 2010.
2. A. Orakhelashvili. *Collective Security*. New York: Oxford University Press 2011.
3. A. Tzanakopoulos, *Disobeying the Security Council: Countermeasures against Wrongful Sanctions*. Oxford and New York: Oxford University Press 2011.
4. B. Simma (ed), H. Mosler, A. Randelzhofer, C. Tomuschat, R. Wolfrum and others. *The Charter of the United Nations. A Commentary*. 2<sup>nd</sup> edition. Volume I. New York: Oxford University Press 2002.

5. C. Eagleton. *International Government*. New York: Ronald Press 1932.
6. C. Michaelsen. A. Byrnes, M. Hayashi (eds). *The Competence of the Security Council Under the UN Charter to Adopt Sanctions Targeting Private Individuals*, *International Law in the New Age of Globalization*. 2013.
7. 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*. 1997.
8. D. Cortright and G. Lopez (eds). *Smart Sanctions. Towards Effective and Humane Sanctions Reform*. 2002.
9. D. Cortright and G. A. Lopez. *Responses to the Global Terrorist Threat*. 2007.
10. D. Cortright, G. A. Lopez and L. Gerber. *Sanctions and the Search for Security: Challenges to UN Action*. 2002.
11. E. de Wet and A. Nollkaemper, *Review of Security Council Decisions by National Courts*. 2002.
12. E. de Wet. *The Chapter VII Powers of the United Nations Security Council*. Hart Publishing 2004.
13. G. C. Hufbauer, J. Schott, K. Elliott and B. Oegg, *Economic Sanctions Reconsidered*. 3<sup>rd</sup> expanded edition. Peterson Institute for International Economics. 2009.
14. G. Nolte. *The Limits of the Security Council's Powers and its Functions in the International Legal System: Some Reflections*. Michael Byers ed. *The Role of Law in International Politics*. 2000.
15. H. Kelsen. *The Law of the United Nations: A Critical Analysis of its Fundamental Problems*. 1951.
16. H. Neuhold, W. Hummer, C. Schreuer (eds). *Die Grundregeln der zwischenstaatlichen Beziehungen*. *Österreichisches Handbuch des Völkerrechts*. 1997.
17. H. Thirlway, *The International Court of Justice*. New York: Oxford University Press 2016.
18. J. Crawford. *Brownlie's Principles of International Law*. 8<sup>th</sup> edition. 2012.
19. J. Dugard. V. Gowlland-Debbas (ed). *Judicial Review of Sanctions*. *United Nations Sanctions and International Law*. 2001.
20. K. H. Kaikobad. *The International Court of Justice and Judicial Review. A Study of the Court's Powers with Respect to Judgments of the ILO and UN Administrative Tribunals*. Hague: Kluwer Law International 2000.



21. M. Bedjaoui. *The New World Order and the Security Council: Testing the Legality of its Acts*. 1994.
22. M. Kiviorg. K. Land, K. Miil, H. Vallikivi. *Rahvusvaheline õigus*. Tallinn: Juura 2004.
23. M. S. M. Amr, *The Role of the International Court of Justice as the Principal Judicial Organ of the United Nations*. Hague: Kluwer International Law 2000.
24. N. Rasiah. University of Cambridge: *The International Court of Justice Should Not Have the Power to Review UN Security Council Resolutions under the Aegis of Chapter VII, An Article Drawing, Inter Alia, from the Scope of Judicial Review in the United Kingdom International Law Competition*. 2006.
25. T. Sato. J.-M. Coicaud and V. Heiskanen (eds). *The Legitimacy of Security Council Activities under Chapter VII of the Charter after the End of Cold War. The Legitimacy of International Organizations*. United Nations University Press 2001.
26. V. Gowlland-Debbas, *The Security Council and Issues of Responsibility under International Law*. 2011.

#### **Law articles**

1. A. Krishnamurthy. *The Lockerbie Incident Cases: Judicial Review By The ICJ*. 5th year Symbiosis Societies Law College. Available at: <http://www.legalserviceindia.com/articles/lock.htm>.
2. A. L. Strauss. *Cutting the Gordian Knot: How and Why the United Nations General Assembly Should Expand the Jurisdiction of the International Court of Justice*. – University of Dayton School of Law Publications. 2011.
3. A. Orakhelashvili. *The Impact of Peremptory Norms on the Interpretation and Application of United Nations Security Council Resolutions*. – *The European Journal of International Law*. Volume 16. 2005.
4. A. Reinisch, *Developing Human Rights and Humanitarian Law Accountability of the Security Council for the Imposition of Economic Sanctions*. – *American Journal of International Law*. Volume 95. 2001.
5. B. Martenczuk. *The Security Council, the International Court and Judicial Review: What Lessons from Lockerbie?* – *The European Journal of International Law*. 1999.
6. E. Kodar. *Järelevalve ÜRO julgeolekunõukogu otsuste üle. Kohtulikud ja kohtuvälised võimalused*. – *Juridica VI/2005*.

7. G. H. Oosthuizen. *Playing the Devil's Advocate: The Security Council is Unbound by Law.* – *Leiden Journal of International Law.* 1999.
8. I. Hurd. *The UN Security Council and the International Rule of Law.* – *The Chinese Journal of International Politics.* 2014.
9. I. Rajčić. *Legal Control over Decisions Taken by the UN organs and Judicial Review of the SC Decisions.* 2014.
10. J. Cianciardo. *The Principle of Proportionality: The Challenges of Human Rights.* – *Journal of Civil Law Studies.* Volume 3. Number 1. 2010.
11. J. E. Alvarez. *Judging the Security Council.* – *American Journal of International Law.* 1996.
12. M. J. Matheson. *ICJ Review of Security Council Decisions.* – *George Washington International Law Review.* 2004.
13. M. Naagel. *ÜRO Rahvusvahelise Kohtu jurisdiktsioon ja seda mõjutavate poliitiliste tegurite peegeldumine kohtu otsustes.* – *Juridica* 2005/6.
14. R. Deplano. *The Use of International Law by the United Nations Security Council: an Empirical Framework for Analysis.* – *Emory International Law Review.* Volume 29. 2015.

### **Newspaper articles**

1. E. Fishman. *Even Smarter Sanctions. How to Fight in the Era of Economic Warfare.* – *Foreign Affairs.* Volume 96. Number 6. November/December 2017.
2. F. Fassihi. *UN Expert Warns of Effects of Sanctions on North Korean Public.* – *The Wall Street Journal.* 27.10.2017.
3. D. Bandow. *Sanctions Against North Korea Hurt the People Rather Than the Government.* – *Huffington Post.* 15.06.2017.
4. K. B. Park. *Hunger in North Korea Is Devastating. And It's Our Fault.* – *The New York Times.* 17.12.2017.
5. K. Gray. *Tighter Sanctions on North Korea Could Have a Harsh Humanitarian Impact.* *The Conversation.* 22.09.2017L. Kanji. *Moving Targets. The Evolution and Future of Smart Sanctions.* – *Harvard International Review.* 04.01.2017.

6. S. D. Sagan. The Korean Missile Crisis. Why Deterrence Is Still the Best Option. – Foreign Affairs. Volume 96. Number 6. November/December 2017.
7. R. Gladstone. Proposed UN Resolution Would Toughen Sanctions on North Korea. – The New York Times. 21.12.2017.

### **Other**

1. D. Fruchart (ed). United Nations Arms Embargoes: Their Impact on Arms Flows and Target Behaviour. Report. 2007.
2. B. Fassbender. Targeted Sanctions and Due Process. Study Commissioned by the United Nations. Office of Legal Affairs 2006.
3. N. Melzer. Interpretative Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law. Geneva: International Committee of Red Cross 2009.
4. R. Wolfrum. 12th Commission on Judicial Control of Security Council Decisions (UNO). Yearbook of Institute of International Law. Tallinn Session 2015. Volume 76.
5. T. Biersteker. Types of UN Targeted Sanctions and their Effectiveness: Research Note. 2014.

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