
XXXII

POLISH YEARBOOK
OF INTERNATIONAL LAW

2012

Board of Editors:

WŁADYSŁAW CZAPLIŃSKI (Editor-in-Chief)
JAN BARCZ (Member)
ANNA WYROZUMSKA (Member)
KAROLINA WIERCZYŃSKA (Specialist editor)
ŁUKASZ GRUSZCZYŃSKI (Specialist editor)

International editor:

BART M.J. SZEWCZYK

Language editor:

JAMES HARTZELL

Statistical editor:

WOJCIECH TOMASZEWSKI

Advisory Board:

MAURIZIO ARCARI
LOUIS BALMOND
JERZY KRANZ
ANDRZEJ MĄCZYŃSKI
ERNST- ULRICH PETERSMANN
JERZY POCZOBUT
PAVEL STURMA
VILENAS VADAPALAS
ROMAN WIERUSZEWSKI
JERZY ZAJADŁO
ANDREAS ZIMMERMANN

Cover designed by:

BOGNA BURSKA

POLISH ACADEMY OF SCIENCES

INSTITUTE OF LAW STUDIES
COMMITTEE ON LEGAL SCIENCES

XXXII

POLISH YEARBOOK
OF INTERNATIONAL LAW

2012



Wydawnictwo Naukowe SCHOLAR
Warsaw 2013

All texts express exclusively personal views of the authors.
Authors bear full responsibility for statements and opinions expressed
in the published studies.

© Copyright by Polish Academy of Sciences Institute of Law Studies
and the Committee on Legal Sciences, Warszawa 2013

PL ISSN 0554-498X
DOI 10.7420/pyil2012

Wydawnictwo Naukowe Scholar Spółka z o.o.
ul. Krakowskie Przedmieście 62, 00-322 Warszawa
tel./fax 22 828 93 91, 22 826 59 21, 22 828 95 63
dział handlowy: jak wyżej w. 105, 108
e-mail: info@scholar.com.pl
www.scholar.com.pl

Printed in Poland

First edition, 250 copies

CONTENTS

ARTICLES

Wojciech Sadurski

Democratic Legitimacy of the European Union: A Diagnosis and Some Modest Proposals9

Roman Kwiecień

Does the State Still Matter? Sovereignty, Legitimacy and International Law45

Anna Wyrozumska

Execution on an Embassy Bank Account75

Malgorzata Fitzmaurice

Some Reflections on Legal and Philosophical Foundations of International Environmental Law89

Susana Camargo Vieira

Governance, Good Governance, Earth System Governance... and International Law111

Alice de Jonge

What Are the Principles of International Law Applicable to the Resolution of Sovereign Debt Crises?129

Mia Swart

The Lubanga Reparations Decision: A Missed Opportunity?169

Adam Bodnar, Irmina Pacho

Targeted Killings (Drone Strikes) and the European Convention on Human Rights.....189

Aleksandra Dłubak

Problems Surrounding Arrest Warrants Issued by the International Criminal Court: A Decade of Judicial Practice209

Maurizio Arcari Limits to Security Council Powers under the UN Charter and Issues of Charter Interpretation.....	239
Natividad Fernández Sola The European Union as a Regional Organization within the Meaning of the UN Charter.....	259
Dagmar Richter Judicial Review of Security Council Decisions – A Modern Vision of the Administration of Justice?.....	271
Pavel Šturma Does the Rule of Law also Apply to the Security Council? Limiting Its Powers by Way of Responsibility and Accountability.....	299
Andreas Zimmermann The Security Council and the Obligation to Prevent Genocide and War Crimes	307
POLISH PRACTICE IN INTERNATIONAL LAW	315
Oktawian Kuc <i>Krstić Case</i> Continued	315
Amicus curiae briefs in <i>Janowiec and Others v. Russia</i>	325
BOOK REVIEWS	401
POLISH BIBLIOGRAPHY OF INTERNATIONAL AND EUROPEAN LAW 2012	427

*Pavel Šturma**

DOES THE RULE OF LAW ALSO APPLY TO THE SECURITY COUNCIL? LIMITING ITS POWERS BY WAY OF RESPONSIBILITY AND ACCOUNTABILITY**

Abstract

Both States and international organizations are subjects of international law. They possess an international legal personality, which also implies international responsibility in case of breach of their obligations. This contribution presents the argument that also the UN Security Council is not legibus solutus, therefore its acts may entail the responsibility of the Organization. A problem remains in the implementation of such responsibility.

1. INTRODUCTION

Both States and international organizations are subjects of international law. They possess an international legal personality, although it is not necessarily identical in its scope and nature.¹ In cases of breach of international law (i.e. internationally wrongful acts), the question of their responsibility arises. Who is responsible in such cases: an international organization, its Member State(s), both of them, or neither?

No doubt, the UN Security Council is an important actor, if not the most important institutional actor (i.e. different from States) in contemporary international relations. However, when it comes to control of the legality of acts adopted by the Security Council and/or its responsibility therefore, the situation seems to be problematic.

Is the assumption correct that the binding nature of the resolutions of the Security Council (Art. 25 of the Charter of the United Nations (Charter or UN Charter)) and the priority of obligations under the Charter over other international agreements (Art.

* Pavel Šturma, JUDr., DR Sc. is Professor and Head of the Department of International Law, Charles University in Prague, Faculty of Law (Czech Republic), and Senior Research Fellow, the Institute of Law, Czech Academy of Sciences, member of the International Law Commission.

** Written version of an oral presentation given at the Warsaw ILA Round Table on Limitation of the Powers of the United Nations Security Council on 11 January 2013.

¹ Reparation of Damage Suffered in the Service of the Organization, Advisory Opinion, ICJ Reports 1949, 174, at 178.

103)² excludes any kind of control over the Security Council's acts? And how does this attitude honor the commitment to the rule of law confirmed in the Declaration of the High-level Meeting of the General Assembly on the Rule of Law at the National and International Levels of 24 September 2012?³ Undoubtedly, norms governing the responsibility of both States and international organizations are essential to the rule of law.

The present contribution does not intend to question the powers of the Security Council to adopt both individual and normative acts under the UN Charter. Clearly, Art. 25 and Chapter VII provide a legal basis for resolutions, including specific obligations related to the protection of peace and security in particular cases. Resolutions of the Security Council that provide for general rules, not necessarily linked to a specific situation in a given country presenting a threat to international peace, are more complicated but still seem justified. They include not only the resolutions that established the Statutes for ad hoc International Criminal Tribunals for the former Yugoslavia [res. 827 (1993)] and for Rwanda [res. 955 (1994)] as well as the Statute of the Special Tribunal for Lebanon [res. 1757 (2007)], but also resolutions that lack a link to any specific situation at all. The most famous examples of these are resolutions 1267 (1999) and 1373 (2001), dealing with targeted sanctions against persons and entities suspected of supporting and financing of terrorism, and resolution 1882 (2009) on the use of children in armed conflicts.

Instead of focusing on the Security Council's powers, this contribution aims at discussing possible legal consequences, namely responsibility, for internationally wrongful acts of the Council. It also includes the issue of judicial (or other) review of acts adopted by the Security Council. In other words, the contribution does not deal with the problem from the point of view of primary norms (powers and their limits), but rather from the point of view of secondary norms (responsibility or accountability).

This seems to be even more important in view of the 2012 Declaration on the Rule of Law, as this declaration, while establishing the applicability of the rule of law to the United Nations and its principal organs, deals only in vague terms with the possible accountability of the Security Council: "Recognizing the role under the Charter of effective collective measures in maintaining and restoring international peace and security, we encourage the Security Council to continue to ensure that sanctions are carefully targeted, in support of clear objectives and designed carefully so as to minimize possible adverse consequences, and that fair and clear procedures are

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 Kingdom*), Order of 14 April 1992, ICJ Reports 1992, 16, para. 39.

³ UN GA Resolution A/RES/67/1 (30.11.2012): "2. We recognize 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. We also recognize 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."

maintained and further developed.”⁴ The key element here is the requirement of fair and clear procedures, although their nature may be different for the Security Council, as a political body, than for international judicial bodies.

Therefore it seems appropriate to shed more light on some issues with respect to the responsibility of international organizations in relation to resolutions adopted by the Security Council and implemented by States. This will be the first part of my contribution. The second part will focus on possible review procedures available to States and/or individuals.

2. INTERNATIONAL RESPONSIBILITY OF THE UN FOR ACTS OF THE SECURITY COUNCIL

Responsibility is a key concept of any legal order, including the system of international law. Both States and international organizations are able to commit an internationally wrongful act.

Unlike the rules on the responsibility of States for internationally wrongful acts, codified already in 2001, the International Law Commission adopted the Articles on the Responsibility of International Organizations in the second and final reading only at its 63rd session in June 2011.⁵ The recently adopted 67 articles (with commentaries) present a welcome attempt to codify and progressively develop general rules on the responsibility of international organizations and the responsibility of a State for an internationally wrongful act committed in connection with the conduct of an international organization (Art. 1).

According to Art. 4, an internationally wrongful act of an international organization occurs when conduct is attributable to that organization under international law and constitutes a breach of an international obligation of that organization.

The Security Council is not an international organization in itself, but only an organ of the United Nations Organization. Thus the conduct of the Security Council as an organ may be attributed to the United Nations Organization (Art. 6).

In spite of its very strong position (i.e. powers), the Security Council is not *legibus solutus* (unbound by law), but is bound by international obligations. These obligations arise first of all from the UN Charter. The special provision on the conflict of norms (Art. 103), provides that “in the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail.” However, this does not affect obligations *erga omnes* arising from the customary norms of international law⁶ having a *jus cogens*

⁴ UN GA Resolution A/RES/67/1 (30.11.2012), para. 29.

⁵ See Report of the International Law Commission, Sixty-third session, GAOR, Sixty-sixth session, Suppl. No. 10 (A/66/10), 53-68.

⁶ Cf. J.-M. Thouvenin, *Article 103*, in: J.-P. Cot, A. Pellet, M. Forteau, *La Charte des Nations Unies. Commentaire article par article* (3e éd.), vol. II, Economica, Paris: 2005, 2140-2142.

nature, binding on all subjects of international law, including the bodies of the United Nations.⁷

Consequently, international responsibility may incur only exceptionally, in the event of an act of the Security Council would constitute either a violation of the Charter itself or a violation of a preemptory norm of general international law.

The first category also covers possible violations committed by the Security Council acting *ultra vires*. According to the ILC's Articles on Responsibility of International Organizations, the conduct of an organ of an international organization shall be considered an act of that organization under international law if the organ acts in an official capacity and within the overall functions of that organization, even if the conduct exceeds the authority of that organ (Art. 8).

One of the most complex problems is drawing a line between the responsibility of an international organization and its Member States.⁸ On the one hand, Chapter IV of Part two of the Articles (2011) deals with the responsibility of an international organization in connection with the act of a State or another international organization. It covers several cases, such as aid or assistance in the commission of an internationally wrongful act (Art. 14), direction and control exercised over the commission of an internationally wrongful act (Art. 15), and coercion of a State or another international organization (Art. 16). All these provisions correspond to Articles 16 to 18 of Articles on Responsibility of States for Internationally Wrongful Acts (ARSIWA, 2001).⁹

On the other hand, Part five of the Articles on the responsibility of international organizations was adopted at the end of the work of the ILC. It deals with the responsibility of a State in connection with an act of an international organization. As was expressed in the commentary, the present articles are intended to fill a gap that was deliberately left uncovered in the Articles on the responsibility of States for internationally wrongful acts.¹⁰

From the point of view of responsibility for the Security Council's acts, the most interesting provisions are in Art. 17 (Decisions, authorizations and recommendations addressed to Member States and international organizations). The purpose of this Article is to ensure that an international organization cannot avoid its responsibility in cases where a Member State breaches an international obligation on the basis of a binding or recommendatory act of the organization. This rather bridges the gap between State responsibility and the responsibility of international organizations.¹¹

⁷ In this sense *cf.* the decision of the Court of First Instance, *Yassin Abdullah Kadi v. Council of the European Union and Commission of the European Communities*, 21 September 2005, T-315/01, para. 226.

⁸ In the recent literature *see e.g.*, *Symposium on Responsibility of International Organizations and of (Member) States*, 7(1) *International Organizations Law Review* 9 (2010), pp. 9 et seq.

⁹ *Yearbook of International Law Commission*, 2001, Vol. II, Part 2, 26.

¹⁰ Report of the International Law Commission, 2009, Sixty-first session, GAOR, Sixty-fourth session, Suppl. No. 10 (A/64/10), p. 158.

¹¹ *Cf.* N. Blokker, *Abuse of the Members: Questions concerning Draft Article of the Draft Articles on Responsibility of International Organizations*, 7(1) *International Organizations Law Review* 35 (2010), p. 39.

According to Art. 17, para. 1 of the 2011 articles, “an international organization incurs international responsibility if it circumvents one of its international obligations by adopting a decision binding a member State or international organization to commit an act that would be internationally wrongful if committed by the former organization”.¹² It does not condition the establishment of international responsibility of an organization on whether or not the act in question is internationally wrongful for the Member State to which the decision, authorization or recommendation is directed (Art. 17, para. 3). In cases where an international organization adopts merely an authorization or recommendation, it would incur responsibility only if the State commits the act in question because of that authorization or recommendation (Art. 17, para. 2), or put differently, because the State relied on that authorization or recommendation.

It is possible to conclude, therefore, that the responsibility of the United Nations Organization may be established even on the basis of certain, however rare, acts of the Security Council. The UN incurs responsibility not only in cases where such Security Council acts were implemented by its subsidiary bodies, but also in cases of binding decisions or authorizations implemented by the Member States.

3. IMPLEMENTATION OF INTERNATIONAL RESPONSIBILITY AND/OR OTHER REMEDIES

Although certain acts of the Security Council may give rise to the responsibility of the United Nations Organization in principle, it remains to see what procedural means, if any, are available for holding it accountable. This seems to be the main problem, if not the key obstacle, in any quest for accountability of the Security Council.

First of all, the International Court of Justice (ICJ), as the principal judicial organ of the United Nations, does not seem to be well suited for a judicial review of the Security Council’s acts, or for deciding a dispute concerning the responsibility of the United Nations Organization. Of course, these are two different procedures in theory, but neither of them is available in practice.

As to the review of the “constitutionality” of the Security Council’s acts, the ICJ does not have any direct competence to review, nor *a fortiori* to declare as null acts of one principle organ of the UN challenged by another principle organ, Member States, or individuals. However, one cannot exclude the possibility of an incidental review exercised by the Court in the framework of its contentious or advisory jurisdiction. It may happen, and indeed does happens in the course of the resolution of a dispute between States or in the case of an advisory opinion requested by the General Assembly.¹³

¹² *Cf.*, Report of the International Law Commission, 2011, Sixty-third session, GAOR, Sixty-sixth session, Suppl. No. 10 (A/66/10), pp. 107-108.

¹³ Legal Consequences for States of the Continued Presence of South Africa in Namibia, Advisory Opinion of 21 June 1971, ICJ Reports 1971, 16: “Undoubtedly, the Court does not possess powers of judicial review or appeal in respect of the decisions taken by the United Nations organs concerned. (...)

Up to now, the ICJ has shown restraint in situations where the Security Council was exercising its functions under the Charter.

When it comes to the issue of the responsibility of the United Nations Organization, it cannot be invoked before the ICJ, as only States may be parties in cases before it. Regarding its advisory jurisdiction, the ICJ may give an advisory opinion on any legal question at the request of whatever body may be authorized by the Charter.¹⁴ Indeed, the Court could give its opinion on the question of the responsibility of the UN, which is clearly a legal question. However even in the case where the General Assembly or the Security Council adopts a resolution with such a request, which is difficult to achieve, the advisory opinion, if given by the Court, will not have the binding force of a judgment.

If the States have a only very limited standing in advisory proceedings before the ICJ initiated by one of the principal UN bodies (mostly written statements), individuals have no standing at all, even if they are directly concerned.

This seems to be one of the most important shortcomings of the legal order of the United Nations, in particular in the context of promoting the rule of law at the national and international levels. It concerns, albeit not only, in particular human rights protection in cases of targeted sanctions introduced by resolutions of the Security Council.

Of course, the establishment of the Office of Ombudsperson (Ms. Kimberly Prost) and of certain procedures for appeal thereto by persons affected by the Security Council sanctions is an important step forward. Nevertheless, this is not a kind of judicial review. The Security Council or the United Nations at large should establish their own efficient mechanism of review, giving full protection of human rights to the extent compatible with the counter-terrorism objectives.¹⁵

However, in the exercise of its judicial function and since objections have been advanced the Court, in the course of its reasoning, will consider these objections before determining any legal consequences arising from those resolutions.” (para. 89) For more details *cf.* D. Richter, *Judicial Review of Security Council Decisions – A Modern Vision of the Administration of Justice?*, this volume, pp. 271-297.

¹⁴ Accordance with international law of the unilateral declaration of independence in respect of Kosovo, Advisory Opinion of 22 July 2010, ICJ Reports, 2010, para. 47: “There is, therefore, nothing incompatible with the integrity of the judicial function in the Court undertaking such a task. The question is, rather, whether it should decline to undertake that task unless it is the organ which has taken the decision that asks the Court to do so. In its Advisory Opinion on Certain Expenses of the United Nations, however, the Court responded to the question posed by the General Assembly, even though this necessarily required it to interpret a number of Security Council resolutions (...) Where, as here, the General Assembly has a legitimate interest in the answer to a question, the fact that that answer may turn, in part, rest on a decision of the Security Council is not sufficient to justify the Court in declining to give its opinion to the General Assembly.”

¹⁵ The recently adopted Security Council res. 2083 (2012) seems to be a step to this direction. The Security Council, in para. 19, “*Decides* to extend the mandate of the Office of the Ombudsperson, established by resolution 1904 (2009), as reflected in the procedures outlined in annex II of this resolution, for a period of thirty months from the date of adoption of this resolution, *decides* that the Ombudsperson shall continue to receive requests from individuals, groups, undertakings or entities seeking to be removed from

If such a mechanism proves to be deficient, the regional courts (such as the Court of Justice of the EU or the European Court of Human Rights), and perhaps even national courts, are and will be able to intervene in order to protect human rights. However, this scenario involves some serious problems. Firstly, as is clearly shown in the *Kadi* case, with different judgments of the Court of First Instance and the European Court of Justice,¹⁶ this may be welcome from the point of view of human rights protection but not from the perspective of the coherency of international law. Instead, this approach opens the way for the increasing fragmentation of international law.¹⁷

Secondly, the intervention and protection by regional courts cures only the symptoms, and not the causes of such infringements. They are not able to decide on the question of responsibility (and financial liability) of the UN as the only universal organization. And they can hardly contribute to the accountability of the Security Council for its acts, and thus to the promotion of the rule of law at the international level. Much work still has to be done.

the Al-Qaida Sanctions List in an independent and impartial manner and shall neither seek nor receive instructions from any government, and *decides* that the Ombudsperson shall present to the Committee observations and a recommendation on the delisting of those individuals, groups, undertakings or entities that have requested removal from the Al-Qaida Sanction List through the Office of the Ombudsperson, either a recommendation to retain the listing or a recommendation that the Committee consider delisting". Annex II sets up the procedure and time limits for both the Ombudsperson and the Committee in the main stages (Information gathering, Dialogue with the petitioner, and Committee discussion). However, there is no rule on compensation for the petitioner in case of his/her delisting.

¹⁶ ECJ, *Yassin Abdullah Kadi and Al Barakaat International Foundation v. Council of the European Union*, Joint Cases C-402/05 P and C-415/05 P, 3 September 2008.

¹⁷ Cf. P. Šturma, V. Bílková, *Targeted Anti-Terrorist Sanctions and Their Implications for International Law Normative and Institutional Coherency*, in: A. Constantinides, N. Zaikos (eds.), *The Diversity of International Law*, Brill, Leiden/Boston: 2009, pp. 215-237.