SECTION 1  INTRODUCTION

International and European judicial organs are familiar with the issue of the personalities and activities of international organizations as independent actors in the contemporary international legal order. However, because international organizations are assuming more ambitious functions, the potential wrongful acts that they may commit have increased, and the need for the development of remedial measures by such judicial organs has also increased. Furthermore, cases concerning the attributability of the acts and omissions of international organizations have come before both international and European tribunals, particularly since the beginning of the twenty-first century. For different reasons, the scope and mechanisms of each judicial organ’s scrutiny over cases concerning international organizations’ responsibility do not conform to a coherent model.

International and European judicial organs experience both external and internal limitations that affect the level and depth of their scrutiny in the development of a regime on the responsibility of international organizations.

As a consequence, the decisions produced by these judicial organs will inevitably reflect their limitations, both external and internal. Such limitations render it difficult to overcome the relativism of international law through judicial organs in disputes involving international organizations.

The internal limitations of the judicial organs are stipulated in their constitutive treaties. In fact, the most common limits on the jurisdiction of the courts are restrictions related to subject matter (jurisdiction ratione materiae), to persons appearing (ratione personae), to geogra-
phical scope (ratione loci) and to time (ratione temporis). These restrictions can be observed as the objective limitations or institutional constraints to which every judicial organ is subject from the very first moment of its constitution. By external limitations, we mean those arising for contingent reasons. Realistically, when settling disputes, such bodies are constrained not only by international law, but also by exogenous circumstances. The political circumstances surrounding a case are not completely controllable. If the tribunal recognizes a particular responsibility as belonging to an international organization, a conflict might arise between the judicial organ (the judges) and the international organization. Furthermore, if the judicial organ developed a strict regime on international organizations’ responsibility, that regime would itself threaten the existence of the international organizations. As a result, determining the legality of the acts of international organizations involves taking a stance towards the organization itself, which is always a delicate issue for the judges.

In this context, questions related to the selection processes of the judges, in particular their terms and the possibility of re-election, must be emphasized. To ensure the independence of the judiciary, attention must be paid to any factor of this type that may influence the adoption of decisions.

The scarcity of case law relating to the responsibility of international organizations further complicates the establishment of a general responsibility regime. This is partly due to the historical development of international law; this system has been developed based on primary rules, but it is also an echo of the structure of the international legal system, which is characterized as an inter-State society. Traditionally, the system of international law, and particularly the system for the protection of human rights, has been designed with the State as the main subject of the legal relationship and as the only party responsible for the violations. In fact, treaties explicitly establishing the responsibility of international organizations are still rare.

According to Article 34 of the Statute of the International Court of Justice (ICJ), States cannot bring international organizations before the ICJ nor can international organizations initiate proceedings against Member States. Therefore, it can be concluded that the ICJ has no direct competence to hear such disputes. Moreover, the resolution of controversies by the ICJ was removed from the Draft Articles on the Responsibility of International Organizations (in the same way as it “evaporated” from the Draft Articles on State Responsibility of 2001).

One could argue that the expansion of international organizations and their growing accountability regime would require that Article 34 of the ICJ Statute be revisited to improve the access of international organizations to the ICJ. Their limited locus standi does not correspond to their status as subjects of international law possessing their own international legal personality, different from that of States. This status can be identified as a reason for granting international organizations the right to bring claims before the courts. The International Law Commission (ILC) itself noted that there is a “widely perceived need to improve methods for settling” disputes involving the responsibility of international organizations. In fact, even if historically it was not the rule, in practice the international judicial bodies that grant standing to non-State

---


entities far outnumber those judicial bodies whose jurisdiction is limited to disputes between sovereign States. However, with regard to international organizations, in most instances, their access is still restricted to obtaining the legal opinion of the judicial body. The question is whether direct remedial actions against the international organizations would contribute to the construction of a responsibility regime and whether such a system is feasible.

Therefore, the perspective of this chapter is one of the limitations of judicial organs and the difficulties regarding the responsibility of international organizations. The aim is to identify how responsibility is determined by the courts and to what extent the differing approaches contribute to developing a regime on international organizations’ responsibility. This analysis is structured in three parts. Section 2 establishes the conceptual framework and the different assumptions of the international legal order. Section 3 addresses the issue of the judicial review of UN Security Council resolutions by explaining the two main approaches of the ICJ, an expansive one and a restrictive one. Subsequently, Section 4 examines how international and European courts and tribunals treat this issue through relevant cases. Finally, the conclusion illustrates the incoherence inherent in the case law.

**SECTION 2**  
DEFINING THE ANALYTICAL FRAMEWORK

Paragraph 1  
The Pluralist and Constitutionalist Approaches to International Law

The study of how courts and tribunals deal with the increasing variety of the legal sources they have at their disposal must

---


11. Without claiming to be comprehensive, this is the case for the General Assembly, any other UN organ or specialized agency so authorized by the General Assembly and the Security Council, which can ask the ICJ for an advisory opinion. The International Tribunal for the Law of the Sea (ITLOS) can also render advisory opinions requested by the General Assembly and the Council of the International Sea-Bed Authority. The ECJ would do the same if it is requested by the Council and the Commission of the European Communities and the ECtHR if the Committee of Ministers would ask for an opinion. Full standing in contentious matters is granted to organs of international organizations, rather than to the international organizations themselves. In the framework of the jurisdictions with universal scope, the Sea-Bed Disputes Chamber of the ITLOS can hear cases between States and the International Sea-Bed Authority. And in the case of the International Criminal Court, it exercises its jurisdiction if a situation is referred to the Prosecutor either by a State party or the Security Council acting under Chapter VII or when the Prosecutor initiates an investigation *propio motu*. 
be examined within the framework of the two primary analytical assumptions of international legal order: the constitutionalist and pluralist approaches. The paradox of the contemporary international legal system is based on these two contradictory legal processes that reflect, on the one hand, forces tending to construct unifying elements and, on the other hand, the compartmentalization of international law. The judgments of the courts can be classified, therefore, as deriving from the tension between a pluralist focus and a constitutional one. All of the judgments conceptualize the legal order in one way or another. In the early 1980s, the ECJ began its effort to “constitutionalize” the European legal order. This effort went beyond the mentioned dichotomy, as it characterized the relationship between international law and European law by presuming that there is no norm conflict and that the EU legal order is not only autonomous but also “constitutional”. Therefore, another force was added to the tension between constitutionalism and pluralism, namely the European constitutional project.

In considering this framework, it should be emphasized that the cases we analyze refer to the United Nations, the primary international organization of universal membership with the purpose of maintaining international peace and security (Chapter VII and Article 103 of the UN Charter). In particular, the ICJ and the regional courts are called upon to review the acts of the Security Council from two different perspectives: their internal validity and their external validity. The ICJ has dealt with the internal validity of Security Council resolutions vis-à-vis the Charter and within the UN organs. In several cases the ICJ has demonstrated an open mind towards judicial review but never to an extent comparable with the regional courts. The latter have addressed the external validity of UN Security Council resolutions in relation to jus cogens and human rights norms in the manner explained by De Burca:


“The European Court of Human Rights (ECtHR) demonstrated strong substantive deference towards the UN Security Council, the Court of First Instance (CFI) demonstrated moderate jurisdictional deference, and the ECJ demonstrated little or no deference.” 15

Thus, the increasingly common practice of referring to international law in constitutional terms — meaning international constitutional norms that enable or constrain the production of international law — has reached international tribunals, such as the CFI, the ECJ and the ECtHR 16. Because we need to identify certain norms as higher norms in the core of international constitutionalism, the constitutional character of the UN Charter (on the grounds of Article 103) is defended by many authors 17 as well as by the ICJ, with the Lockerbie case 18 as the clearest example. The words in Article 103 — “obligations of the Member States under the Charter” — acknowledge the primacy of the UN system over any other legal order and are understood as covering State obligations arising from binding decisions of UN organs, primarily the Security Council. The words “any other international agreement” in the same Article leave no room for any excepted category of treaties, including the ECHR 19.

Several authors claim that the constitutional function of international law plays a broader role than the one stipulated in Article 103 of the UN Charter because it takes the global public order as a starting point. International constitutional norms represent a “comprehensive blueprint for social life and have become a multi-faceted body of law that permeates

all fields of life”. Beyond the UN Charter paradigm, the idea of a
global public order addresses, legitimizes and limits all forms of polit-
tical power. Consequently, international law acquires a new prominence
as it has moved from a “sovereignty-centred to a value oriented system,
although this shift has not found a definitive equilibrium”.

Between the classical notions of constitutionalism — from the for-
malist idea based in the Charter to the not-so-formalist idea proposed by
Kant — and the notion of pluralism, we can situate the constitutionali-
zation of the European Union (EU). Since the 1980s, the European
Community’s Treaties have become, in the ECJ’s words, “the constitu-
tional charter of a Community based on the rule of law”. This idea was
applied in 2008 by the ECJ in Kadi and Al Barakaat v. Council and
Commission (Kadi). However, as a clear European constitutional
framework has not yet been determined, for the moment, a “weak con-
stitutionalism” could be taken to mean that it must still undergo a long
process of political evolution even if the current political climate (as of
March 2013) is not the most conducive to thoughts of such political
unity.

Moreover, as suggested by Lindseth, the ECJ’s constitutionalizing
logic cannot negate the idea that Europe’s supranational institutions
draw their “authority not from a constitutional enactment of some
definable European ‘demos’ . . . but generally from lawful transfers . . .

Mankind on the Eve of a New Century, General Course on Public International
Law”, Recueil des cours, Vol. 281, 1999, p. 63 and p. 70. An exhaustive com-
ment on Tomuschat’s view in Armin von Bogdandy “Constitutionalism in Inter-
national Law: Comment on a Proposal from Germany” (2006) 47:1 Harvard
22. Trevor C. Hartley, Constitutional Problems of the European Union
(Oxford University Press, 1999); Peter L. Lindseth, “The Contradictions of
Supranationalism: Administrative Governance and Constitutionalization in
European Integration Since the 1950’s” (2003) 36 Loyola Los Angeles Law
Review, pp. 363-406; Joseph H. H. Weiler, The Constitution of Europe (Cam-
ECR 1339, para. 23.
24. Kadi v. Council and Commission and Yusuf and Al Barakaat Interna-
tional Foundation v. Council and Commission, Joined Cases C-402/05 P and C-415/05
P, 2008, European Court of Justice.
25. Peter L. Lindseth, “‘Weak’ Constitutionalism? Reflections on Comi-
tology and Transnational Governance in the European Union” (2001) 21:1
Oxford Journal of Legal Studies, pp. 145-163, and José Martín y Pérez de
Nanclares, “Unidad y Pluralismo en la jurisprudencia del Tribunal de Justicia de
la Unión Europea. Hacia un refuerzo de la autonomía del Derecho de la Unión
frente al Derecho Internacional”, A. Rodrigo and C. García (eds.), Unidad y
pluralismo en el Derecho Internacional Público. Coloquio en Homenaje a Oriol
from national [institutions] as representatives of their national [political] communities\textsuperscript{26}.

By contrast, legal pluralism offers a different and, to my mind, richer focus for the analysis of the expansion of international law\textsuperscript{27}. Pluralism emphasizes a multiplicity of distinct and diverse normative systems and competitions for primacy among them. Specifically, in studying the responsibility of State, Special Rapporteur Wilhem Riphagen opined that international law is not articulated as a unique system but rather as diverse subsystems, inside of which there are primary and secondary rules. This perspective overcomes the individual and monolithic consideration of international obligations as regards responsibility.

Nico Krisch, a strong pluralist, defends the pragmatic accommodations of pluralism because they can lead to stronger transnational accountability. From the point of view of accountability problems in global governance, pluralism allows “mutual influence and gradual approximation” and prevents any level or site from dominating the others\textsuperscript{28}. Two of the difficulties of pluralism, the \textit{lack of certainty} and \textit{power disparities}, are reflected in the cases studied in this chapter. The lack of certainty is the best description of what happens on judicial grounds on the issue of international organization responsibility. The “strikingly” different responses of the ECtHR and the ECJ to the challenge of the Security Council action severely compromise the security expected from the law\textsuperscript{29}. Regarding the issue of power disparities in the pluralist approach, the common thread in this chapter is the tension born of the interdependence of the EU legal order and the international order as well as the implications of the powerful Security Council with respect to the other organs of the United Nations and to the European Union.

In considering the different cases, one attractive option would be to avoid any conflict among sometimes colliding norms and to attempt to find presumptions in favour of bridges across the divide to guarantee the principle of justiciability.


The Precondition for Defining Responsibility: International Legal Personality

The fact that international organizations cannot resort to the contentious jurisdiction of the ICJ means that, historically, the first avenue for obtaining judicial input with respect to international organizations has been the advisory jurisdiction of the ICJ\(^{30}\). In fact, during the early years of the United Nations the advisory jurisdiction of the ICJ dealt essentially (but not only) with what Laurence Boisson de Chazournes has called issues of a “constitutional nature”\(^{31}\), meaning that the ICJ assumed a constitutional role as regards the United Nations’ institutional framework. Specifically, questions relating to the personality of international organizations, to the powers of institutions and to the sharing of responsibilities among the organs were among the issues addressed by the ICJ.

To begin with, the ICJ confirmed the legal personality of the United Nations in its Advisory Opinion in *Reparation for Injuries Suffered in the Service of the United Nations* (1949). As is well known, the ICJ declared that

“The Organization [of the United Nations] is an international person . . . that is subject of international law and capable of possessing international rights and duties, and that it has capacity to maintain its rights by bringing international claims.”\(^{32}\)

Decades later, the ILC’s Draft Articles on the Responsibility of International Organizations defined international organizations by the same two conditions, “to be an organization established by a treaty or other instrument governed by international law and to possess its own international legal personality”\(^{33}\). In its interpretation of the Advisory Opinion, the

---


ILC noted that if an organization has legal personality, it has an “objective legal personality”; thus, it would not be necessary to determine whether the injured State has recognized the organization’s legal personality. This consideration must be observed in its two dimensions: first, it provides international organizations and specifically the United Nations with an objective personality vis-à-vis States, and second, it distinguishes and separates the personality of international organizations from that of States. As Wilde states, “legally, they are more than the sum of their (State) parts”, which leads to the conclusion that these entities are responsible for their acts. The underlying issue was that when States establish international organizations and entrust them with certain functions they charge the international organization with the “attendant duties and responsibilities”. The logic of the Advisory Opinion made the passive accountability of international organizations emerge in an embryonic form, although that particular aspect did not fall within the scope of the question submitted by the General Assembly. However, at no time did the ICJ declare that membership in an international organization suspends the responsibility of member States to comply with international law.

Moreover, the ICJ established the concept of an “agent of an international organization” on the grounds that the decisive factor is that the person or entity that “has been charged by an organ of the international organization with carrying out, or helping to carry out, one of its functions — in short, any person through whom it acts”. This criterion brought new dimensions to the attribution of conduct to international organizations; it went beyond the distinction made in the UN Charter between “principal organs” and “subsidiary organs” (Articles 7, 22 and 30). The relevant condition is that the person has been conferred functions by an organ of the United Nations. This condition shows that, together with the formal links, another type of relationship applies to the organisations, their personality and codification see J. M. Cortés Martín, Las organizaciones internacionales: codificación y desarrollo progresivo de su responsabilidad internacional, Instituto Andaluz de Administración Pública (Junta de Andalucía, Seville, 2008).

37. Wellens, supra footnote 4.
agents within an international organization. Later, with regard to the 
Applicability of Article VI, Section 22, of the Convention on the Privi-
egleges and Immunities of the United Nations, the ICJ gave the same 
opinion: “The essence of the matter lies not in their administrative posi-
tion but in the nature of their mission.”
Thus, according to the ICJ, the 
conduct of UN activities includes the acts and omissions of its organs as 
well as those of its “agents”.

Finally, the ICJ itself recognized in its Reparation Advisory Opinion 
that the United Nations has the capacity to bring an international claim 
not only against Members of the United Nations but also against other 
States. Ironically, this power to bring an international claim against 
Members of the United Nations cannot be exercised before the ICJ.

SECTION 3  JUDICIAL REVIEW OF SECURITY 
COUNCIL RESOLUTIONS BY THE 
INTERNATIONAL COURT OF JUSTICE

The granting of the powers of judicial review to the ICJ 
was a Belgian proposal in the UN Conference that, in 1945, elaborated 
the UN Charter. Belgium proposed a first amendment to the Chapter on 
Pacific Settlement of Disputes in the draft UN Charter, providing that:

“Any State, party to a dispute brought before the Security Coun-
cil, shall have the right to ask the Permanent Court of International 
Justice whether a recommendation or a decision made by the 
Council or proposed in it infringes on its essential rights. If the 
Court considers that such rights have been disregarded or are 
threatened, it is for the Council either to reconsider the question or 
to refer the dispute to the Assembly for decision.”

Therefore, a State would seek an advisory opinion from the ICJ if it 
believed that a Security Council recommendation contravened its essential rights. Consequently, this possibility would “strengthen the juridical basis” of Security Council decisions. However, certain States such as

40. Applicability of Article VI, Section 22, of the Convention on the Privileges 
and Immunities of the United Nations, International Court of Justice, Advisory 
Opinion, ICJ Reports 1989, p. 194, para. 47.

41. Hersch Lauterpacht, “The Revision of the Statue of the International 
Court of Justice” (2002) 1 The Law and Practice of International Courts and 
Tribunals, pp. 55-128, p. 57. Sir Robert Jennings described it as “an extra-
ordinary anomaly” in Robert Jennings, “The United Nations at Fifty: The Inter-
national Court of Justice after Fifty Years” (1995) 89 American Journal of Inter-
national Law, pp. 493-504.

42. Doc. 2, G/7 (k) (1), United Nations Conference on International Organiza-

43. Ibid.
the Soviet Union, the United States and France rejected the proposal, considering that the Security Council should receive the full confidence of the Member States. Finally, because the Security Council’s power to “recommend” a solution to disputes would not bind the parties, the Belgian delegate withdrew the amendment.

Belgium proposed a second amendment to “determine the proper interpretative organ for the several parts of the Charter,” but, again, its proposal did not prevail. The Committee rejected its suggestion of referring disagreements between organs over the interpretation of the Charter to the ICJ as an established procedure. It can be concluded, as Professor Rosalyn Higgins noted,

“that at the San Francisco Conference the proposal to confer the point of preliminary determination [of each organ’s competence] upon the ICJ was rejected. The view was preferred that each organ would interpret its own competence.”

Whether the ICJ should judicially review Security Council decisions and who the ultimate guardian of UN legality is were both questions that re-emerged during the 1990s, specifically due to the case concerning interim measures brought by Libya against the United States and, in general, as a consequence of the end of the Cold War. For American authors such as Thomas Franck, the issue of judicial review can be approached by comparing the classic case of *Marbury v. Madison* and the US constitutional canon, as neither the US Constitution nor the UN Charter specifies the role of the courts. In fact, the Charter declares that the ICJ shall be “the principal judicial organ of the United Nations” (Article 92) and that each Member of the Organization “undertakes to comply with the decision[s] . . . to which it is a party” (Article 94 (1)).

---

49. 5 US (1 Cranch) 137 (1803).
The question of judicial review arises in a more forceful way in the twenty-first century as a result of the increasing quasi-legislative role assumed by the Security Council as part of its effort to address the global terrorist threat. The more that the Security Council uses its broad powers, the greater the number of controversies that will arise for judicial review.

The ICJ has taken steps to approach the assessment of Security Council resolutions through advisory opinions and its contentious jurisdiction, though this has occurred in a tangential way because of the United Nations’ early history. As noted previously, such review can be focused on the internal validity of Security Council resolutions vis-à-vis the Charter (review ad intra) or on the external validity of Security Council resolutions vis-à-vis the norms of jus cogens and human rights standards (review ad extra). This section will address the first category through the study of the Advisory Opinions of the ICJ, which tend to be more open-minded towards judicial review, and the contentious jurisdiction, which tends to be conservative and cautious, always considering such resolutions with a presumption of validity.

Before we approach the study of each case, it should be noted that we are not here concerned with the Tadić case, one of the most exhaustive cases of judicial review before an international court, but a very special one because it was exercised by an ad hoc tribunal established by a Security Council resolution under Chapter VII of the Charter. In brief, the Appeals Chamber of the International Criminal Tribunal for the former Yugoslavia (ICTY) had to deal with the issue of its own legality and scope to declare itself competent. Whereas the Trial Chamber argued that the competence of the tribunal was precise and narrowly


54. Prosecutor v. Tadić case, Case No. IT-94-1-AR72, 2 October 1995, ICTY Appeals Chamber, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction.
defined, the Appeals Chamber argued that the principle known as “la compétence de la compétence” is considered to be a “major part” of the inherent jurisdiction of any judicial tribunal, consisting of its “jurisdiction to determine its own jurisdiction.” Moreover, the Appeals Chamber invoked the residual power that may derive from the requirements of the “judicial function” itself, on the grounds that the Security Council decided to establish a “special” type of subsidiary organ, a tribunal. The ICTY Appeals Chamber delivered a landmark decision on Tadić’s interlocutory appeal on jurisdiction: Security Council resolutions are subject to judicial review. Although still significant, we leave this case aside, as it does not concern the issue of international organization responsibility.

Paragraph 1  The Expansive Approach to Judicial Review

A. Certain Expenses of the United Nations

The question referred to the ICJ was whether the expenditures authorized by certain General Assembly resolutions constituted “expenses of the organization” within the meaning of Article 17, paragraph 2, of the Charter. The expenditures were those relating to the operations in the Middle East in the late 1950s and in the Congo in 1960-1961, in pursuance of certain resolutions of the General Assembly and the Security Council. Essentially, the ICJ was called upon to determine the “validity” of the Security Council and General Assembly resolutions by assuming a sort of power for judicial review. Through the Advisory Opinion on Certain Expenses of the United Nations, the ICJ suggested that that “it might consider exercising a power of judicial review.”

The assessment was centred on a situation in which two organs of the United Nations exercised their functions. Thus, the question was whether these organs exercised their respective functions in conformity with the UN Charter. The ICJ argued that, although the act in question may have been committed outside the limits of General Assembly func-

56. Prosecutor v. Tadic case, Case No. IT-94-1-AR72, supra footnote 54, paras. 18-22.
57. Ibid., para. 14.
tions, in the light of the Security Council’s primary responsibility for the maintenance of international peace and security, it appeared to have, at least from the perspective of third parties, a close connection with the exercise of an official function. The ICJ made it clear that an internal ultra vires act meant that action was taken by a wrong organ, it was irregular as a matter of that internal structure, but this would not necessarily mean that the expense incurred was not an expense of the organization. Thus, the case was a question of the distribution of powers between the Security Council and the General Assembly in the United Nations. The ICJ formulated its arguments in the form of a presumption: as the action of the Security Council was appropriate for the fulfilment of one of the stated purposes of the United Nations, the presumption was that such action was not ultra vires “the Organization”.

In this framework, support for judicial review could also be found in certain individual opinions. Judge Bustamante defended the possibility of judicial review by the ICJ assertively:

“It cannot be maintained that the resolutions of any organ of the United Nations are not subject to review: that would amount to declaring the pointlessness of the Charter or its absolute subordination to the judgment, always fallible, of the organs.”

Thus, the need to control the acts of the UN organs is based on a dynamic interpretation of the Charter in which a control among the powers gives a sense to the evolution of the Organization. In his separate opinion, Judge Morelli proposed the review of the acts of the United Nations in special cases:

“It must be recognized that there may be cases in which an act of the Organization would have to be considered as invalid, and therefore as an absolute nullity. . . . It is only in especially serious cases that an act of the Organization could be regarded as invalid . . . Examples might be a resolution which had not obtained the required majority, or a resolution vitiated by a manifest excès de pouvoir.”

---

60. *Certain Expenses of the United Nations*, supra footnote 58, p. 168. The Court stated that “both national and international law contemplate cases in which the body corporate or public may be bound, as to third parties, by an ultra vires act of an agent”.


Therefore, the answers of both the ICJ and certain judges could be interpreted as being in favour of judicial review. This perspective needs to be linked to the second part of the Advisory Opinion related to the issue of the responsibility of international organizations, in which the ICJ admitted that the ultra vires acts of an international organization are attributable to the international organization:

“If it is agreed that the action in question was within the scope of the functions of the Organization but it is alleged that it was initiated or carried out in a manner not in conformity with the division of functions among the several organs which the Charter prescribes, one moves to the internal plane, to the internal structure of the Organization. If the action was taken by the wrong organ, it was irregular as a matter of that internal structure, but this would not necessarily mean that the expense incurred was not an expense of the Organization. Both national and international law contemplate cases in which the body corporate or politic may be bound, as to third parties, by an ultra vires act of an agent.”

The ICJ declared that ultra vires acts of an international organization’s organs and agents are attributable to the international organization, just like ultra vires acts of State organs and agents are attributable to the State. According to this view, external ultra vires acts would constitute the type of wrongful acts of international organizations that might entail the international responsibility of those organizations towards their Member States or third-State parties.

Even if international organizations have limited powers, the legal validity of ultra vires decisions of international organizations is assumed. Whatever immunity the international organizations may enjoy will not extend to acts that exceed their powers or to acts commonly described as ultra vires or in excès de pouvoir, which the Draft Articles on international organizations’ responsibility describes as “excess of authority or contravention of instructions”:

“The conduct of an organ or agent of an international organization shall be considered an act of that organization under international law if the organ or agent acts in an official capacity and within the overall functions of that organization, even if the conduct exceeds the authority of that organ or agent or contravenes instructions.”

This perspective refers to the attribution of conduct regardless of

whether an *ultra vires* act is valid under the rules of the international organization. In the same vein, the ILC supports the idea that “even if the act was considered to be invalid, it may entail the responsibility of the organization. The need to protect third parties requires attribution not to be limited to acts that are regarded as valid”\(^{67}\). As there are legally protected interests for third parties, the right to a remedy is stressed\(^{68}\).


A decade after the Advisory Opinion on *Certain Expenses*, the ICJ discussed the consequences of the termination of South Africa’s mandate over Namibia (the former South West Africa), which was decided upon by the General Assembly resolutions and confirmed by the Security Council. When South Africa refused to comply with the resolutions, the Security Council requested an advisory opinion from the ICJ on the legal consequences of South Africa’s continued presence in South West Africa notwithstanding Security Council resolution 276. In its opinion, the ICJ repeatedly considered the validity of both the General Assembly and Security Council resolutions on the following grounds\(^{69}\):

“Undoubtedly, the Court does not possess powers of judicial review or appeal in respect of the decisions taken by the United Nations organs concerned. The question of the validity or conformity with the Charter of General Assembly resolution 2145 (XXI) or of related Security Council resolutions does not form the subject of the request for advisory opinion. 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.”\(^{70}\)

---

68. Wellens, *supra* footnote 4, pp. 16-17.
The ICJ appeared to contradict itself. After a categorical initial rejection of a judicial review, it affirmed its competence to assess the Council’s decisions and their conformity with international law. The ICJ concluded that “the decisions made by the Security Council... were adopted in conformity with the purposes and principles of the Charter and in accordance with its Articles 24 and 25.”

In their concurring opinions, Judge Petén, Judge Onyeama and Judge Dillard underlined the need and the responsibility for judicial review. If determining the validity of decisions was necessary to reach a correct judgment or opinion, the ICJ could not avoid such a determination.

Moreover, Judge Fitzmaurice, in a more-than-clear act of judicial review through his dissenting opinion, declared that the acts of the Security Council in relation to mandates “would have lacked all raison d'être... if the Assembly’s previous resolutions lacked in se validity and legal effect.”

In contrast, Judge Nervo expressed opposition to a doctrine of judicial review of the principal organs of the United Nations “without specific request to that effect”; thus, he leaves room for judicial review at the request of one of the UN organs referred to in Article 96 of the UN Charter; the General Assembly and the Security Council may request the ICJ to give an advisory opinion “on any legal question” (Article 96 (1)). This limit is the only one determined by the Charter and since the General Assembly has such broad competences, it is not easy to find limits for the request of judicial review.

In the Namibia case, the request for an opinion came from the Security Council, which might have put limits to the scope of the judicial review.

In considering this argument, it is important to distinguish advisory opinions from contentious cases. In the latter cases, the organ’s acts might be reviewed even in a broader sense if the claimant States would not limit, through their consent, such eventual review.

72. Legal Consequences, supra footnote 69, p. 53, para. 115.
73. Namibia case, separate opinion of Judge Onyeama, pp. 142-143, separate opinion of Judge Petén, p. 131, and separate opinion of Judge Dillard, pp. 151-152.
74. Dissenting opinion of Judge Sir Gerald Fitzmaurice, p. 291, para. 108.
75. Namibia case, separate opinion of Judge Nervo, p. 105.
Paragraph 2  The Restrictive Approach to Judicial Review

A. Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie

The question of judicial review of Security Council resolutions arose for the first time in a case based on the ICJ’s contentious jurisdiction in the Lockerbie case\(^77\). By determining to what extent the Security Council acted lawfully in adopting decisions under Chapter VII, the ICJ had to take a position regarding a resolution designed to force Libya to hand over the two Libyan agents suspected of placing the bomb that destroyed Pan Am flight 103\(^78\).

This Boeing 747 airliner exploded over Lockerbie in Scotland on 21 September 1988, and the Security Council condemned the crime seven days later\(^79\). When Libya refused to surrender the suspects, the Security Council adopted resolution 731 (1992), asking Libya to comply with the request made by the British and American Governments and “to provide a full and effective response”\(^80\). Libya denied the competence of the Security Council in the matter and, on 3 March 1992, filed its application against the United Kingdom and the United States before the ICJ, invoking Article 14 of the 1971 Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation (Montreal Convention), accompanied with a request for provisional measures of protection\(^81\). This case was the first to come to the ICJ since the end of the Cold War and the reactivation of the Security Council\(^82\).

---

79. UN Press Release SC/5057.
The ICJ heard the request for provisional measures between 26 and 28 March 1992 and, three days after the end of the oral hearings on the Libyan requests on 31 March 1992, the Security Council determined in resolution 748

“That the failure by the Libyan Government to demonstrate by concrete actions its renunciation of terrorism and in particular its continued failure to respond fully and effectively to the requests in resolution 731 (1992) constitute a threat to international peace and security” 83.

The ICJ declined to order provisional measures and confirmed the validity and binding force of resolution 748 (1992) 84. The controversial issue was whether the ICJ could examine the resolution in accordance with Article 25 of the Charter and whether, in conformity with Article 103 of the Charter, the obligations of the parties prevailed over any other agreement, including the Montreal Convention 85. According to Libya, by a full judicial review, the ICJ should have declared resolution 748 “ultra vires” on the grounds that it was not compatible with the UN Charter 86. Libya’s argument was that the Security Council resolutions did not, in fact, require the surrender of the accused, but if they did, they were ultra vires. The United Kingdom answered that the charter does not confer upon the ICJ a general power to review the decisions of political organs 87, to which the representative of Libya said the following:

---

83. Security Council resolution 748 (31 March 1992), para. 7. The Security Council moved from Chapter VI, under which resolution 731 was adopted, to Chapter VII as the basis of resolution 748.

84. In its application for provisional measures, Libya asserted that the 1971 Montreal Convention was the only appropriate Convention in force between the parties dealing with the offences listed in Article 1. According to the application, both the United States and the United Kingdom had breached the Convention by ignoring, bypassing, and directly violating the above provisions. See Libyan Application, 3 March 1992, ICJ General List No. 88, para. 3 (a) and 3 (b) (f).


87. Counter-Memorial of the United Kingdom, 31 March 1999, paras. 4.17-4.29.
“The resolutions of the political organs are no isolated legal artefacts but are adopted within a matrix of legal instruments and rules of general international law. And it is legally impossible to limit the judicial function of judicial review to the issue of formal validity of resolutions.”

Thus, according to Libya, the determination by the Security Council in resolution 748 that Libya’s conduct constituted a threat to international peace and security was not justified. Accordingly, as there was no threat to international peace and security, the Security Council was acting ultra vires.

However, at the provisional measures stage, the ICJ considered the legality of Security Council resolutions “with a very strong presumption of intra vires”. According to the ICJ, which reserved its competence to query the validity of resolution 748 (1992) on its merits, in the exercise of its discretionary competence given by Article 39 of the UN Charter, the Security Council decided that there existed a threat to the peace, and it was not the role of the ICJ to question that decision. Therefore, the judgment appeared to give deference to the Security Council once a decision had been made under Chapter VII. The ICJ, by assuming the validity of Security Council resolutions, found that these resolutions provided a legal justification for the non-application of the Montreal Convention. Nevertheless, several judges in their individual opinions expressed slight differences on judicial review. Judge Oda anticipated that “the Court has ‘at present’ no choice but to acknowledge that pre-eminence” of resolution 748, indicating that the review might still take place at the merits stage. Judge Sir Robert Jennings argued that the ICJ’s function was to “protect” the Security Council’s exercise of its power and duty conferred by the law. He stated:

“Both kinds of decision [political and judicial] are necessary in any civilized society governed by the rule of law. Neither kind of decision can be said to be per se superior to the other kind; they should rather be complementary.”

90. 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; Libyan Arab Jamahiriya v. United States of America), International Court of Justice, ICJ Reports 1992, pp. 15 and 127 and pp. 1 and 113 respectively.
Every judge carefully avoided the fundamental issue underlying the arguments of the parties, that of their own power of judicial review of the decisions of the Security Council. Judge Bedjaoui noted the discretionary nature of the situation, as he recognized the fact that the ICJ refused to follow one of the parties in criticizing the action of the Security Council and considered the hypothesis of requesting an advisory opinion from the ICJ that could have provided guidance before the adoption of resolution 731 of 21 January 1992. He found it “not satisfactory for the judicial function” that the Security Council annihilated the right to provisional measures by the adoption of resolution 748 when the case was sub judice. Judge El-Kosheri emphasized that the Security Council committed an act of “excès de pouvoir” when adopting paragraph 1 of resolution 748 (1992). Additionally, Judge Shahabuddeen stated that “prima facie” Libya’s rights to interim measures could not be enforced during the life of resolution 748.

Rather than presenting a solution, the combination of Article 25 and Article 103 presented a problem because another two forms of Charter-based obligations were not taken into consideration, such as provisions on fundamental human rights. Furthermore, the application of the Montreal Convention as lex specialis and lex posterior in relation to the Charter was also ignored. The Lockerbie case inaugurated the most acute problem of the relationship between the Security Council and the ICJ, a problem for which the solution has not yet been found.

B. Legality of the Use of Force (Yugoslavia v. 10 NATO Member States)

The Legality of the Use of Force cases offered a clear opportunity to tackle the question of whether the acts of NATO could be imputable to NATO itself, to the participating States individually or collectively, or to both the States and NATO jointly. Yugoslavia instituted

94. Ibid., p. 45, para. 23.
95. Dissenting opinion of Judge El-Kosheri, p. 105, para. 33.
96. Dissenting opinion of Judge Shahabuddeen, p. 29.
99. Laurence Boisson de Chazournes, “La Cour internationale de justice aux prises avec la crise du Kosovo: à propos de la demande en mesures conserva-
proceedings before the ICJ against 10 Member States of NATO, but it did not raise claims against NATO as an international organization due to the limits of Article 34 (1) of the ICJ Statute. Yugoslavia asked the ICJ to hold each of the respondents individually responsible for certain breaches of international law arising from their participation in the NATO air campaign against Yugoslavia in March and April 1999.

Nevertheless, in its Applications for provisional measures, Yugoslavia alleged that

“The North Atlantic Council directs the war against Yugoslavia as a joint enterprise. It constantly says so. It would be a legal and political anomaly of the first order if the actions of the command structure were not attributable jointly and severally to the member states. This joint and several responsibility is justified both in legal principle and by the conclusion of the member states.”

Furthermore, Yugoslavia added that “[t]he command structure of NATO constitutes an instrumentality of the respondent States, acting as their agent”. From the perspective of international responsibility, it was necessary to clarify both the concept of joint responsibility and the existence (or non-existence) of an agency relationship between NATO and its Member States.

Several respondent States argued that the conduct was not imputable to Member States, either individually or jointly, but solely to NATO. Canada based this argument on Article 5 of the 1949 NATO Convention:

“Joint and several liability for acts of an international organization, or for the acts of other States acting within such an organization, cannot be established unless the relevant treaty provides for such liability. Article 5 of the 1949 NATO Convention . . . provides no such indication of an assumption of joint and several

liability, and neither do the provisions of the Handbook respecting the integrated military structure of the Organization.\textsuperscript{104}

Canada argued that because the NATO Convention provided neither a joint liability nor an agency relationship between the organization and its Member States, the conduct could not be attributed to the latter. In considering this question, Canada applied what Sarooshi denominates the “general presumption against the establishment of an agency relationship between an international organization and its Member States”\textsuperscript{105}. In fact, implicitly, Canada referred to the main reasons for the existence of such a presumption, that two of the conditions for the establishment of an agency relationship — consent and control — were not fulfilled\textsuperscript{106}.

On a different basis, the French Government’s preliminary objections alleged that the principle laid down in Article 28, paragraph 2, of the ILC Draft Articles on State Responsibility had to be applied \textit{mutatis mutandis}\textsuperscript{107}. According to France, this principle was fully transposable to cases where the power of direction or control is exercised not by another State but by one or two (as NATO was responsible for the “direction” of the Kosovo Force (KFOR) and the United Nations for the “control” of the same body) international organizations\textsuperscript{108}. In the same vein, Pellet held that the conduct of NATO forces could be attributed only to NATO, even if this organization was not recognized explicitly by the claimant. The reason given was that, in international law there is no norm providing that States are, due to their quality as members, jointly or subsidiarily responsible for the obligations of an international organization\textsuperscript{109}.

In contrast, the Committee on Accountability of International Organizations of the International Law Association had already suggested that “the responsibility of an IO does not preclude any separate or concurrent

\textsuperscript{104}Legality of the Use of Force (Yugoslavia v. Canada), CR 99/27, 12 May 1999, p. 10.


\textsuperscript{106}Ibid.

\textsuperscript{107}“An internationally wrongful act committed by a State in a field of activity in which that State is subject to the power of direction or control of another State entails the international responsibility of ‘that other State’” (understood as “that international organization”) (emphasis added). ILC, Draft Articles on State Responsibility, Yearbook of the International Law Commission, 1996, Vol. II, Part Two, p. 61.

\textsuperscript{108}Legality of Use of Force (Yugoslavia v. France), 5 December 2004, Preliminary Objections, ICJ Reports 1999, p. 33, para. 46.

responsibility of a State or of another IO which participated in the performance of the wrongful act. In the same sense, ILC Special Rapporteur Gaja was favourable to the imputation to NATO of the acts in question. He argued that

“[a]ttribution of conduct to an international organization does not necessarily exclude attribution of the same conduct to a State, nor does, vice versa, attribution to a State rule out attribution to an international organization. Thus, one envisageable solution would be for the relevant conduct to be attributed both to NATO and to one or more of its member States, for instance because those States contributed to planning the military action or to carrying it out.”

The ICJ had the tendency of “judicializing” new conduct in international relations but in this case it hid behind its legal competence, finding it had no jurisdiction to hear the case. We can observe that the regime on international organizations’ responsibility at the moment of the Legality of Use of Force cases was of a general nature.

The practice available was limited, and the ILC’s first report on the responsibility of international organizations was only published in 2003. In the future, the ICJ will be obliged to adopt a stance in favour of a restrictive interpretation of law or in favour of an interpretation that harmonizes and takes into account legal and political dimensions.

The ICJ declared itself to be profoundly concerned with the use of force in Yugoslavia (although it did not indicate by whom), “which under the present circumstances raise very serious issues of international law”, an expression that suggests the Court’s concern over the personality and independence of international organizations.

SECTION 4 JUDICIAL REVIEW OF SECURITY COUNCIL RESOLUTIONS BY EUROPEAN TRIBUNALS

Paragraph 1 Security Council Resolutions Imposing Sanctions

As the organ primarily responsible for the maintenance of international peace and security within the United Nations, the Secu-

rity Council can take the measures indicated in Chapter VI and Chap-
ter VII of the UN Charter when international peace and security is under
threat (Article 39 of the UN Charter). One of these measures is the
imposition of economic sanctions against a State (Article 41). Even if
the word “sanction” does not appear in the Charter, “UN sanctions” is
the common denomination for the coercive measures decided on by the
Security Council based on Article 41 of the Charter.\textsuperscript{116}

Since the end of the 1990s, the idea of a war on terror and the failure
of the general economic embargos have led to the use of a different
sanctioning technique based on targeting specific individuals and private
organizations suspected of being involved in terrorist activities.\textsuperscript{117}
The blacklisting of individuals and private entities and the freezing of their
financial assets have become the specific measures taken in these
instances. The use of targeted sanctions by the Security Council under
resolutions 1267 (1999) and 1373 (2001) and the reliance by States on
Article 103 of the UN Charter to preclude any human rights-based
challenge to these sanctions provoked a number of litigations focused on
the limits that can be assigned to the action of the Security Council.

As we have observed in the previous section, resolutions of the Secu-
rity Council have been largely excluded from judicial review, as neither
the ICJ nor any other court, international or domestic, has any express
power to review them. As this section will show, in recent European
cases courts have reviewed the implementation of targeted sanctions,
first with regard to conformity with norms of \textit{jus cogens} and, afterwards,
in terms of compliance with international human rights standards.

Even if the scope of the measures taken by the Security Council
differs, the question is whether there is any restriction on the judicial
review of its decisions. Would European judicial bodies trespass upon
the Security Council’s prerogatives if they reviewed the implementing
measures of acts taken by the Council?

\textbf{A. Comprehensive sanctions:} Bosphorus Airways v. Ireland

In May 1993, an airline company registered in Turkey, Bosphorus Airways, leased a civil aircraft from Yugoslav Airlines. The
Irish authorities seized the aircraft during a maintenance stop-over in
Ireland. The legal basis for the measure taken by Ireland was an EC
Regulation concerning trade between the European Community and the

\textsuperscript{116} Fredrik Stenhammar, “United Nations Targeted Sanctions, the Interna-
tional Rule of Law and the European Court of Justice’s Judgment in \textit{Kadi} and
\textsuperscript{117} www.un.org/terrorism/sc.htm.
Federal Republic of Yugoslavia, which itself was based on a resolution of the Security Council.

As a result of this seizure, Bosphorus Airways took Ireland to the ECtHR. Because the aircraft was impounded by Irish authorities on Irish territory, the ECtHR accepted its jurisdiction under Article 1 of the ECHR. For the first time, the ECtHR agreed to examine a complaint on its merits concerning measures taken by a State Member of the European Community to execute an EC Regulation derived from UN sanctions against the Federal Republic of Yugoslavia. The ECtHR considered such measures to be susceptible to judicial review. The ECtHR held that the contracting parties to the ECHR are not prohibited from transferring sovereign powers to an international organization but that States remain responsible for all acts and omissions of their organs regardless of whether the act or omission was a consequence of domestic law or of the necessity to comply with EC obligations.

In Bosphorus, the ECtHR sought a balance between two competing interests: membership in an international organization and human rights protection. By reinforcing its function as a constitutional instrument of European public order, the ECtHR made it clear that the transfer of powers to an international organization is compatible with the Convention, provided that fundamental rights receive an “equivalent level of protection” within the organization. If the organization provides such equivalent protection, the ECtHR will presume that the State acted in compliance with the Convention and did no more than implement the obligations flowing from its membership in the organization.

The ratio decidendi was based on the fact that Ireland had no margin of appreciation to take the measures to implement EC Law. However, that presumption might be rebutted when the protection of the Convention rights in the particular case is regarded as “manifestly deficient”.

Thus, the ECtHR introduced a two-stage test: first, it examines whether the organization provides equivalent protection, and, here, the presumption is to be applied; and second, it makes an assessment of whether the presumption must be rebutted in the concrete case because

---

118. EC Regulation No. 990/93.
121. Loizidou v. Turkey (Preliminary Objections), 23 March 1995, European Court of Human Rights, paras. 75 and 156.
123. Bosphorus Hava Yollan Turizm v. Ireland, supra footnote 120, para. 156.
the protection of fundamental rights is regarded as “manifestly deficient”. In Bosphorus, the ECtHR considered the human rights protection granted by the European Union to be equivalent to that of the Convention and so the presumption was applied.  

Therefore, when contracting States transfer parts of their sovereign power to an international organization, the ECtHR will assess whether the international organization gives equivalent protection. The Bosphorus presumption will be applied *a fortiori* if the ECtHR would have to decide a case in which there was no implementing action by a Member State. Furthermore, the Gasparini judgment, which originated due to a labour dispute between NATO and an employee, extended the Bosphorus presumption to an organization beyond the European Union and introduced a new rationale for the Bosphorus presumption by relaxing the due diligence standard required of contracting States. Under this standard, the ECtHR would have to determine whether the defendant State, upon joining NATO, was able to consider in good faith that the internal mechanisms for the solution of labour conflicts were not in flagrant contradiction with the ECHR. The ECtHR found the presence of a structural due-process lacuna in the international organization’s procedures (the mechanism by which the employees of an international organization can bring their employment-related claims against the international organization) to be sufficient for finding a Member State liable. The ECtHR went on to examine whether the internal mechanisms of dispute resolution were vitiated by a “manifest deficit” in the protection of fundamental rights. Such deficit in the protection of rights could not be determined in the case. The rationale was that labour disputes between international organizations and their employees do not imply an exercise of sovereign powers by an organization and, in consequence, should not be subject to review by the ECtHR. 

Given the shortcomings of Bosphorus and Gasparini, we can conclude that an applicant will have to prove that there is either “no equivalent protection” of ECHR rights at the international organization level or that the protection in a particular case is “manifestly deficient”. Proof of the latter premise would lead to the declaration of non-fulfilment by

---

the international organization of its human rights obligations. The ECtHR attempted to ensure in this way that there would not be a jurisdictional gap regarding the responsibility of international organizations.

The aim of avoiding any gap coincides with the statement of the Recommended Rules and Practices presented by the International Law Association Committee on the issue:

“A transfer of powers to an IO cannot remove acts of the IO from the ambit of control mechanisms established by particular treaties nor can it exclude the responsibility of States who transferred powers to an IO. States should ‘make provision that a potential jurisdictional gap concerning the control of the exercise of such transferred powers does not arise’.”

Through its jurisprudence, the ECTHR developed a process of controlling EU Member States’ implementation of EU law, finding that EU law gave equivalent protection. The judgment assumed the possibility of controlling the conduct of States in the application of EU law. The only critique is that the equivalent protection criterion _in abstracto_ is insufficient and, thus, the ECTHR should have descended to a deeper analysis of the equivalence in the concrete case.

### B. Targeted sanctions: Kadi and Al Barakaat International Foundation v. Council and Commission

The litigation provoked by targeted sanctions responds to the tension between the maintenance of international peace and security as a fundamental purpose of the United Nations on the one hand and respect for human rights on the other. From the point of view of the rule of law, the aim is for effective action against terrorism to be consistent with international human rights standards.

In the _Kadi_ case, the CFI assessed a number of EC Regulations that had been adopted to reflect sanctions imposed by the Security Council against suspected terrorists and their supporters. The EC Regulations became directly applicable in the legal structure of the EU Member

---


States. According to the CFI, the lawfulness of the EC Regulations in imposing restrictive measures, both financial and personal, against individuals and associated entities suspected of terrorism was based on the fact that they were implementing Security Council resolutions 1267 (1999), 1333 (2000) and 1390 (2002), which prevailed over human rights principles enshrined in EU law.

The applicant, identified by the Sanctions Committee of the Security Council, argued that the Regulations were ultra vires because the asset-freezing procedure violated his fundamental rights to a fair trial and to respect for his property, as protected by the EC Treaty. The CFI rejected the claim that it had jurisdiction to review indirectly the compatibility of resolutions of the Security Council with fundamental rights but argued that it was legally bound by the Security Council resolutions in the same manner, as were the EU Member States.

Additionally, the CFI expressed the following constitutional perspective with regards to the relationship between the EC and the international legal order:

“It must therefore be considered that the resolutions of the Security Council at issue fall, in principle, outside the ambit of the Court’s judicial review and that the Court has no authority to call in question, even indirectly, their lawfulness in the light of Community Law. On the contrary, the Court is bound, so far as possible, to interpret and apply that law in a manner compatible with the obligations of the Member States under the Charter of the United Nations.”

Due to the application of Article 103 of the UN Charter, the CFI assumed that the international legal order is “one” and vertical. Within this unified system, the UN Charter — and Security Council resolutions — prevail over any other authority. Nonetheless, the CFI recognized that it was empowered to check indirectly the lawfulness of the Security Council resolutions in question with regards to jus cogens. The CFI could carry out an indirect judicial review and extend “highly exceptionally” to determine whether the superior rules of international law falling

129. Council Regulation EC 881/2002 of 27 May 2002 imposing certain specific restrictive measures directed against certain persons and entities associated with Osama bin Laden, the Al-Qaeda network and the Taliban. Annexed to the Regulation was the list of persons whose funds were to be frozen, based on the list made by the Sanctions Committee of the Security Council.
within the ambit of *jus cogens* have been observed\(^{133}\). However, the judicial review was confined to the correspondence of the Regulations with no other instrument of law than *jus cogens*, what the appellant called a “wrong standard of review when assessing the alleged breaches of fundamental rights”\(^{134}\).

The ECJ, by contrast, held that there is more than one legal order and declared its competence to review the EC measures designed to give effect to the Security Council resolutions under Chapter VII. The significant ambivalence in the European Union’s approach to international law and governance\(^ {135}\) is illustrated in the ECJ’s words:

> “It follows from the foregoing that the Community judicature must, in accordance with the powers conferred on it by the EC Treaty, ensure the review, in principle the full review, of the lawfulness of all Community acts in the light of the fundamental rights forming an integral part of the general principles of Community law, including review of Community measures which, like the contested regulation, are designed to give effect to the resolutions adopted by the Security Council under Chapter VII of the Charter of the United Nations.”\(^ {136}\)

Whereas the CFI attempted to review the international lawfulness of the UN sanctions through the *jus cogens*, the ECJ decided on grounds of Community Law\(^ {137}\). The ECJ declared that the implementing measures violated the fundamental rights protected by the EC legal order and, accordingly, annulled the measures. The latter was considered to be an independent legal order that international law could penetrate only on the European Union’s own terms\(^ {138}\). Thus, the ECJ applied European legal standards\(^ {139}\) and did not even mention Article 103 of the UN


\(^{136}\) Joined cases C-402/05 P and C-415/05 P, 3 September 2008, European Court of Justice, para. 326.


\(^{138}\) Joined Cases C-402/05 P and C-415/05 P, *supra* footnote 136.

Charter. A dualistic and a robustly pluralist approach to international law prevailed over a soft-constitutionalist approach.\textsuperscript{140}

If procedural opportunities arise for judicial review of State acts or of decisions by the international organizations’ political organs\textsuperscript{141}, the question is how to incorporate the concept of the rule of law into the pluralist and constitutionalist approaches. I would argue that the pluralist approach offers more facilities for the accommodation of the rule of law.\textsuperscript{142}

Paragraph 2 Security Council Resolutions Authorizing Peace Operations

As is well known, the agreements provided for in Article 43 of the UN Charter between the Security Council and UN State Members for the maintenance of international peace and security have never come into effect. As a result, the Security Council invented a new formula by appealing directly to UN Member States to contribute when it needs to take action under Chapter VII.

In the framework of this new formula, the Security Council can limit itself to “authorizing” an armed operation, counting on the national contingents acting collectively. In that case, the United Nations would renounce the effective control over the operation. In contrast, if the Security Council purports to assume overall responsibility to the extent that it assumes the effective control over the operation, the operation concerned would be legally attributable to the United Nations. However, the problem is that the Security Council much more frequently uses broad language and imprecise mandates that are left to be defined in the realities of daily operations. Therefore, “one can rarely, if ever, draw any watertight conclusion as to the degree of ‘effective control’ vested in the Security Council.”\textsuperscript{143} The decisive criterion for determining responsibility, which is effective control\textsuperscript{144}, is to be identified on a factual basis.

\textsuperscript{140} Búrca, \textit{supra} footnote 135.


\textsuperscript{144} José Manuel Cortés Martín, \textit{Las organizaciones internacionales : codificación y desarrollo progresivo de su responsabilidad internacional} (Instituto Andaluz de Administración Pública, Junta de Andalucía, Seville, 2008), pp. 184-203.
The variants and nuances are infinite, as recognized by the ECtHR in *Loizidou v. Turkey* regarding State control and responsibility:

“The responsibility of a contracting party may also arise when as a consequence of military action — whether lawful or unlawful — it exercises effective control of an area outside its national territory. The obligation to secure, in such an area, the rights and freedoms set out in the Convention, derives from the fact of such control whether it be exercised directly, through its armed forces, or through a subordinate local administration.”

A. United Nations-established missions (United Nations subsidiary organs): Behrami and Behrami *v.* France and Saramati *v.* France, Germany and Norway

The cases of *Behrami and Behrami v. France* and *Saramati v. France, Germany and Norway* concerned four applicants of Albanian origin complaining about the violation of the ECHR by certain States participating in a peace-keeping mission in Kosovo. These cases were the first presented to the ECtHR regarding accountability for human rights violations committed in a territory under UN Administration. Therefore, the ECtHR first had to declare whether the impugned actions and omissions were attributable to the respondent troop-contributing States or to the international organization involved. In the event that the conduct was attributable to the international organization, the ECtHR could have considered whether the respondent troop-contributing States could also be held responsible.

The case arose from the following facts. KFOR, the NATO-led international security force, arrived in Kosovo after and pursuant to Security Council resolution 1244 (1999), which provided for the establishment of a security presence by “Member States and relevant international institutions”, “under UN auspices” and with “substantial NATO participation”. The KFOR contingents were grouped into multinational brigades led by France and Germany. The Security Council, also through resolution 1244 (1999), determined the deployment of the United Nations Interim Administration Mission in Kosovo (UNMIK), the international civil administration, which was entrusted with governmental functions.


146. *Behrami and Behrami v. France*, No. 71412/01, and *Saramati v. France, Germany and Norway*, No. 78166/01, 2 May 2007, paras. 132-133, 141 and 143 (hereinafter *Behrami* and *Saramati*).
In this context, Behrami’s sons were victims of the explosion of an undetonated cluster bomb unit dropped in Kosovo during the bombardment by NATO in 1999. This explosion caused the death of one of the boys and serious injuries to the other on 11 March 2000. The applicants argued that the incident had occurred because of the failure of French Kosovo Force troops to mark or defuse undetonated bombs that they knew to be present on the site where the explosion occurred. The complaint against France was based on Article 2 of the ECHR (the right to life).

The *Saramati* case concerned the arrest of the applicant by UNMIK police in April 2001 on suspicion of attempted murder and illegal possession of weapons as well as his extra-judicial detention by KFOR between July 2001 and January 2002. He brought a claim under Article 5 of the ECHR (the right to liberty and security) alone and in conjunction with Article 6 (1) concerning the access to court and Article 13 (the right to an effective remedy).

The cases raise two issues: first, the attribution of the impugned action and omission to the United Nations and secondly, the ECtHR’s competence *ratione personae*.

(i) *Attribution of the impugned action and omission to the United Nations*

The ECtHR decided that the conduct in both cases was not attributable to one or more ECHR States parties but rather to the United Nations. The acts of KFOR were “in principle” attributable to the United Nations and not to individual States because the Security Council retained the “ultimate authority and control so operational command was only delegated” over KFOR 147.

The factor determining the attribution of the conduct to the United Nations was resolution 1244 (1999), which “delegated” to willing organizations and Member States the power to establish an international security presence in Kosovo. Troops would operate therefore “on the basis of United Nations delegated, not direct, command” 148. In particular, for the ECtHR, the key question was whether the delegation in question was

---

147. *Behrami and Saramati, supra* footnote 146, paras. 132-143 (emphasis added).

“sufficiently limited so as to remain compatible with the degree of centralization of United Nations Security Council collective security constitutionally necessary under the Charter and, more specifically, for the acts of the delegate entity to be attributable to the United Nations”\(^{149}\).

The ECtHR then declared that the key condition for the acts of the delegate to be attributable to the United Nations was whether “the Security Council retained ultimate authority and control so that operational command only was delegated”\(^{150}\). The ECtHR observed that “KFOR was exercising lawfully delegated Chapter VII powers of the UN Security Council so that the impugned action was, in principle, attributable to the United Nations”\(^{151}\).

Regarding the alleged failure to de-mine in the Behrami case, the ECtHR considered that, in contrast to KFOR, “UNMIK was a subsidiary organ of the UN institutionally directly and fully answerable to the UN Security Council”\(^{152}\).

The fundamental issue underlying the discussion was whether the ECtHR made an attempt to support the Draft Articles on the Responsibility of International Organizations of the ILC. Particularly, Draft Article 5 provided the criterion for attribution based on the “effective control”:

“The conduct of an organ of a State or an organ or agent of an international organization that is placed at the disposal of another international organization shall be considered under international law an act of the latter organization if the organization exercises effective control over that conduct.”\(^{153}\) (Emphasis added.)

This criterion appeared to be the basis for assessing whether any act or omission by KFOR could be attributed to the United Nations\(^{154}\). However, the ECtHR focused on the assessment of effective control over the territory and not over the impugned conduct. In considering this aspect, the ECtHR considered that Kosovo was “on those dates under the effective control of the international presences which exer-

\(^{149}\) Behrami and Saramati, supra footnote 146, para. 132.

\(^{150}\) Ibid, para. 133.

\(^{151}\) Ibid, para. 141.

\(^{152}\) Ibid, para. 142.


cised the public powers normally exercised by the Government of the Former Republic of Yugoslavia” 155.

Moreover, in Behrami/Saramati the ECtHR ruled out the possibility of attribution to more than one entity 156. In fact, by reading the Commentary to Draft Article 5 of 2004, one should conclude that the ILC does not fully consider dual or multiple attribution 157.

The multiple attribution rule was suggested in 2008 in the introduction to the Commentary on the Draft Articles:

“Although it may not frequently occur in practice, dual or even multiple attribution of conduct cannot be excluded. Thus, attribution of a certain conduct to an international organization does not imply that the same conduct cannot be attributed to a State, nor does vice versa attribution of conduct to a State rule out attribution of the same conduct to an international organization. One could also envisage conduct being simultaneously attributed to two or more international organizations . . .” 158

Arguing in favour of dual or multiple attribution, Condorelli says that blue helmets are and continue to be organs of the contributing States. Their link with the sending State is not negated during their commitment with the United Nations 159. Another line of argument with the same objective and identifying the consequences of the lack of a co-responsibility regime is used by Wellens, who predicted Behrami’s final result:

“The functional decision-making autonomy of the IO is protected by the probable absence of a rule of general international law on corresponsibility of member states for the IO non fulfillment of its commitments and obligations to third parties.” 160

155. Behrami and Saramati, supra footnote 146, para. 70.
157. Consider two passages of the Commentary: “In this situation the problem arises whether a specific conduct of the lent organ or agent has to be attributed to the receiving organization or to the lending State or organization” and “The criterion for attribution of conduct either to the contributing State or organization or to the receiving organization is based according to Article 5 on the factual control that is exercised over the specific conduct taken by the organ or agent placed at the receiving organization’s disposal”, Report of the International Law Commission on the Responsibility of International Organizations, UN doc. A/59/10 (2004), pp. 110-111.
(ii) *The ECtHR’s competence ratione personae*

The intervening States argued not for attribution but rather for no jurisdiction in the sense of Article 1 of the ECHR. The question was which criterion applied to determine whether the ECtHR was competent *ratione personae* to review the acts of the respondent States carried out on behalf of the United Nations. Because it concerned the exercise of extra-territorial jurisdiction over Kosovo, the ECtHR had to determine which entity had “the effective control of the relevant territory and its inhabitants” as had been established in previous case law. Kosovo was, at that time, “under the effective control of the international presences which exercised the public powers normally exercised by the Government of the FRY.” Therefore, for the ECtHR, the question was “[L]ess whether the respondent States exercised extra-territorial jurisdiction in Kosovo but far more centrally, whether this Court is competent to examine under the Convention those States’ contribution to the civil and security presences which did exercise the relevant control of Kosovo.”

The ECtHR asked itself if it was, in fact, the appropriate forum to review the acts and omissions that had occurred within the context of a UN mission and considered that “the Convention cannot be interpreted in a manner which would subject the acts and omissions of Contracting Parties which are covered by UN Security Council resolutions . . . to the scrutiny of the Court.” The ECtHR faced the conflict between contracting parties’ obligations under the ECHR and under the law of the United Nations. It could have taken into consideration the Bosphorus path developed in relation to the European Union. Applying the Bosphorus presumption, it could have assessed whether the protection of

---


163. Behrami, *supra* footnote 146, para. 70.


165. Behrami, *supra* footnote 146, para. 149.

fundamental rights provided by KFOR was in any event “equivalent” to that under the ECHR. However, the ECtHR renounced the extension of Bosphorus jurisprudence on the grounds that the events occurred outside the scope of the application of the Convention.

The ECtHR declared its non-competence to control the activity of States acting in the application of the resolutions of the Security Council based in Chapter VII and avoided the point regarding the responsibility of the organs of the United Nations. It provided an easy “exit” to the States:

“UNMIK was a subsidiary organ of the UN created under Chapter VII and KFOR was exercising powers lawfully delegated under Chapter VII of the Charter by the United Nations Security Council. As such, their actions were directly attributable to the UN, an organization of universal jurisdiction fulfilling its imperative collective security objective.”

There was a difference between Bosphorus and the Behrami and Saramati cases. In the latter, the direct object of the judicial review would have been the Security Council resolutions and not the EC Regulations. However, notwithstanding that nuance, why did the ECtHR apply the criterion of equivalent protection for the European Union (Bosphorus) and not for the United Nations (Behrami and Saramati)? In this last case, the ECtHR acted as if there was no interplay between the UN Member States and the ECHR.

By analysing the restrictive and legally flawed decision reached by the ECHR in the joint cases Behrami and Saramati, the conclusion is that the ECHR is unlikely to be an effective remedy for local individuals alleging human rights violations by European States participating in peace support operations abroad. In consequence “a non-justiciability situation” arises. The decision may be understood by the choice to let the rationale of the effective functioning of peace support operations prevail over the effectiveness of human rights protection of local individuals.

The ECtHR’s decision provides an unsatisfactory result on the matter.

167. Behrami, supra footnote 146, para. 151.
of States’ policy abroad by allowing States to feel free to “transfer” the responsibility for any of their actions to the United Nations. Rather than a victim-oriented approach, Behrami responds, as clearly stated by Pérez de Nanclares, “to the (political) will of avoiding any kind of conflict with the Security Council in a particularly delicate issue.” The lack of any consideration of the principles of justiciability and co-responsibility reveals a regression on the extra-territorial reach of human rights obligations.

B. United Nations-authorized missions (control and command of States): Al-Jedda v. United Kingdom

The Al-Jedda case concerned a national of both the United Kingdom and Iraq who was suspected of being a member of a terrorist group involved in weapons smuggling and explosive attacks. He was detained by British troops in Iraq from 10 October 2004 to 30 December 2007. Security Council resolution 1546 (2004) explicitly authorized the Multinational Force “to take all necessary measures to contribute to the maintenance of security and stability in Iraq.” Al-Jedda complained that his detention constituted a breach of Article 5 (1) of the ECHR.

The judgment of the ECtHR in Al-Jedda first examined the issue of the jurisdiction of the United Kingdom during the detention of the applicant. If the detention of the applicant was attributable to the United Nations, the jurisdiction of the United Kingdom would be excluded, and the facts would be outside the scope of the ECHR; if it was attributable to the United Kingdom, then it would be within the scope of the ECHR. A third hypothesis could be considered, namely whether multiple and concurrent attribution to both the United Nations and United Kingdom was possible.


173. Al-Jedda v. The United Kingdom, 7 July 2011, European Court of Human Rights, No. 27021/08, (hereinafter Al-Jedda).
The second issue in the case was whether the detention of Al-Jedda infringed Article 5 (1) of the ECHR or if, on the contrary, the legal regime established pursuant to Security Council resolutions 1511 (2003) and 1546 (2004) prevailed by reason of the operation of Articles 25 and 103 of the UN Charter.

As regards the chronology of the facts of the case, on 1 May 2003, the United States of America and the United Kingdom became Occupying Powers in Iraq within the meaning of Article 42 of the Hague Regulations. The first Security Council resolution after the invasion was resolution 1483 (2003), which recognized that the United States and the United Kingdom were Occupying Powers under a unified command (the Coalition for the Provisional Authority (CPA)). These two States would exercise the powers of government temporarily, including the provision of security in Iraq. It is important to note that resolution 1483 (2003) did not assign any security role to the United Nations. Resolution 1511 (2003) was the second relevant one. The Security Council authorized a “multinational force under unified command to take all necessary measures to contribute to the maintenance of security and stability in Iraq”. It highlighted the provisional nature of the exercise by the CPA of its authority and responsibility. The CPA would cease as soon as an internationally recognized representative Iraqi Government could be established. Finally, the last resolution of relevance was resolution 1546 (2004), which was adopted three weeks before the end of the occupation and the transfer of authority from the CPA to the interim Government of Iraq. This resolution reaffirmed the authorization for the Multinational Force established under previous resolution 1511 (2003) without any indication that the Security Council intended to assume any greater degree of control or command over the Multinational Force.

(i) Jurisdiction and detention by the Multinational Force

The applicant alleged that he fell within the jurisdiction of the United Kingdom because he had been detained in a British-run military prison in Iraq. He argued that “in a multi-State operation, responsibility lies where effective command and control is vested and practically exercised”. In Iraq, the coalition forces worked through the CPA and the unified command over the multinational force was under the control of the United States and the United Kingdom. The letter from the US Secretary of State to the President of the Security Council annexed to reso-

174. Al-Jedda, supra footnote 173, para. 78.
176. Al-Jedda v. The United Kingdom, 7 July 2011, European Court of Human Rights, No. 27021/08, para. 69.
olution 1546 (2004) undermined any suggestion that the Multinational Force was under UN authority and control. By both Security Council resolutions 1511 (2003) and 1546 (2004), the United Nations gave the Multinational Force express authority to take steps to promote security and stability in Iraq, and there was no delegation of UN power. Therefore, the United Nations did not assume any degree of control over either the force or any other of the executive functions of the CPA.

In contrast, the Government of the United Kingdom defended the analogy between Behrami and Saramati and Al-Jedda on the grounds that, in both cases, when authorizing the KFOR and when authorizing the Multinational Force, the Security Council acted expressly under Chapter VII of the UN Charter. The United Kingdom referred to the “ultimate authority and control” as the key question identified by the ECtHR in Behrami and Saramati to determine whether the acts of the delegate can be attributable to the United Nations. Following this line of reasoning, the United Kingdom asserted that the Security Council retained the control over the Multinational Force as it did over KFOR.

However, the ECtHR declared that the situation was clearly distinguishable from that considered in Behrami and Saramati because resolution 1244 (1999) was a major and explicit coercive measure adopted under Chapter VII by which the United Nations delegated to KFOR the function of maintaining security.

“The Court does not consider that, as a result of the authorization contained in Resolution 1511, the acts of soldiers within the Multi-National Force became attributable to the United Nations or — more importantly, for the purposes of this case — ceased to be attributable to the troop-contributing nations.” (Emphasis added.)

Thus, authorization by the Security Council does not indicate attributability to the United Nations, or, more precisely, “exclusive attributability” to the United Nations. As was observed by Milanović, the words of the ECtHR represent a “crucial development, as the ECtHR now essentially admits the possibility of dual or multiple attribution of the same conduct to the UN and to a state, a possibility that it did not entertain in

177. Al-Jedda, supra footnote 176, paras. 71-72.
179. Al-Jedda, supra footnote 176, para. 66.
180. Ibid.
181. Ibid., para. 80.
As if it may appear to be an advertent error, the ECtHR accepts the idea that the detention was attributable to the United Kingdom but could have also been attributable to the United Nations if there could have been an indication that the Security Council intended to assume any degree of control or command over the Multinational Force.

(ii) Infringement of Article 5 (1) of the ECHR

At this stage of the case, we are able to deduce that, alongside the problem of attributability, the other key question was that there was a clash between a power and duty to detain authorized by the Security Council and a fundamental right that the United Kingdom had undertaken to secure to those within its jurisdiction. Of particular interest was the right to security and not to be deprived of one’s liberty save in express cases and in accordance with the procedure prescribed by law (Article 5 (1) of the ECHR).

Al-Jedda’s argument was that Article 103 of the UN Charter was not applicable because resolution 1546 (2004) merely “authorized” the United Kingdom to detain persons considered to be security threats but did not “oblige” the State to do so. Therefore, no conflict arose, as Article 103 accords pre-eminence only to “obligations” under the Charter. The ECtHR provided the following explanation regarding resolution 1546:

“[The Security Council] did not require a State to take action incompatible with its human rights obligations, but instead left a discretion to the State as to whether, when and how to contribute to the maintenance of security. Respect for human rights was one of the paramount principles of the UN Charter and if the Security Council had intended to impose an obligation on British forces to act in breach of the United Kingdom’s international human rights obligations, it would have used clear and unequivocal language.”

The applicant highlighted the European Court’s own qualification of the ECHR as the “constitutional instrument of European public order” in the field of human rights. Thus, it was not only that Security Council resolutions issued authorizations rather than obligations; in any case, they could neither displace nor extinguish the ECHR. Two precedent

183. Al-Jedda, supra footnote 176, para. 93.
184. Behrami, supra footnote 146, para. 145, and Bosphorus, supra footnote 120, paras. 155 and 156.
judgments were used by the applicant: the ECJ’s decision in Kadi, which declared that Security Council resolutions could not affect human rights protection under the ECHR, and the ECHR’s decision in Bosphorus, which declared that Security Council resolutions could potentially displace the ECHR if the European Community provided equivalent protection of human rights. Both of these judgments opted for a pluralist international legal order for the benefit of human rights.

In contrast, the United Kingdom argued that the Multinational Force acted under such an authority for the purposes of Articles 25 and 103 of the UN Charter. Therefore, the United Kingdom’s obligation under resolution 1546 (2004) took precedence over its obligations under the ECHR. During the proceedings held in the House of Lords, Lord Bingham noted that, in certain situations, the Security Council can adopt resolutions couched in mandatory terms, but that, in practice, the Security Council can do little more than give “authorization” to Member States. Therefore, and according to the doctrine, the obligations of Article 103 of the UN Charter should not be interpreted in a narrow and contract-based manner, and resolutions containing authorizations are also covered by Article 103.

The ECHR designed a rule for interpreting Security Council resolutions:

“The Court considers that, in interpreting its resolutions, there must be a presumption that the Security Council does not intend to impose any obligation on Member States to breach fundamental principles of human rights. In the event of any ambiguity in the terms of a Security Council resolution, the Court must therefore choose the interpretation which is most in harmony with the requirements of the Convention and which avoids any conflict of obligations.”

The ECHR created an interpretative presumption — the Al-Jedda presumption — to secure conciliation between human rights and compliance with UN Security Council resolutions. The norm conflict was “minimized” by a judicial interpretation; indeed a presumption against a

---

185. Al-Jedda, supra footnote 176, para. 17.
186. One example is Security Council resolution 820 (1993) which decided that “all states shall impound all vessels, freight vehicles, rolling stock and aircraft in their territories” in reference of Bosphorus case and the EC Regulations giving effect to it.
188. Al-Jedda, supra footnote 176, para. 102.
norm conflict was evident\textsuperscript{189}. The ECtHR imposed on itself an interpretative norm in cases of ambiguity:

“The presumption must be that the Security Council intended States within the Multi-National Force to contribute towards the maintenance of security in Iraq while complying with their obligations under international human rights law.”\textsuperscript{190}

Security Council resolutions gave authorizations to take measures to contribute to the maintenance of security in Iraq. However, none of these resolutions required the United Kingdom to place an individual into indefinite detention without charge. Rather than binding obligations derived from the Charter, the United Kingdom’s obligations derived from Article 5 (1), ECHR, which was not displaced and was therefore applicable and violated\textsuperscript{191}.

The ECtHR’s assessment offers a more illuminating approach than previous judgments. It sheds light on the possibility of dual attribution; thus, it moves towards a non-monolithic vision of attributability. However, it does not yet offer any clear solution to co-responsibility.

SECTION 5 \hspace{1em} CONCLUSION

This chapter has responded to the question of whether and to what extent international courts and tribunals contribute to the development of a regime of international organizations’ responsibility. The judicial organs considered — the ICJ, the CFI, the ECJ and the ECtHR — react to the question of the direct or indirect “reviewability” of the acts of international organizations in a largely unsystematic way.

The case law of the international tribunals regarding judicial review and its connection with the international responsibility of international organizations spreads in various dimensions. The tensions among the judicial decisions, involving the interplay of limitations and exclusions, is perhaps evidence of an immature international legal order in this regard.

The strong presence of international organizations in the international field as a result of the quantitative and qualitative increase of their functions is not matched by the judicial development of a law of international organizations’ responsibility. To facilitate the development

\textsuperscript{190} Al-Jedda, supra footnote 176, para. 106.
\textsuperscript{191} Al-Jedda. Only in the dissenting opinion of Judge Poalelungi.
through jurisprudence, two conditions are necessary: the density of primary rules and the coherence of the judicial organs applying such rules in the settlement of disputes involving international organizations. Specifically, the judicial responses to the concrete question of the responsibility of international organizations are found in a variety of interpretations of the international regimes and even in the gaps of such regimes. The efficacy of the judicial organs will lie in their capacity to promote harmonizing solutions in a system supposed to be based on the rule of law.

Two different conceptual frameworks have driven this analysis: one that conceives of international law as a constitutional system and one that sees it as a pluralist one. In considering these two approaches, the question is whether one or the other fits better with the principles of justiciability and human rights standards. Perceptions and expectations of the courts make the mechanism of judicial review a prevailing approach for finding an answer. The boundaries of the principle of justiciability will depend on the intensity of the review exercised by judicial organs.

In any event, the solutions concerning multiple responsibility for the wrongful acts of international organizations will have to focus on the tension between the preservation of the autonomy of international organizations and the human rights regime. Ideally, jurisprudence should move towards a convergence of the two extremes, which should be presumed to be compatible.

Judicial organs have taken two different directions, the one of the ICJ and the one of the European courts (ECtHR and ECJ). Requests for advisory opinions to the ICJ have been rather infrequent, even after the end of the Cold War. Only six advisory opinions have been requested, and none related either to the relationship between the UN organs or to the responsibility of international organizations. However, the approach through advisory opinions has been more favourable to judicial review than an approach through contentious proceedings, where the opportunities for incidental review have been scarcely considered. In contrast, European regional courts (ECtHR and ECJ) have pushed a


194. The Advisory Opinion on the Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights (29 April 1999) was centred on an individual’s responsibility, not on the responsibility of the international organization. However, this Advisory Opinion could also be the object of discussion as regards responsibility.
recent trend towards *direct* judicial review. Although they have proceeded in an ambivalent way, these judicial organs have found themselves to be empowered to undertake judicial review on the grounds of international human rights standards directly claimed in the proceedings related to international organizations.