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INTERNATIONAL LAW AND THE RULE OF LAW

The rule of law cannot achieve its main goal – the protection of individual freedom and well being – without international law. The peculiar characteristics of international law and international legal order do not harm the rule of law. There is nothing inherent in international law that is an obstruction to the rule of law. International human rights law plays a particular role in strengthening the rule of law. The revolt of the European Court of Justice against the arbitrary interference of the UN Security Council in human rights has opened a new horizon for the rule of law in relationships between individuals and international organizations.

Key words: *Rule of law. International law.*

1. INTRODUCTION

This paper aims at providing answers to whether international law serves the rule of law (hereinafter: the ROL) and whether it serves individual freedom and well-being or it serves as a shelter for unlimited power of national rulers.¹ Additionally, due to the particular characteristics of international law and the international community, as the community of sovereign States, the question is if international law is appropriate for any role in the ROL. Some suspicions concerning the issue have appeared.²

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¹ J. Waldron, “Are Sovereigns Entitled to the Benefit of the International Rule of Law?”, *The European Journal of International Law (EJIL)* 2/2011, 316–343.

² *Ibid.*

We shall endeavor to show that due to the effect of the “global village”, the ROL, limited to national law and national borders, does not suffice and require the service of international law. After a short determination of standards pertaining to the ROL, we shall endeavor to explain why the ROL needs international law. Considerations on peculiar characteristic of international law and international legal order from a perspective of the ROL will follow. The impact of the breadth and abstractness of provisions of international law, of present state international judiciary and the enforceability of international law to the ROL will be explored. Particular references to the revolt of the European Court of Justice against arbitrary interference of the UN Security Council in human rights of individuals, affected by sanctions, and to the distinguished role of international human rights law in the ROL will be made.

2. STANDARDS OF THE ROL

According to Henkin, the doctrine of the ROL was conceived by *Magna Carta Libertatum* in 1215. Henkin states: “A perhaps innocent, incidental phrase in *Magna Carta*, providing that a freeman shall be punished only ‘by the lawful judgment of his peers or by the law of the land’, came to establish the rule of law...”³ A. V. Dicey established the Anglo-Saxon doctrine of the ROL as a limitation of governmental power by the law in favor of basic rights and freedoms. According to him the main elements of the ROL are equality before the law and legal certainty.⁴ Historically, the ROL relates to the limitation of the absolute power of a ruler, but contemporarily it relates to the control of the State’s authority by the judiciary.⁵ Concluding his lecture on the ROL, delivered at Cambridge University on 16 November 2006, Lord Bingham stated that the ROL “does depend on an unspoken but fundamental bargain between the individual and the state, the governed and the governor, by which both sacrifice a measure of the freedom and power which they would otherwise enjoy”.⁶

Standards of the ROL have been defined by authors in various, but similar ways. Some standards relate to certain qualities of the law itself. The law has to consist of general rules, publicly accessible, clear enough

³ L. Henkin, “The Age of Rights”, *Human Rights* (eds. L. Henkin, G. L. Neuman, D. F. Orentlicher, D. W. Leebron), University Casebook Series, New York 1999, 11.

⁴ A. V. Dicey, *Introduction to the Study of the Law of the Constitution*, Liberty Classics, Indianapolis 1982., 120. G. Vukadinović, D. Avramović, *Uvod u pravo*, Pravni fakultet u Novom Sadu, Novi Sad 2014, 107.

⁵ W. C. Whitford, “The Rule of Law”, *Wisconsin Law Review* 3/2000, 724.

⁶ L. Bingham, “The Rule of Law”, *Cambridge Law Journal* 1/2007, 84.

to be foreseeable,⁷ to enable people to understand what the law requires of them and to predict the legal consequences of their actions, “and what they can rely on so far as official action is concerned”.⁸ The law should not have retroactive effects.⁹ The law has to be controlled by the principle of equality¹⁰ and to be in accordance with international human rights standards.¹¹ “Absence of arbitrary power” is an important requirement of the ROL.¹² The other standards refer to supremacy of the law. States, governments,¹³ public authorities,¹⁴ institutions, public and private entities and individuals have to be subjected to the law¹⁵ and no one should be above the law.¹⁶ The third group of standards distinguishes the judiciary in organization of a state: an independent judiciary established by the law,¹⁷ procedural guaranties of fairness of procedures “and allowing people an opportunity...to challenge the legality of official action, particular when it impacts on vital interests in life, liberty, or economic well-being”.¹⁸

3. THE ROL BEYOND NATIONAL LAW AND NATIONAL BORDERS

The ROL is envisaged as a national concept, as a set of legal standards that should be applied to internal legal system in favor of freedom and well-being of citizens. Such a concept cannot be complete. Waldron remarks correctly: “it may be a mistake to think that the ROL aims only

⁷ S. Chesterman, Panel on “The 2012 UN Declaration on the Rule of Law and Its Projections”, *American Society of International Law Proceedings* 107/2013.

⁸ J. Waldron, 317.

⁹ J. Crawford, “International Law and The Rule of Law”, *Adelaide Law Review* 24/2003, 4.

¹⁰ J. Waldron, 317, S. Chesterman, 467, R. E. Brooks, “Conceiving a Just World under Law: A Panel Summary of Remarks by Frederic L. Kirgis”, *Proceedings of the 98th Annual Meeting of the American Society of International Law* 2004, 126.

¹¹ The rule of law and transitional justice in conflict and post conflict societies, Report of the UN Secretary General, 23 August 2004, S/2004/616, 4; R. E. Brooks, 126.

¹² J. Crawford, 4; J. Waldron, 316; The rule of law and transitional justice in conflict and post conflict societies, Report of the UN Secretary General, 23 August 2004, S/2004/616, 4; S. Chesterman, 467; R. E. Brooks, 126.

¹³ J. Crawford, 4.

¹⁴ S. Chesterman, 467.

¹⁵ The rule of law and transitional justice in conflict and post conflict societies, Report of the Secretary General, 23 August 2004, S/2004/616, 4.

¹⁶ J. Waldron, 317.

¹⁷ J. Crawford, 4.

¹⁸ J. Waldron, 317.

to protect subjects from the state, government, or law itself. It also aims to protect them from one another, both from other individuals at the national level, and perhaps from other nation-states at the international level”.¹⁹ But, what concerning interactions among individuals at the international level? In spheres, such as economy, environment or security, individuals in one State can be affected by the acts of individuals in other States. Our thesis is that the ROL, as an exclusively national concept, is not sufficient to protect individual freedom and well-being and it should be supplemented by international law. The time has come to consider whether the ROL does indeed depend today on bargains between individuals and States at the international level. Indirect bargains between individuals and States at the international level is not a new fact. In most international fields, the State acts as an agent of their citizens. Most of international law governs directly or indirectly interactions among subjects from two or more States. If the purpose of the ROL is to defend personal freedom and well-being by a set of legal standards, international law should not be left aside. The issue might be whether a legal defense of individual freedom and well-being against any detrimental interference of foreign States or individuals in foreign States is possible without international law.

If we accept the relevance of international law for the ROL, the following issue is how standards of the ROL correspond to particular characteristics of international law and international legal order. International law addresses primarily States, not individuals. The international community, composed of sovereign States, is much more political than the legal community. The relationships among States are not relationships between the governed and the governor. There is no central government, neither general compulsory judiciary nor executive power.²⁰ However, we are not investigating the validity of the ROL at international level, but how particular characteristics of international law and international legal order affect standards of the ROL. The provisions of international law are frequently very broad. Such broad provisions leave certain freedom to States in fulfillment their obligations. If the ROL opposes the arbitrariness in the performance of State’s authority, whether the left freedom harms the ROL? If judicial control over the performance of the State’s authority is a standard of the ROL, how does the present state of interna-

¹⁹ *Ibid.*, 324, Concerning protection of individuals from other nation states at international level, see E. Benvenisty, “Sovereigns as Trustees of Humanity: On the Accountability of States to Foreign Stakeholders”, *American Journal of International Law (AJIL)* 2/2013, 295–333.

²⁰ D. Avramović, “Vladavina prava – međunarodno priznata vrednost?”, Scientific Conference “*The European Union of Nations and Universal Values*”, held on 13 September 2008 in the organization of NATEF, available at <http://natef.net/downloads/Dragutin%20Avramovic.pdf>, last visited 14 October 2016.

tional judiciary affect the ROL? We shall endeavor to address these questions. When we consider the relationship between the standards of the ROL and particular characteristics of international law, we should separate international human rights law which has had a distinguished role in strengthening the ROL.

4. THE BREADTH AND ABSTRACTNESS OF INTERNATIONAL PROVISIONS ARE NOT AN OBSTACLE TO THE ROL

Waldron says that “the ROL may be thought to require clarity in the rules that are applied to states in the international arena; it may be thought to prohibit the imposition of international obligations on states by norms whose meaning is controversial or unclear”²¹ and notes that some governments have objected that various international human rights provisions violate ROL standards, being not clear enough.²² It cannot be denied that international treaties contain sometimes controversial or unclear provisions. It happens that parties to a treaty intentionally mask an absence of their agreement on the concrete issue by unclear provision. However, it is rather an exception than a regular phenomenon of international law.

The frequent, but not prevailing, characteristic of provisions of international law is their breadth and abstractness. Under “broad” or “flexible” international provisions we understand the provisions that leave significant discretion to a State in respect of their execution. Such provisions are characterized by the absence of strict international obligations in respect to a precise result that has to be achieved or in respect of the means for its achievement. Under “abstract” international provisions we understand the provisions whose content does not determine precisely each legal situation on which the provisions apply. “Abstract” international provisions leave also some discretion to States, but it is not as large as it is in the case of “broad” international provisions. The European Court of Human Rights names it “margin of appreciation.”²³

Regulating social interactions at an international level can be a much more complex process than regulating them at national level. The variety of involved interests is considerably larger and their reconciliation requires broader legal solutions. States search for solutions that will enable an achievement of a common goal and the preservation of particular interests as far as possible. Due to that reason, international provisions

²¹ J. Waldron, 326.

²² *Ibid.*

²³ See consideration on extension of the doctrine beyond the European Convention on Human Rights in Y. Shany, “Toward a General Margin of Appreciation Doctrine in International Law”, *EJIL* 5/2006, 907–940.

foresee sometimes a range of alternative results and by achieving one of them a party fulfils obligations, established by these provisions. A good deal of international treaties is of a legislative character and the reason of abstractness of their provisions is the same as the reason of abstractness of any national legislative act.

However, the breadth and abstractness of international provisions do not contravene legal predictability and certainty in the context of the ROL. No matter whether internal constitutional rules allow the direct effects of international treaties, the broad provisions of international law are frequently of such legal characteristics that require implementation in internal law. Implementing international provisions and transforming them in internal law, States can meet standards of the ROL. Article 3 (1) of the 1998 Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters obliges parties “to establish and maintain a clear, transparent and consistent framework to implement the provisions of this Convention”. Besides that, Article 9 of the mentioned Convention requires parties to provide the rights, guaranteed by the Convention, with judicial protection and Article 9 (4) determines certain qualities of such protection. According to Article 9 (4) the procedures, foreseen by Article 9, “shall provide adequate and effective remedies, including injunctive relief as appropriate, and be fair, equitable, timely and not prohibitively expensive”. Such instructions for implementation of a treaty’s provision, which obviously meet standards of the ROL, are not typical for international treaties, but, in spite of the fact that implementation is not fully an autonomous process, there is no any obstacle that a State may not apply standards of the ROL in the process of implementation, so that implementing domestic provisions satisfies them.

However, in spite of their abstractness, some provisions of international provisions are capable of producing a direct effect. If internal constitutional rules allow the direct effect of international provisions, subjects can invoke them before internal courts, asking for the protection of their rights derived from such provisions. In such cases their determinative incompleteness might not be eliminated in the process of implementation. Or, on the other hand, in the case of implementation, the interaction between international provisions and an internal implementing act remains alive, at least, in the process of interpretation. Interpreting an internal implementing act, a national judge can take into account its international source. It means that the insufficiency of a determinative effect of an international provision might be relevant even in the case of implementation. The problem is not characteristic only for international law. It appears also in internal law and in the both cases it has to be resolved by interpretation. Rules on interpretation of international treaties are codified

in Articles 31–33 of the Vienna Convention on the Law of Treaties. The other source of clarification of broad and abstract international provisions is international judicial jurisprudence.

We shall endeavor to outline further our thesis by a short reference to the law of the World Trade Organization (hereinafter: the WTO) and international human rights law.

Bearing in mind the goals of WTO, such as full employment, raising standards of living, expanding the production of and trade in goods and services, preservation of environment and sustainable development,²⁴ on one hand, and different realities in various States, on the other, WTO law has to reconcile a lot of different and opposing interests. Due to that fact, WTO law is very complex and flexible, leaving significant discretion to Members to adjust achieving the goals to their needs, concerns and levels of development. The European Court of Justice found that a great flexibility of the GATT, which manifests in the possibility of derogation from the general rules by the measures to be taken when confronted with exceptional difficulties and in the settlement of disputes that includes a possibility of bargaining between the contracting parties, precludes direct effects of its provisions.²⁵ It means that the implementation of WTO law is necessary. However, the importance of flexibility was confirmed, for example, by the Ministerial Conference of the WTO, at its meeting in Doha, of 14 November 2001. The Conference stressed that the Agreement on Trade-Related Aspects of Intellectual Property Rights provides flexibility necessary for reconciliation of Members' right to protect public health and to advance access to medicines for all and obligation of protection of intellectual property rights.²⁶

The complexity and flexibility of WTO law does not necessary mean that legal uncertainty and unpredictability are permanent characteristics of that law. The WTO includes the Dispute Settlement Body of compulsory jurisdiction for all Members. Decisions of the Dispute Settle-

²⁴ The first recital of the Preamble of the Agreement Establishing the World Trade Organization reads: "Recognizing that their relations in the field of trade and economic endeavor should be conducted with a view to raising standards of living, ensuring full employment and a large and steadily growing volume of real income and effective demand, and expanding the production of and trade in goods and services, while allowing for the optimal use of the world's resources in accordance with the objective of sustainable development, seeking both to protect and preserve the environment and to enhance the means for doing so in a manner consistent with their respective needs and concerns at different levels of economic development,..." " http://www.wto.org/english/docs/e/legal/e/04_wto.pdf, last visited 21 September 2016.

²⁵ Case C 469/93, *Amministrazione delle Finanze dello Stato v Chiquita Italia SpA.*, Judgment of 12 December 1995, para 26–29.

²⁶ F. M. Abbott, "The WTO Medicines Decision: World Pharmaceutical Trade and the Protection of Public Health", (*AJIL*) 2/2005, 317.

ment Body make the “GATT *acquis*,”²⁷ that supplements and clarifies WTO law. Article 3 (2) of the Understanding on Rules and Procedures Governing the Settlement of Disputes defines the dispute settlement system of the WTO as “a central element in providing security and predictability to the multilateral trading system”. In his departing statement to the General Council of 14 April 1999, R. Ruggiero, Director-General of the WTO has distinguished a “combination of equality in commitments with flexibility in implementation” as “the foundation of the WTO’s success in building a respected and credible system which has strengthened the rule of law in international system”.²⁸ “A combination of equality in commitments with flexibility in implementation” is enabled by broad and flexible provisions of WTO law.

The main source of clarification of international human rights provisions is case law of human rights bodies and international human rights courts. The source is of such importance that some countries of the dualist approach to the relationship between international and national law have formally instructed their courts to follow the practice of the European Court of Human Rights.²⁹ Article 18 (3) of the Serbian Constitution, which adheres to monist tradition, instructs that provisions on human and minority rights should be interpreted, *inter alia*, pursuant to the practice of international institutions that supervise their implementation.

Abstract provisions of the European Convention on Human Rights, due to the poorness of content, frequently do not say anything about rights in a concrete situation. In such situations, the European Court of Human Rights searches for a determination in subsequent practice of the parties concerning the application of the provisions, as it is foreseen by Articles 31 (3b) and 32 of the Vienna Convention on the Law of Treaties. Article 31 (3b) of the Vienna Convention refers to subsequent practice in the application of an international treaty, which reflects an informal agreement among all parties concerning interpretation of provisions of the treaty, as to an authentic means of interpretation. Article 32 recognizes the relevance of an informal agreement of some parties, reflected by the practice, as a supplementary means of interpretation. When a provision of the European Convention on Human Rights is silent concerning the right in a

²⁷ P. Lamy, “Place of the WTO and its Law in the International Legal Order”, *EJIL* 5/ 2007, 972.

²⁸ http://www.wto.org/english/news_e/sprpr_e/sprpr_14apr99_e.doc, last visited 26 September 2016.

²⁹ The British 1998 Human Rights Act incorporating the ECHR in the UK law is explicit. Section 2(1) of the Act states: “A court or tribunal determining a question which has arisen in connection with a Convention right must take into account any (a) judgment, decision, declaration or advisory opinion of the European Court of Human Rights...”. Similar provision is inserted in section 4 of the 2001 European Convention on Human Rights Bill that incorporated the ECHR in Irish law.

concrete situation and if the practice of the application of the provision in majority of the parties discloses their sufficiently common position concerning the right in the concrete situation, the European Court of Human Rights usually takes it as determinative for the interpretation.³⁰ It is known as evolutive method of interpretation. The ECtHR has stressed many times the importance of dynamic and evolutive interpretation:

“...since the Convention is first and foremost a system for the protection of human rights, the Court must have regard to the changing conditions within the respondent State and within Contracting States generally and respond (...) to any evolving convergence as to the standards to be achieved (...) A failure by the Court to maintain a dynamic and evolutive approach would indeed risk rendering it a bar to reform or improvement (...)”.³¹

It means that the European Court of Human Rights changes its case law over time and that it might be an element of legal uncertainty. Practitioners in State Parties should look at the case law of the European Court of Human Rights and at comparative practice in the application of the Convention in other State Parties, what is not an easy task. However, legal certainty is a fundamental standard of the ROL, but not an absolute one. Any small harm made by evolutive interpretation to legal certainty has been compensated for by progress in human rights standards allowed by evolutive interpretation. Since the final goal of the ROL is protection of rights and freedoms of an individual, such compensation cannot be seen as contrary to the ROL. It should be added that the European Court of Human Rights attributes a great value to legal certainty. The Court stated: “While the Court is not formally bound to follow its previous judgments, it is in the interests of legal certainty, foreseeability and equality before the law that it should not depart, without good reason, from precedents laid down in previous cases”.³²

If the breadth and abstractness of international provisions enable necessary adjustment of local particular interests with general international goals and if there are the means for their alignment to standards of the ROL in the process of implementation or interpretation of these provisions, we cannot see harm these characteristics can cause to the ROL.

³⁰ R. Etinski, “Subsequent Practice in the Application of the Convention for the Protection of Human Rights and Fundamental Freedoms as a Means of its Interpretation”, *Thematic Collection of Papers, Harmonisation of Serbian and Hungarian Law with the European Union Law*, Novi Sad Faculty of Law 2015, 17–36.

³¹ *Christine Goodwin v The United Kingdom* App. no. 28957/95 (ECtHR, 11 July 2002) para. 74, *Chapman v the United Kingdom* App. no. 27238/95 (ECtHR, 18 January 2001) para 93, *D.H. and Others v the Czech Republic*, App. no. 57325/00 (ECtHR, 13 November 2007) para. 181, *Sampanis et autres c Grèce* App. no. 32526/05 (ECtHR, 5 June 2008) para. 72.

³² *Christine Goodwin v The United Kingdom* App. no. 28957/95 (ECtHR, 11 July 2002) para 75.

5. PRESENT STATE OF INTERNATIONAL JUDICIARY AND THE ROL

Supreme national courts are of the key importance for the ROL. By making a final determination of law in concrete situations, the supreme judicial authority harmonizes national judicial practice, providing legal certainty and equality before law. There is nothing comparable at the international level. Attempts for the establishment of a world compulsory arbitration, inspired by a desire to secure “principle of law in international relations”³³ failed at The Hague Peace Conferences in 1899 and 1907³⁴ and judicial means of dispute settlements have remained the matter of disposition of States.

However, possibilities of final judicial determination of the law in international disputes vary from one to the other field of international law, as well as from one to the other world region in the same field of international law. They depend on interests of States. The international trade regime, which functions in the framework of the WTO, includes a compulsory dispute settlement mechanism. The WTO included 164 Members on 29 July 2016.³⁵ The international legal regime of the sea, established by the UN Convention on the Law of the Sea includes compulsory judicial mechanisms of dispute settlement. There are 168 parties to that Convention.³⁶ The 1998 Rome Statute of International Criminal Court is accepted by 122 States.³⁷ The Rome Statute is not of the same type as compulsory judicial mechanism in the WTO or that, established by the UN Convention on the Law of the Sea. It should be part and parcel of international humanitarian law, of the Geneva Conventions, but it is self-standing treaty. Nevertheless, it is accepted by 122 States, a much larger number of States in comparison with 70 States which accepted compulsory jurisdiction of the International Court of Justice by unilateral declarations.³⁸ The judicial bodies of compulsory jurisdiction are, also, Criminal Tribunals or UN Compensation Commission,³⁹ established by the UN Security Council.

³³ W. I. Hull, “Obligatory Arbitration and The Hague Conferences”, *AJIL* 2/1908, 731.

³⁴ H. Lammash, “Compulsory Arbitration at the Second Hague Conference”, *AJIL* 4/ 1910, 93.

³⁵ http://www.wto.org/english/thewto_e/whatis_e/tif_e/org6_e.htm, last visited 1 October 2016.

³⁶ <https://treaties.un.org/Pages/ViewDetailsIII.aspx?src=TREATY&mtmsgno=XXI6&chapter=21&Tempmtmsg3&clang=en>, last visited 1 October 2016.

³⁷ <https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtmsgno=XVIII10&chapter=18&lang=en>, last visited 1 October 2016.

³⁸ <http://www.icj.cij.org/jurisdiction/index.php?p1=5&p2=1&p3=3>, last visited 1 October 2016.

³⁹ <http://www.un.org/press/en/2005/ik486.doc.htm>, last visited 1 October 2016.

At the regional level, a distinguished example is the European Convention on Human Rights. All 47 Members of the Council of Europe are Parties to the European Convention on Human Rights and, as such, accept compulsory jurisdiction of the European Court of Human Rights. Regional economic integrations include regional courts.

The number of States which have accepted optional mechanisms of judicial and quasi-judicial resolution of international disputes at universal and regional levels might be indicative for global trend of interaction of national and international legal orders in the context of the ROL. It is also important to note to raising number of judicial and quasi-judicial mechanisms for dispute resolutions between States and non-State private subjects. Let us just mention ICSID tribunals, human rights bodies at global level and the American Court of Human Rights, the European Committee of Social Rights or the Aarhus Compliance Committee at regional level. States are more eager to accept compulsory judiciary in some fields of international relations than in others.⁴⁰ The absence of a world compulsory mechanism for dispute resolution is not in favor of the ROL, though not an inherent deficiency of international legal order, rather the failure of States.

6. ENFORCEABILITY OF INTERNATIONAL LAW

Concerning the enforceability of WTO law, Pascal Lamy, Director-General of the WTO, says: “Everything is done to ensure that the complaint, if it is substantiated, is followed by concrete effects. After the adoption by the panel, and possibly the Appellate Body, of their ‘recommendations’, WTO Members continue to monitor and to follow up on the implementation by the losing country of the conclusions of the case. Furthermore, if the conclusions are not fully implemented, the winning party that so requests may impose countermeasures in the form of trade sanctions”.⁴¹

The European mechanism of control over respect for human rights, consisting of the European Court of Human Rights and the Committee of Ministers of the Council of Europe, which monitors the execution of the Court’s judgments, is distinguished by its capacity to be effective.⁴² Exclusion of a State from the membership of the Council is the last measure

⁴⁰ Y. Shany, “Assessing the Effectiveness of International Courts: A Goal Based Approach”, *AJIL* 106/2012, 225–270.

⁴¹ P. Lamy, 976.

⁴² D. Anagnostou, A. Mungiu Pippidi, “Domestic Implementation of Human Rights Judgments in Europe: Legal Infrastructure and Government Effectiveness Matter” *EJIL* 25/2014, 205.

in the case of persistent and grave disrespect for human rights of fundamental importance.

Concerning the judgment of the International Court of Justice Article 94 (2) of the UN Charter authorizes the UN Security Council, upon a request of a party to a dispute, to take measures to give effect to a judgment. But, the Security Council will take measures if it deems it necessary. For the time being, the Security Council has not taken such measures.

Mr. Lamy referred to counter-measures as the last resort at disposition of States to enforce law. Indeed, in a community of sovereign States, counter-measures and sanctions are a last resort for the enforcement of international law. However, it is a considerable issue on how much they are effective in relationships between small and big countries.⁴³

The existence and performances of enforceable mechanisms depends on the will of States. Despite some fluctuations, it seems that there is a rising trend of building such mechanisms.

7. THERE IS NO WORLD GOVERNMENT, BUT THE UN SECURITY COUNCIL TO INTERVENE IN BASIC HUMAN RIGHTS

Writing about the Hobbesian problem and the absence of the world sovereign, Waldron observes that there are some worries “about lawlessness or arbitrary exercise of power at the highest level of international governance, for example, in the UN Security Council” and that “there do appear to be certain Hobbes-like difficulties in subjecting its decisions to legal control (not to mention legal review)”.⁴⁴ Crawford has seen a problem of arbitrary power of the Security Council in missing “regular institutional means for bringing Charter constraints to bear on the Security Council”.⁴⁵

However, the first acts of direct and indirect control of legality of acts of the Security Council have been performed. The first instance of direct international judicial control over the Security Council resolutions was, probably, the Decision on the defence motion for interlocutory appeal on jurisdiction, adopted by the Appeals Chamber of the International Criminal Tribunal for the Former Yugoslavia on 2 October 1995.⁴⁶ The Appeals

⁴³ See critical observations about counter measures in: J. J. Jackson, “International Law Status of WTO Dispute Settlement Reports: Obligation to Comply or Option to ‘Buy Out’?” *AJIL* 98/2004, 109–123.

⁴⁴ J. Waldron, 319.

⁴⁵ J. Crawford, 10.

⁴⁶ *Prosecutor v. Dusko Tadic*, Decision on the defence motion for interlocutory appeal on jurisdiction, adopted by the Appeals Chamber of the International Criminal Tribunal for the Former Yugoslavia on 2 October 1995.

Chamber controlled whether the International Criminal Tribunal had been established in accordance with human rights standards and gave a positive answer.

But, potentially far-reaching effects of limiting arbitrary power of the Security Council were produced by judgments of the European Court of Justice in cases *Kadi* and *Al Barakaat*.⁴⁷ The European Court of Justice annulled regulations of the EU Council implementing resolutions of the Security Council on individual sanctions, since effects of human rights breaches, done by the Security Council resolutions, had been transferred by the Council's regulations in the EU legal system. Due to the violation of some human rights, the European Court of Justice deprived the Security Council resolutions of their legal effects in the EU legal system. The Judgments have provoked a huge discussion among writers.⁴⁸ The Secu-

⁴⁷ Case T 306/01, *Ahmed Ali Yusuf, Al Barakaat International Foundation v. Council of the European Union, Commission of the European Communities*, Judgment of 21 September 2005, para. 277, Case T 315/01, *Yassin Abdullah Kadi v. Council of the European Union, Commission of the European Communities*, Judgment of 21 September 2005, para. 226, Joined Cases C 402/05 P and C 415/05 P, *Yassin Abdullah Kadi v. Council of the European Union*, Judgment of 3 September 2008, para. 287, Case T 85/09, *Kadi v. Commission*, 30 September 2010, Joined Cases C 584/10 P, C 593/10 P, C 595/10 P, Judgment of 18 July 2013.

⁴⁸ C. Tomaschut, "Case T 306/01, *Ahmed Ali Yusuf and Al Barakaat International Foundation v Council and Commission*, judgment of the Court of the First Instance of 21 September 2005; Case T 315/01 *Yassin Abdullah Kadi v Council and Commission*, judgment of the Court of the First Instance of 21 September 2005, nyr", *Common Market Law Review* 43/2006, 537, E. Cannizzaro, "A Machiavellian Moment, The UN Security Council and the Rule of Law", *International Organizations Law Review* 3/2006, 189, J. d'Aspremont, F. Dopagne, "Kadi: The ECJ's Reminder of the Elementary Divide between Legal Orders", *International Organizations Law Review* 5/2008, 371, E. Sándor Szalay, "Fundamental Rights at the Crossroads", Conferința Internațională Bială, Timișoara 2008, 917, P. De Sena, M.Ch. Vitucci, "The European Courts and the Security Council: Between Dédoulement Fonctionnel and Balancing of Values", *EJIL* 20/2009, 193, See observations to this text from G. de Búrca, A. Nollkaemper, I. Canor, published under the same title "The European Courts and the Security Council: Between Dédoulement Fonctionnel and Balancing of Values: Three Replies to Pasquale De Sena and Maria Chiara Vitucci," in *EJIL* 20/2009, 853, 862, 870, respectively and the reply of P. De Sena, M. Ch. Vitucci, "The European Courts and the Security Council: Between Dédoulement Fonctionnel and Balancing of Values: A Rejoinder to Gráinne de Búrca, André Nollkaemper and Iris Canor", *EJIL* 20/2009, 889, G. De Búrca, "The European Court of Justice and the International Legal Order after Kadi", *Jean Monnet Working Papers* 1/2009, www.jeanmonnetprogram.org/papers/09/090101.html, last visited 10 October 2016. D. Halberstam, E. Stein, "The United Nations, the European Union, and the King of Sweden: Economic Sanctions and Individual Rights in a Plural World Order", *Jean Monnet Working Paper* 2/2009, <http://centers.law.nyu.edu/jeanmonnet/papers/09/090201.pdf>, last visited 10 October 2016, K. S. Ziegler, "Strengthening the Rule of Law, but Fragmenting International Law: The Kadi Decision of the ECJ from the Perspective of Human Rights", *Human Rights Law Review* 2/2009, 288, P. Takis Tridimas, J. A. Gutierrez Fons, "EU law, International Law and Economic Sanctions against Terrorism: The Judiciary in Distress?", *Fordham International Law Journal* 32/2008–2009, 660, A. Aust, "Kadi: Ignoring Inter

rity Council has established an Ombudsman Office to serve as a communicator between individuals on Al-Kaida sanctions lists and the Security Council Sanction Committees.

Reinisch noted that “with regard to individuals listed by the UN Security Council as terrorists, the Ombudsperson institution has markedly improved the situation, although Paragraph 29 of the 2012 Declaration of the High-level Meeting of the General Assembly on the Rule of Law at the National and International Levels suggests that there is still a need for reform when it ‘encourage[s] the Security Council to continue to ensure that [. . .] fair and clear procedures are maintained and further developed’.”⁴⁹

The first issue is whether the competence of the Ombudsperson should be extended to individuals affected by sanctions of the Security Council beyond the ISIL and Al-Qaida list and the following issue is whether the institution of Ombudsperson should be supplemented by other mechanisms capable of satisfying standards of the right to a fair trial. But, no doubt the revolt of the European Court of Justice against any arbitrary interventions of the Security Council in human rights has opened a new horizon for the ROL in relationships between individuals and international organizations.

8. INTERNATIONAL HUMAN RIGHTS LAW AND THE ROL

The above text has investigated a role of international law in the trans-border relationships between individuals and foreign States, between individuals from more States and between individuals and the UN Security Council concerning the ROL. International human rights law is dedicated to the most important relationships between a State and individuals under its jurisdiction, which make a substance of the ROL. By the establishment of minimal standards of human rights, that branch of international law secures a worldwide minimum of the ROL. On the other hand, by developing standards on the right of fair trial or the right to effective remedy, or by establishing standards which internal law has to meet, to be recognized as legally appropriate limits of the human rights, international human rights law directly improves the ROL.

national Legal Obligations”, *International Organizations Law Review* 6/2009, 293, M. Lukić, “The Security Council’s Targeted Sanctions in the Light of Recent Developments Occurring in the EU Context”, *Annals of the Faculty of law in Belgrade Belgrade Law Review* 3/2009, 239.

⁴⁹ A. Reinisch, “Panel on the 2012 UN Declaration on the Rule of Law and Its Projections”, *American Society of International Law Proceedings* 107/2013, 469, 473.

9. CONCLUSIONS

Standards of the ROL can be separated between those related to some qualities of the law, such as sufficient clarity and determinative power of the legal provisions to exclude arbitrary exercise of a State's authority, and those related to legal order, the separation of powers, organization of judicial system etc. Purposes of the ROL include providing all subjects with legal certainty and protection of individual freedom and well-being against illegal interferences.

Since many of illegal interferences are trans-border and come from foreign States or individuals in foreign States, a successful defense of personal liberty and well-being is not possible without international law. A State may have whatever power, but in its "sovereign isolation" the State is not capable of protecting its citizens from foreign interferences. International cooperation and international law are necessary. The particular characteristics of international law and international legal order are not obstacles for international law to serve the ROL. However, the scope and quality of the service of international law to the ROL varies from one to the other legal field and from one to the other world region in the same legal field and depend on the interests of States.

The exceptional breadth of provisions of international law has a legitimate purpose, that purpose being the accommodation of particular national interests within the common goal of general interests. International reality in fields such as economy or environment is far more complex than national, and it requires harmonization of larger number of particular interests. Due to this fact, international provisions in some fields are probably broader than national, but it does not harm the standards of clarity and legal predictability. Most of such international provisions have to be implemented in internal legal systems and by transforming them into internal law States can meet the standards of the ROL. Even beyond implementation, there are enough means at disposal of subjects for their clarification in concrete situations. Even a small harm which might be cause to legal certainty by evolutive interpretation of abstract provisions of human rights treaties by international courts and bodies is compensated in advance of international standards of human rights, brought to be evolutive interpretation.

The possibilities of international judicial determination of international law in disputes or enforceability of international law vary from one to another area of international law and from one to another world region in the same area. After the Second World War, the number of international proceedings between States and individuals has grown. That meant that possibilities of international judicial or quasi-judicial determination

of the international law in disputes between individuals and States have risen.

The revolt of the European Court of Justice against arbitrary interference of the UN Security Council in human Rights has opened a new horizon of the ROL in relationship between individuals and international organizations.

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