Strengthening the rule of law through the United Nations Security Council

Workshop paper series

The United Nations Security Council, Sanctions and the Rule of Law

Workshop held at the Australian Mission to the United Nations, New York, on 31 May 2012 by the Australian Government's Australian Civil-Military Centre and the ANU Centre for International Governance and Justice

(Project funded by ARC linkage grant LP110100708)

Judicial challenges to the United Nations Security Council's use of sanctions with some references to national implementation

Working paper No. 4.2

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1. Focus

The paper focuses on the role that courts, particularly in Europe, have played in the enforcement of United Nations Security Council (UNSC) resolutions that also affect the international human rights obligations of the State in question. At the outset, the paper examines the techniques of interpretation which the European Court of Human Rights (ECtHR) as well as certain domestic courts developed in order to reconcile obligations stemming from UNSC resolutions with (international) human rights standards.

Thereafter the paper summarizes the benchmarks for judicial protection, as developed by the courts of the European Union (EU), which are applicable within the EU legal order in relation to individuals and other entities that form the subject of targeted sanctions by the UNSC. The methodology of the EU courts distinguishes itself from those that strive for a harmonious interpretation of UNSC obligations and international human rights standards. First, the benchmarks for judicial protection are developed exclusively on the basis of EU law (which is effectively treated as a domestic legal order). Second, the result of this approach was not to reconcile potentially conflicting (international) obligations, but to send a warning to the UNSC. As long as the UNSC is unwilling and/ or unable to provide extensive judicial protection at the UN level to individuals and entities affected by targeted sanctions, the EU courts will insist on providing such protection at the regional level.[1] This, in turn, could result in a refusal to give effect to the consequences of a particular listing (such as the freezing of assets of certain individuals or entities).

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[1] Despite the introduction of the Ombudsperson and additional reforms in SC Res 1988, 1 July 2011 and SC Res 1989, July 2011, the de-listing procedure at the UN level does not yet amount to independent judicial review. See extensively Tladi & Taylor, 'On the Al Qaida/ Taliban Sanctions Regime: Due Process and Sunsetting', 10 *Chinese Journal of International Law* (2011), 771 ff.

Finally, the paper briefly draws attention to the fact that in developing countries (using South Africa as an example), the problems with the enforcement of UNSC sanctions are of a very different nature. Whereas courts within Europe, where States are are at pains to implement UNSC sanctions extensively, are concerned with an overreach of these sanctions resulting in human rights violations, developing countries frequently are not in a position to implement the UNSC sanctions. This inter alia results from the absence of national framework legislation that facilitates expedited enforcement of UNSC sanctions, lack of capacity to adopt and implement such legislation, as well as insufficient political will to give effect to international obligations.

The effective implementation of UNSC sanctions are therefore caught up between two extremes. On one hand, 'excessive implementation' in developed countries increasingly leads to court challenges that may result in a rejection of particular implementing measures. On the other hand, in many developing countries UNSC sanctions remain unimplemented. Both extremes questions the efficacy of the current manner in which the UNSC approaches targeted sanctions.

2. A human rights friendly interpretation of UNSC resolutions

The *Al Jedda* of the European Court of Human Rights (ECtHR) is the most recent and most prominent in a series of cases, indicating a reluctance on the part of courts to assume that the United Nations Security Council (UNSC) intends to limit international human rights disproportionately (let alone suspend them) through sanctions regimes or other restrictive measures.[2] The case concerned the issue whether the detention without trial of a British/ Iraqi national by British forces in Iraq in 2004, on the basis UNSC Resolution 1546 of 8 June 2004, violated Article 5(1) ECHR. The (then still) House of Lords accepted the argument of the British government that the authorization to use 'all necessary means' against Iraq in Security Council Resolution 1546 (2004) served as a legal basis for internment, despite the fact that this ground of detention was not covered by the exhaustive list contained in Article 5(1)

[2] *Al-Jedda v United Kingdom*, Appl. No. 27021/087. ECtHR, Judgement (Grand Chamber), 7 July 2011..

ECHR. Security Council Resolution 1546 (2004) would therefore constitute a justification for deviating from the ECHR.[3]

However, the ECtHR found this reasoning to be in violation of Article 5(1) ECHR. Although the ECtHR seemed to accept that obligations under the United Nations Charter (the Charter) prevailed over conflicting obligations under any other conflicting international obligation, it did not accept that in this instance such a conflict indeed existed. In fact, it adopted a strong presumption in favor of a human rights friendly intention on the part of the UNSC. It was unwilling to accept that the UNSC intended a suspension of Article 5(1) ECHR, in light of the fact that the promotion of human rights constituted one of the purposes of the United Nations.[4] This presumption constitutes a high threshold and it is unlikely that the ECtHR will accept the suspension or disproportionate limitation of rights in the ECHR unless the wording of a particular Security Council resolution leaves no room for a human rights friendly interpretation.

The position of the ECtHR in *Al Jedda* was also echoed in the separate opinion of Sir Nigel Rodley in the the *Sayadi & Vinck* decision of the United Nations Human Rights Committee (HRC). [5] In this case filed against Belgium by Mr Nabil Sayadi and his wife Ms Patricia Vinck (*Sayadi & Vinck* case), the HRC found Belgium in breach of Article 12 ICCPR, as the travel restrictions resulting from the Resolution 1267 sanctions regime prevented the plaintiffs from travelling within or leaving Belgium.[6] Although the majority opinion limited itself to addressing the State responsibility of Belgium under Article 12 ICCPR, the individual concurring opinion by Sir Nigel Rodley also addressed the relationship between international human rights standards and the UNSC.[7]

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[3] *R (on the application of Al-Jedda) v Secretary of State for Defence* [2007] UKHL 58.
[4] *Al-Jedda* decision (ECtHR) n 2, paras 101 ff.
[5] HRC, *Sayadi and Vinck v Belgium*, UN Doc. CCPR/C/94/D/1472/2006.
[6] Art 12(1) ICCPR , determines: 'Everyone lawfully within the territory of a State shall, within that territory, have the right to liberty of movement and freedom to choose his residence', whereas Art 12(2) states that: 'Everyone shall be free to leave any country, including his own.'
[7] See the individual concurring opinions of Committee member Sir Nigel Rodley and Mr Yuri Iwasaw in *Sayadi & Vinck,* n 5. See also Lord Mance in *Her Majesty's Treasury (Respondent) v Mohammed Jabar Ahmed and others (FC) (Appellants); Her Majesty's Treasury (Respondent) v Mohammed al-Ghabra (FC) (Appellant); R (on the application of Hani El Sayed Sabaei Youssef) (Respondent) v Her Majesty's Treasury (Appellant)* (hereinafter *Joint Appeal of A,K,M,Q and G and Hay*) 2010 UKSC 2, 27 January 2010, paras, 86 245. He noted the support for human rights expressed in the preamble and Article 1(3) of the UN Charter, as well as the fact that the UNSC itself in various resolutions requested States to implement its resolutions aimed at combating international terrorism in conformity with international human rights obligations. He consequently raised (but

In accordance with his line of argument, the over-arching criterion for interpretation is the presumption that the UNSC did not intend actions pursuant to its resolutions to violate international human rights standards. The remaining criteria concretize this presumption: namely, in any event there would be no intention to violate a peremptory norm of international law; there would be no intention to violate non-derogable rights, regardless of whether these rights have peremptory status; and all limitations of human rights have to be in accordance with a strict proportionality principle.

The question that arises is what the concrete implications of this presumption would be, if applied by a domestic or regional court to a targeted sanctions regime. This question is of particular relevance for those states that have ratified the ECHR and have thus also accepted the jurisdiction of the ECtHR. Although the *Al Jedda* decision formally binds only the United Kingdom, other States are well aware that if they do not bring their practice in line with this case, they will also risk e reprimand by the ECtHR.

It is arguable that a court would depart from the premise that a suspension of individual human rights by a UNSC sanctions regime cannot be assumed unless provided for explicitly.[8] This approach would imply that a sanctions regime such as the one resulting from Resolution 1267 (1999) necessarily and implicitly allows States the discretion needed to enforce the respective sanctions regime in accordance with international human rights standards - including the judicial protection standards guaranteed by Articles 14(1) ICCPR and 6(1) ECHR.[9]

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left unanswered) the question whether UNSC resolutions could have intended to require member states to enact domestic legislation that would violate fundamental principles of human rights under their domestic regimes.

[8] Alvarez, 'The Security Council's War on Terrorism: Problems and Policy Options' in De Wet and Nollkaemper (eds), *Review of the Security Council by Member States* (2003), 134.

[9] It will be interesting to see if and to what extent the United Kingdom Supreme Court will adjust its interpretation of sanctions regimes such as the one stemming from Resolution 1267 (1999). In the *Joint Appeal of A,K,M,Q and G and Hay*, n 7, it acknowledged that the Resolution 1267 sanctions regime did not provide for a merits based review. However, at the time the Supreme Court was relying on the 2007 *Al-Jedda* decision of its predecessor the House of Lords (*R (on the application of Al-Jedda) v Secretary of State for Defence* [2007] UKHL 58). This decision did not fully embrace the presumption that the UNSC intended to act in accordance with international human rights standards. Instead, it deferred to Article 103 of the Charter and accepted that the UNSC obligations in this instance prevailed over obligations stemming from the ECHR. See Lord Hope paras 81–2; Lord Roger, ibid, paras 203–4.

A test case in this regard for the ECtHR is the *Nada* case against Switzerland, which is to be decided in June 2012 and which concerns the listing of an individual in accordance with the Resolution 1267 sanctions regime.[10] The Swiss Federal Tribunal acknowledged that the de-listing procedure foreseen by the sanctions regime was not compatible with article 6(1) of the ECHR. However, it also referred to Switzerland's obligation under Article 103 of the Charter to give precedence to UNSC obligations in case of a conflict with other obligations under international law. The Swiss Federal Tribunal was not prepared to interpret the Resolution 1267 sanctions regime in a human rights friendly manner that allowed judicial protection on the domestic level. Instead, it concluded that the de-listing procedure left no room for interpretation, as a result of which Mr. Nada's right to a fair hearing in Article 6(1) ECHR was necessarily suspended. [11]

The Swiss Federal Tribunal reiterated this position in two subsequent decisions. Whereas one of the cases also concerned the Resolution 1267 sanctions regime as it existed at the time,[12] the other decision concerned the freezing of assets of individuals and entities who were associated with the Iraqi regime of Saddam Hussein, as well as the immediate transfer of those assets to the Development Fund of Iraq in accordance with Resolution 1483 of 22 May 2003.[13] These individuals and entities were directly identified by the Sanctions Committee set up under UNSC Resolution 1518 of 24 November 2003[14] which - as in the case of the Resolution 1267 sanctions regime - did not (explicitly) provide for judicial protection.

An example of a where a domestic court indeed interpreted a UNSC resolution restrictively in order to find a balance with international human rights standards, concerns a decision of the Court of First instance in The Hague in 2010, pertaining to domestic measures implementing UNSC Resolution 1737 of 23 December 2006. This resolution called on 'all States to exercise

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[10] See the enclosure ('Improving the implementation of the sanctions regime through "fair and clear procedures"') of the identical letters of 23 June 2008 from the Permanent Representative of Switzerland to the UN. The letters are addressed to the President of the UNGA and the President of the UNSC, UN Docs A/62/891 and S/2008/428, para 4; See also Keller and Fischer, 'The UN Anti-Terror Sanctions Regime under Pressure' 9 *Human Rights Law Review* (2009) 257, 265. Although Mr Nada was de-listed by the Al-Qaida and Taliban Sanctions Committee in September 2009, he pursued the case before the ECtHR, notably in order to claim damages.

[11] *Youssef Mustapha Nada v Staatssekretariat für Wirtschaft*, Case No 1A 45/2007 BGE 133 II 450; See also ILDC 461 (CH 2007) at www.oxfordlawreports.com.

[12] *A v Federal Department of Economics*, Swiss Federal Tribunal, Judgment of 22 April 2008.

[13] *A v Federal Department of Economics*, Swiss Federal Tribunal, Judgment of 23 January 2008; SC Res 1483, 22 May 2003, paras 19, 23.

[14] SC Res 1518, 24 November 2003.

vigilance and prevent specialized teaching or training of Iranian nationals, within their territories or by their nationals, of disciplines which would contribute to Iran's proliferation sensitive nuclear activities and development of nuclear weapon delivery systems'.[15] According to the Dutch government, this requirement left them no other choice but to refuse access of Iranian nationals to certain specialized areas of education and training in member States.

The Dutch Court rejected this argument, concluding that the implementing measure constituted discrimination on the basis of nationality and therefore violated the Article 26 ICCPR. Although it accepted that a UNSC resolution would trump the states' human rights obligations in cases of irreconcilable conflict, it was unwilling to accept that such a conflict existed in the present case. The Court determined that the resolution did allow sufficient room to States for reconciling the respective UNSC obligations with the States' human rights obligations. The differentiation on the basis of nationality was not appropriate for preventing the transfer of specialized nuclear knowledge to Iran, as it was both over and under-inclusive. An effective measure would require a risk analysis of each and every individual in the relevant Dutch educational institutions. In addition, there were less restrictive measures available such as more thorough screening of individuals.[16]

Another interesting example concerns the Canadian case of *Abdelrazik*.[17] Although this case was decided on the basis of Canadian domestic human rights standards, it is illustrative of the potential for reconciling UNSC obligations with human rights standards. The respective Canadian Federal court relied on the right of Canadian citizens to enter their country as guaranteed in Article 6(1) of the Canadian Charter of Rights and Freedoms,[18] in order to limit the impact of the travel ban contained in UNSC Resolution 1822 (2008)[19] - a follow-up to Resolution 1267 (1999).[20] In this instance the exception to the travel ban in paragraph 1(b) of Resolution 1822 (2008) permitted a state to allow entry into its territory of its own nationals, while prohibiting the transit of listed persons through any territory.

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[15] Par. 17
[16] See Case No 334949/HA ZA 09-1192, *A,B,C, Actiegroep Iraanse Studenten v The Netherlands*, Court of First Instance, The Hague, decision of 3 February 2010.
[17] *Abousfian Abdelrazik v The Minister of Foreign Affairs and the Attorney General of Canada* [2009] FC 580.
[18] Canadian Charter of Rights and Freedoms RS 1982 c C-00 (Canada).
[19] SC Res 1822, 30 June 2008.
[20] SC Res 1267, 15 October 1999.

The Canadian Federal Court nonetheless concluded that Mr *Abdelrazik* (a Canadian citizen) would not be violating the travel ban if he returned to Canada by airplane. In reaching this conclusion, the court relied on an interpretation of the term 'territory' that did not include airspace.[21] Moreover, the court also interpreted the resolution in question in a manner that allowed Canada to pay the airfare for Mr Abdelrazik's return to Canada, even though the text of the resolution did not provide for this possibility.[22]

The great advantage of the technique of human rights friendly interpretation is that it prevents an open rejection of UNSC resolutions, which could result in undermining a unified system for the protection of international peace and security. States remain bound to give effect to UNSC resolutions, even though the scope of these obligations is limited by human rights obligations through creative interpretation. From a textual perspective such a balancing exercise may sometimes appear unconvincing in instances where the text at first sight leaves very limited room for interpretation (as seems the case in relation to the Resolution 1267 sanctions regime).

Also, it is an approach that shies away from acknowledging any human rights based norm hierarchy in international law. Even when the result reached through harmonious interpretation is a human rights friendly one, it is done without an open acknowledgment of the superiority of human rights obligations vis-à-vis other international obligations. Even so, the approach of systemic integration (as harmonious interpretation is sometimes referred to) has the advantage of finding solutions for norm conflicts within the international legal order itself, while sustaining the unity of the international legal order. This approach can be distinguished from that followed by the courts of the European Union (EU), which anchored the right of judicial protection of listed individuals within the EU legal order.

[21] *Abdelrazik* case (n 121 above) para 127. See also Tzanakopoulos, 'An Effective Remedy for Josef K: Canadian Judge "Defies" Security Council Sanctions through Interpretation', EJIL:Talk!, available at www.ejiltalk.org/an-effective-remedy-for-josef-k-canadian-judge-defies-security-council-sanctions-through-interpretation (last accessed 1 March 2011). It is also worth noting that within the EU, measures implementing sanctions do cover airspace in their scope of application, but travel bans remain an area of member state competence.

[22] *Abdelrazik* case, ibid para 127; Tzanakopoulos, ibid.

3. Benchmarks for judicial protection as developed as developed by the courts of the EU

In addition to attempts to reconcile UNSC obligations with human rights standards through interpretation, the courts of the EU have also developed clear benchmarks for the type of judicial protection applicable to individuals affected by UNSC targeted sanctions. The General Court (ECG) (formerly known as the Court of First Instance/ CFI) and the European Court of Justice (ECJ) have developed these benchmarks on the basis of EU law. The seminal cases to date are *Yassin Abdullah Kadi and Al Barakaat International Foundation v. Council and Commission*[23] (decided by the ECJ) and the three *Organisation des Modjahedines du Peuple d'Iran* (*OMPI*) (decided by the then still CFI) cases.[24] Whereas the *Kadi* case concerned the lists adopted in accordance with the Resolution 1267 sanctions regime[25], the *OMPI* cases concerned the list adopted within the EU pursuant to UNSC Resolution 1373 (2002).[26]

One can conclude from the *Kadi* case that the ECJ insists on the same level of judicial protection to be provided for all listed individuals and entities in the EU - regardless of whether these individuals or entities were listed under the Resolution 1267 sanctions regime or the Resolution 1373 sanctions regime. In doing so, the ECJ rejected the notion that different levels of judicial protection and review were applicable within the EU depending on the degree of discretion or autonomy that the EU had in implementing Security Council resolutions directed at the freezing of assets.[27]

The ECJ took what can be described as a strict dualist approach: it held that the EU constitutes an autonomous legal order within which fundamental rights form an integral part

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[23] Joined Cases C-402/05 P and C-402/05 P, *Kadi and Al Barakaat International Foundation v Council and Commission*, OJ 2008 C 285/2 (*Kadi (ECJ)*). The reasoning of this decision was subsequently confirmed on 30 September 2010 in a follow-up decision by the EGC, Case T/85/09, *Yassin Abdullah v European Commission* (*Kadi EGC*).

[24] Case T-228/02, *Organisation des Modjahedines du Peuple d'Iran v Council* [2006] ECR II-4665 (*OMPI (I)*); Case T-256/07, *People's Mojahedin Organization of Iran v Council* [2008] ECR II-03019 (*OMPI (II)*); Case T-284/08, *People's Mojahedin Organization of Iran v Council*, Judgment of 4 December 2008 (*OMPI (III)*).

[25] SC Res 1267, 15 October 1999.

[26] SC Res 1373, 28 September 2001)

[27] Kunoy * Dawes Kunoy and Dawes, 'Plate Tectonics in Luxembourg: the *Menage a Trois* between EC Law, International Law and the European Convention on Human Rights Following the UN Sanctions Cases' 46 *Common Market Law Review* (2009), 100.

of the general and constitutional principles.[28] These principles, one of which is effective judicial protection, could not be prejudiced by an international agreement, be it the Charter or otherwise, despite the fact that the treaty in question maintains its primacy under the international law.[29] By hiding behind a veil of dualism these courts attempt to avoid an open conflict with the UNSC, while simultaneously attempting to protect fundamental principles of judicial protection.

In concrete terms this means that the benchmarks developed by the courts are directed at the administrative organs within the EU itself, which are responsible for the implementation and execution of the respective UNSC targeted sanctions regime on behalf of EU member States. These benchmarks are not directed at the UNSC sanctions committees, as the EU courts do not have the judicial competence to order the UNSC or its sanctions committees to de-list any particular individual, nor to introduce effective judicial protection at the international level. The practical outcome of this situation is that while the ECG/ ECJ can order executive organs within the EU not to give effect to a UNSC listing in relation to particular individuals or entities (for being in violation of EU law), they will formally remain listed at the UNSC level.

Judicial protection in the EU rests on two pillars which can broadly be categorized by the right to a fair hearing vis-à-vis the EU administrative organs, such as the Council of the EU (the Council) and judicial review involving the EU courts.

3.1. The right to a fair hearing

Within the EU legal order the right to a fair hearing applies to all decisions that can culminate in a measure adversely affecting the person in question. It requires that the administrative

[28] *Kadi* (ECJ), n 23, para 288; Gattini, 'Joined Cases C-402/05 P & 415/05 P, Yassin Abdullah Kadi, Al Barakaat International Foundation v. Council and Commission, judgment of the Grand Chamber of 3 September 2008' 46 *Common Market Law Review* (2009), 213, 221; Kunoy & Dawes, note 27, 73, 101; in December 2009 the ECJ confirmed its *Kadi*-reasoning in two very similar cases, Case C-399/06 P, *Faraj Hassan v Council*, Judgment of 3 December 2009, not yet published; and Case C-403/06 P, *Chafiq Ayadi v Council of the European Union*, Judgment of 3 December 2009.

[29] See also *Kadi* (EGC), n 23 above, para 119; De Búrca, 'The European Courts and the Security Council: Between Dédoublement Fonctionnel and Balancing of Values: Three Replies to Pasquale De Sena and Maria Chiara Vitucci', 20 *European Journal of International Law* (2009), 853; see also De Búrca, 'The ECJ and the International Legal Order after Kadi' 51 *Harvard International Law Journal* (2010), 1. She views the *Kadi* decision in light of a pluralist understanding of the international legal order, in which a multiplicity of distinct and diverse normative systems give rise to clashes of authority-claims and competition for primacy in specific contexts.

organs notify those persons of the evidence against them, provide them with a statement of reasons for the adverse decision, as well as with the opportunity to make their views known. Both the ECJ and the CFI, relying on jurisprudence of the ECtHR,[30] accepted that not all relevant matters have to be conveyed to the affected persons during the notification of evidence or the statement of reasons[31] and that a concise statement of reasons may sometimes suffice.[32]

However, the decisive fact remains that the listed individual must be able to determine whether the blacklisting was justified, or whether there was an error that justified an action before the EU courts. Furthermore, the Council of the EU has to review the sanctions list at least once every six months to ensure that there are still grounds for sustaining it.[33] Where it decides to maintain a name on the list (a so-called 'subsequent decision'), it must indicate the actual and specific reasons why, after re-examination, the freezing of the funds remains justified.[34]

It is important to point out that the right to a fair hearing is triggered only after the listing (and subsequent freezing of assets) has occurred. The reasons for the decision do not have to be communicated to the affected person or entity in advance, but must nonetheless be communicated as soon as possible after the measures have been imposed. Similarly, it is not necessary that States first institute and await the outcome of criminal proceedings prior to participating in the listing of individuals in their territory. [35] The position of the EU courts can therefore be distinguished from that of the HRC in the *Sayadi and Vinck* decision. The HRC concluded that by transmitting the names of Mr Sayadi and Ms Vinck to the respective UNSC sanctions committee, without awaiting the outcome of the national criminal investigation, Belgium was responsible for the resulting infringement of their right to liberty of movement as protected by Article 12 ICCPR.

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[30] *Chahal v United Kingdom*, ECHR (1996-V) Series A No 22 (*Chahal* case) para 131.
[31] *Kadi,* ECJ, n 23, para 344; *OMPI (I)*, n 24, paras 135, 146; Gattini, n 28, 222.
[32] Joined Cases T-246/08 and T-332-08, *Melli Bank plc v Council*, Judgment of 9 July 2009 (*Melli Bank* case); SC Res 1737, 23 December 2006.
[33] *OMPI (I)*, n 24, para 116.
[34] Ibid paras 138, 143, 145.
[35] Joined cases T-37/07 and T-323/07, *Mohamed El Morabit v Council*, Judgment of 2 September 2009, paras 40, 51, 52.

It is difficult to reconcile this position with that of the ECJ and CFI in the *Kadi* and *OMPI (I)* cases, which concluded that a pre-listing-hearing would compromise the purpose of the listing procedure. Had Belgium indeed awaited the outcome of the criminal investigation - which commenced two months before the transmission of the names of Mr Sayadi and Ms Vinck and were only completed three years later - the purpose of 'swift and effective action' would certainly have been undermined.[36]

3.2. The right to judicial review

The second pillar of judicial protection within the EU legal order concerns the right to judicial review before the ECG and ECJ – a right that applies regardless of whether the freezing of assets amounts to a criminal charge.[37] For this review to be meaningful, the ECG/ ECJ must be placed in a position to determine whether the EU administrative body responsible for the listing has carefully applied its mind to all the relevant facts; whether the facts actually support the conclusions drawn by the administrative body, and whether the administrative authorities have given sufficient consideration to any exculpatory evidence. This implies that the provision of a statement of reasons for the listing is not only a crucial element of a fair hearing before the administrative organs, but also of judicial review by the EU courts. Just as the listed individual needs to know the gist of the allegations against him/ her, the court itself must be in a position to exercise review, which is not possible in the absence of a statement of reasons.[38]

When exercising judicial review, the courts have to strike a balance between deference to the Council of the EU's assessment of the evidence and the level of scrutiny necessary for guaranteeing that a fair balance is maintained between the need to combat international terrorism and the protection of fundamental rights.[39] In striking this balance the ECJ and CFI/ ECG have indicated a willingness to accept that certain evidence should be revealed only to the court; or that only part of the evidence be revealed to the court and the affected individual.

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[36] Individual dissenting opinion of Committee member Mr Ivan Shearer in *Sayadi & Vinck,* n 5 above.
[37] EU courts were initially at pains to comment on the non-punitive, precautionary nature of asset freezing, as illustrated by the *El Morabit* decision, n 35. However, in its September 2010 *Kadi* decision the EGC did caution that measures which have been in place for more than ten years can hardly be described as temporary and precautionary. After such a period of time it is open to question whether the measures have not since become punitive or even amount to a criminal sanction. See *Kadi* (EGC) n 23, para 150.
[38] Ibid paras 89, 93, 143, 145.
[39] *OMPI (I)*, n24, para 155.

For the time being it remains unclear what exactly this would imply and whether, for example, these courts would accept the appointment of special advocates or other procedures designed to defend the interests of the individual.[40] What is clear, however, is that the Council of the EU is not allowed to base its fund-freezing decisions entirely on confidential materials received from a member State unwilling to authorize the communication of these materials to the EU courts.[41]

As far as the special advocate procedure is concerned, it is worth noting that the ECtHR has attached certain conditions to the acceptability of this procedure, which are likely to inform the position of the ECG/ ECJ in this regard. In the so-called *A* case the ECtHR confirmed that the special advocate could perform an important role in counterbalancing both the lack of full disclosure, as well as the absence of a full, open adversarial hearing by gauging the evidence and forwarding arguments on behalf of the detainee during closed hearings.[42] However, the special advocate could not perform this function in any useful way unless the detainee was provided with sufficient information about the allegations against him, so as to enable him to give effective instructions to the special advocate. This would be impossible if the open material consisted purely of general assertions and the court's decision to uphold detention was based solely—or to a decisive degree—on closed material.[43]

This particular case concerned the compatibility of long-term detention of foreign nationals due to their suspected involvement in international terrorism with the fair trial guarantees laid down in Articles 5(4) and 6(1) ECHR. There was open evidence available that large sums of money passed through the applicants' bank accounts, and in some instances the evidence even showed that this money had been raised fraudulently. However, the evidence allegedly linking the money raised to terrorism was not disclosed to the applicants. Under such circumstances

[40] *Kadi* (ECJ), n 23, para 344; *Kadi* (EGC) n 23, para 134; *OMPI (I)*, n 24, para 135, 158; Gattini. n 28, 222.
[41] *OMPI (III)*, n 24, para 73; *Kadi* (EGC), n 23, paras 145, 176.
[42] *A and Others v United Kingdom*, *Appl. no. 3455/05*, ECtHR, judgment (Grand Chamber), 19 February 2009.
[43] Ibid paras 220, 215. On the domestic level the Special Immigration Appeals Commission (SIAC), which functioned like a full court, considered both open and closed material. Neither the applicants nor their legal advisers could see the closed material. Instead, the closed material was disclosed to one or more special advocates, appointed by the Solicitor General to act on behalf of each applicant. During the closed sessions before the SIAC, the special advocate could make submissions on behalf of the applicant, both as regards procedural matters, such as the need for further disclosure, and as to the substance of the case. However, from the point at which the special advocate first had sight of the closed material, he was not permitted to have any further contact with the applicant and his representatives, save with the permission of the SIAC.

the applicants were not in a position to effectively challenge the allegations against them.[44] From this decision one can infer that sufficient concrete evidence needs to be revealed to the applicants, in order to enable them to instruct the special advocate effectively.

In essence the standard of judicial protection required within the EU legal order (as informed by the jurisprudence of the ECtHR is high) and the risk of the courts rejecting a listing on the basis that it is not substantiated by a convincing factual basis – as has happened in the *Kadi* case – remains high. This will remain the case as long as the administrative organs within the EU, as well as the various UNSC sanctions regimes remains unwilling to provide the ECG/ ECJ with sufficient factual information as to why particular listings are necessary.

While the bottom-up pressure generated by the EU courts on the UNSC to introduce extensive judicial protection for listed individuals at the UN level is as such very positive and have already lead to some (modest) reform of the sanctions regimes,[45] the approach carries with it the risk of devaluing and marginalizing international human rights law. It is based purely on EU law and leaves unanswered the question if and to what extent the UNSC has to or is presumed to act in accordance with international human rights standards, such as those contained in the ICCPR.

It furthermore fuels the perception that an irreconcilable normative conflict exists between the UN legal regime and domestic or regional regimes that value the protection of human rights - a conflict which could only be resolved by protecting either one of the regimes at the expense of the other.[46] It also leads to a situation of legal uncertainty, as certain individuals and entities remain listed at the UNSC, while member States cannot give effect to them domestically, due to their internal legal order.

[44] Ibid, para 223.
[45] Tladi Article above
[46] For a recent debate concerning the implications of decisions such as *Kadi* (ECJ), n 23, for the relationship between different legal orders, see De Sena and Vitucci (n 20 above) 206 *et seq*; see also De Búrca (EJIL) (n 29 above) 857 *et seq*; Nollkaemper (n 25 above) 864 *et seq*; and Canor, 'The European Courts and the Security Council: Between Dédoublement Fonctionnel and Balancing of Values: Three Replies to Pasquale De Sena and Maria Chiara Vitucci' (2009) 20 EJIL 870, 870 *et seq*.

4. From excessive implementation to non-implementation: the South African example

South Africa, despite being a founding member of the United Nations, has never incorporated the Charter into domestic law. Whereas this attitude was to be expected during the Apartheid era, when South Africa constituted a prime object of UNSC sanctions, it seems perplexing that the no meaningful progress has been made since the introduction of the democratic dispensation in 1994.

During the early 1990s, while the new constitutional dispensation was negotiated, the Application of Resolutions of the Security Council of the United Nations Act 172 of 1993 (the 1993 Act) was drafted and assented to by Parliament. In terms of section 1 of the 1993 Act, the State President could by proclamation in the Government Gazette declare that any resolution of the UNSC shall apply in the Republic to the extent specified in the proclamation. Any such proclamation was subjected to Parliamentary approval in terms of section 2. The value of the foreseen procedure was that it provided for expedited implementation in the area of international peace and security, while still allowing for some parliamentary oversight.

However, the 1993 Act was never promulgated and therefore never entered into force. This fact means that South Africa still has to rely on issuing specific legislation to enforce UNSC resolutions, almost 20 years after reasserting itself as a member of the international community. Strictly speaking this would imply that for every binding UNSC resolution that is adopted, a new implementing act has to be adopted concurrently. Since this is bound to take years, the efficacy of the UNSC obligations, which serve the important goal of international peace and security, will be undermined. In addition, protracted implementation can trigger State responsibility on the international level, since South Africa remains bound by its international obligations, regardless of whether the country has facilitated their implementation domestically.

To overcome this dilemma, one currently has to determine which existing legislation can accommodate expedited implementation of UNSC resolutions. One existing piece of legislation that can be used for these purposes - in the area of trade sanctions - is the Import

and Export Control Act of 45 of 1963. Section 2(2) of the Act empowers the Minister of Trade and Industry to restrict the importation of certain goods to and from South Africa whenever he deems it necessary or expedient in the public interest. It was first used as a vehicle to enforce UNSC sanctions in 1993 in relation to the former Yugoslavia.

Another prominent area for which specific legislation was introduced, concerns the Protection of Constitutional Democracy against Terrorism and Related Activities Act 33 of 2004. Section 25 provides for giving effect to UNSC resolutions adopted in terms of Chapter VII of the Charter. It obliges the President to give notice in the Government Gazette if the Security Council has identified a specific entity as being involved in terrorist activities, or as an entity against whom United Nations member states must take action specified in UNSC resolutions with a view to combat or prevent terrorism. Proclamations of this nature are subject to parliamentary scrutiny and Parliament is also empowered to decide on the appropriate way in which domestic effect must be given to such resolutions.

However, the fact remains that the current legal situation obliges the government to determine on an ad hoc basis (in relation to every UNSC resolution that is adopted), whether and under which existing law can the resolution be implemented. This carries with it the risk that in some situations no legislation exists, as a result of which a new act has to be adopted. This in turn can result in great delays and a violation of South Africa's international obligations. In addition, the situation gives rise to a fragmented approach to the implementation of obligations arising under the Charter.

In response to questions why the 1993 Act has been shelved, the Department of International Relations and Cooperation indicated that while the 1993 Act was desirable, certain concerns about its constitutionality first had to be removed. It is, however, not clear what aspects of the 1993 would potentially be unconstitutional. It is true that a particular proclamation by the State President concerning a specific sanctions regime may raise questions of constitutionality. For example, it is highly likely that a proclamation intended to implement a sanctions regime such as the one foreseen by UNSC Resolution 1267 (1999) might be declared unconstitutional, for inter alia being in violation of the right to judicial protection

guaranteed in the constitutional bill of rights.[47] However, in such an instance – and to the extent that it is not possible to harmonize a particular sanctions regime with human rights standards through interpretation – it would only be the specific proclamation that would need to be annulled. The 193 Act itself would remain intact.

From a policy perspective it is also desirable to adopt the 1993 Act expeditiously. South Africa is a regional power house, current member of the UNSC and a founding member of the United Nations. It would strengthen the country's position in these various roles, if it facilitated the effective implementation of Charter obligations.

5. Conclusions

- Contrast between harmonious interpretation versus outright rebellion
- Both approaches have pros and cons. Without the rebellion of the EU courts, any reform of the de-listing procedure at the UN level would have been unlikely
- Also, once can stretch a text only so far through interpretation. At the same time however, this approach does protect the unity of international law and underscores the relevance of international human rights standards for the actions of the UNSC.
- The 'excessive implementation' seems a predominantly Western/ European problem. Developing countries are at the other extreme. If a country like South Africa, which has a well developed legal system, has difficulties in giving effect to UNSC resolutions, it is likely that other African countries would face even bigger challenges in doing so.
- In essence, the effective implementation of UNSC sanctions regimes is undermined by various factors: on one hand the absence of judicial protection at UN level, resulting in rebellion by courts in developed countries (notably Europe). On the other hand the absence of implementing mechanisms in developing countries, as a result of which sanctions may not be implemented at all.

[47] The South African government has thus far prevented the listing of any South Africans in accordance with this sanctions regime, in order to pre-empt any subsequent court challenges at the domestic level.