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Legal boundaries of the
UN Security Council:
Limitations in the use of targeted
sanctions

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Summary

The UN Security Council has been questioned ever since the time of its foundation in 1945. Mostly the criticism has evolved around its powerful status in relation to its limited number of seats and the privileges of the permanent members, such as their right to veto, thus, the question is not new. Nonetheless, the change of political circumstances in the 1990s that suddenly enabled the Council to make use of its extensive powers for the first time since its creation, put the this question in a new dimension; the previously paralysed Council was now acting unified and the common concerns were no longer about how to break the deadlock but how to handle its use of these far-reaching powers.

In this context, the main question in this essay is to examine if there are any legal measures or remedies available if the Security Council were to adopt decisions contrary to international law. Different possibilities of legal review is analysed by using the example of the Security Council resolutions ordering the use of targeted sanctions that freeze assets belonging to individuals suspected of terrorism. The most serious problem surrounding these measures is considered to be the limited rights to be heard and tried when exposed to these sanctions.

The right to a fair trial or an effective remedy form an important part of any society abiding to the rule of law, and in my study it becomes apparent that the Council might very well be acting contrary to international law when deciding that these targeted economical sanctions should be implemented despite the limited guarantees of procedural safeguards. The problem is that not many courts of law consider themselves to have the jurisdiction to try such a breach, save for a few important exceptions. One of these is the recent judgement of the European Court of Justice in the Kadi and al-Barakaat cases that concern the implementation of targeted sanctions within the EU, based on the above-mentioned resolutions stemming from the Security Council. The Court found that the procedure was contrary to the fundamental rights of the EU because of the limited possibilities to a fair trial.

In my conclusion I found the decisions of the Council in this particular case most likely are in breach of fundamental international norms, making the lack of control mechanisms apparent. However, there might be room for careful optimism because of the judgement of the European Court. Although limited to the member states of the EU, it is the first time a court so clearly expresses its jurisdiction to try- indirectly- the implementation of a Security Council resolution. Still, despite the positive effects this judgement might bring, the fact that the Security Council is self controlling remains, and as the analysis of the targeted sanctions showed, supported by the judgement of the European Court, this is not enough to prevent oversteps of the law. I find this to be worrying as well as unacceptable for an organisation that is

supposed to uphold the core values of international law and human rights. Thus, in my conclusion I also find that reforms are necessary; for the sake of the innocent affected by these breaches as well as for the continued respect and credibility of the UN and the Security Council

Sammanfattning

Våran tids mäktigaste politiska organ, Förenta Nationernas Säkerhetsråd, har ända sedan dess grundande 1945 ifrågasatts. Framför allt har det begränsade antalet medlemmar och de permanenta medlemmarnas privilegier, exempelvis deras vetorätt, skarpt kritiserats på grund av den uppenbara risken av maktmissbruk. De nya politiska vindarna under 1990-talet gav dock frågeställningen en ny dimension: för första gången sedan Säkerhetsrådets grundande agerade dess medlemmar i en anda av samarbete och enighet. Den enorma makt som säkerhetsrådet så länge besuttit var plötsligt en realitet som Säkerhetsrådet hade för avsikt att göra bruk av.

Mot denna bakgrund ligger uppsatsens utgångspunkt i att undersöka om det finns några rättsliga möjligheter att ifrågasätta Säkerhetsrådet om situationen skulle uppstå att en antagen resolution strider mot absoluta normer inom den internationella rätten. I uppsatsen analyseras olika alternativ till rättslig prövning utifrån förutsättningarna i en fråga som just nu är mycket omdiskuterad; Säkerhetsrådets resolutioner om riktade sanktioner som syftar till att frysa tillgångar tillhörande personer med anknytning till al-Qaida, talibanerna och Usama bin Ladin. Dessa resolutioner har blivit hårt kritiserade, framförallt på grund av de allvarliga procedurrella bristerna i rätten till en rättvis rättslig prövning för de som utsätts för sanktionerna.

Dessa rättigheter anses tillhöra grundstenarna till den demokratiska rättsstaten och i min studie blir det uppenbart att resolutionerna mycket väl kan stå i strid med internationell rätt. Problemet är att inga domstolar anser sig vara behörig att pröva implementeringen av Säkerhetsrådets resolutioner, med ett fåtal viktiga undantag. Ett av dessa är den nyligen meddelade domen från EG-domstolen i fallen Kadi och al-Barakaat, där domstolen behandlar de riktade sanktioner som genomförts inom EU, baserade på de nämnda resolutionerna som härrör från Säkerhetsrådet, och gör därmed också en indirekt prövning av resolutionerna. Domstolen ansåg att implementeringen av dessa stod i strid med de grundläggande rättigheterna inom EU just på grund av de bristande möjligheterna till en rättvis prövning för de som drabbas av sanktionerna.

Det som tydligt framkom under arbetet med min studie är att trots implementeringen av Säkerhetsrådets sanktioner med stor sannolikhet inte lever upp till den internationella rätten på området så är möjligheterna att rättsligt pröva detta oerhört begränsat. Ändå kan det finnas visst utrymme för försiktig optimism genom EG-domstolens dom; för första gången har en domstol klart och tydligt uttryckt dess behörighet att indirekt pröva ett beslut med sitt ursprung i Säkerhetsrådet. Samtidigt måste man komma ihåg att oavsett eventuella positiva effekter som domen kan bana väg för så kvarstår faktumet att Säkerhetsrådet fortfarande är helt självkontrollerande och de rättsliga prövningar som gjorts sker bara indirekt samt mer eller

mindre slumpmässigt. Resultatet av denna studie visar tydligt på att denna typ av kontroll inte alltid fungerar, något jag finner oroväckande, så väl för de människor som inte får sina fundamentala och absoluta rättigheter tillgodosedda som för FN: s och säkerhetsrådets trovärdighet. Enligt min mening är reformer absolut nödvändiga för att komma tillrätta med denna besvärande problematik.

Abbreviations

CFI	European Court of Justice; Court of First Instance
CTC	The Counter-terrorism Committee
ECJ	European Court of Justice
EC	European Community
ECHR	European Convention for the protection of Human Rights and fundamental Freedoms
EctHR	European Court of Human Rights
EU	European Union
HRC	Human Rights Committee
ICCPR	International Covenant on Civil and Political Rights
ICJ	International Court of Justice
NGO	Non Governmental Organisations
SCOR	Official records of the UN Security Council
UN	United Nations

1 Introduction

“There can be no peace without development,
there can be no development without peace,
there can be no development or peace without respect for Human Rights”

Kofi Annan, speech at the Anna Lindh memorial lecture,
Lund 2 October 2008

Whenever there is an emergency of international proportions, caused by an aggressor, the world looks to the United Nations Security Council for guidance. Through its unique position, the Council has taken on the role of legitimizer or delegitimizer of actions in international conflicts.¹ This is possible because of its role within the United Nations to maintain international peace and security, and for this purpose, it has been given extraordinary enforcement powers, with the authority to take decisions binding upon all its states parties. This raises the question of the Council's legal boundaries. Is it possible that its powers are limitless, capable of overriding both customary law and international treaties? Even though the decisions of the Council mostly are respected and considered by many to enjoy a high legitimacy, it cannot be denied that there is always the risk that the Council might act outside its scope of powers.² Especially the composition of the Council, giving extensive powers to only its five permanent members³, is conceived as problematic because of the fear that these super powers might use the powerful tools vested in the Council for their own interests rather than in the interests of the international community as a whole. Indeed, there have been a number of resolutions that were questioned for their legality⁴, yet, there is no clear answer to what happens when an adopted resolution might be contrary to accepted international laws and norms. There is a need to identify what possibilities there are to use judicial review in situations where there is reason to question the legality of a resolution and for this purpose I have used one of the Security Council's more controversial resolutions as an example.

¹ Moore and Pubantz, *The New United Nations: international organization in the twenty-first century*, p. 167

² Susan Lamb, *Legal Limits to United Nations Security Council Powers*, in Goodwin –Gill and Talmon, *The reality of international law*, p. 365

³ The five permanent members of the Security Council are China, France, Russia, The United Kingdom and the USA

⁴ See e.g. Susan Lamb, *Legal Limits to United Nations Security Council Powers*, in Goodwin –Gill and Talmon, *The reality of international law*, p. 371, regarding resolution 731, demanding the extradition of two Libyan nationals.

As a part of the collective international efforts to fight terrorist groups, one of the measures used by the Security Council are targeted sanctions that freeze assets belonging to individuals suspected of terrorist associations.⁵ Internationally, a lot of attention has been attracted to one of the targeted groups: the al-Qaida, Usama bin Laden and their associates. Since the first decision was adopted in 1999 to impose sanctions against this grouping of terrorists, it has continuously been severely criticized by the international community for its deficits in respect of human rights treaties. This is because even though the targets of the sanctions are civilians and the measures involve a complete loss of all their known financial assets, mainly through the freezing of funds and bank accounts, none of the judicial safeguards normally associated with such invasive measures are available. In particular it is the lack of a fair trial or an effective remedy that has been questioned.

There are three reasons in particular why these questions are important:

First, it is of interest to see if there is any truth to the severe allegations directed against these sanctions or not, and to see if there might be good reasons for questioning the legality of these targeted sanctions that have caused so much debate.

Second, the answer to the first question - the conformity of the resolutions to international law - is directly connected to the credibility of the UN. The United Nations is strongly associated with values such as equality and respect for human rights, which is also its main purpose according to the UN Charter.⁶ Still, today there is a development towards growing discontent in all corners of the world because of the impression of abuse and unfairness in the activities and decisions of the Security Council. If the targeted sanctions were likely to be contrary to international conventions on human rights it would do serious harm to the credibility of the UN.

The third reason is to find out what can be legally done when this type of situation occurs; it is a question of how well the rule of law is maintained within the UN itself. The Security Council is the highest political organ we have, and if the international support and credibility of the Council is eroded due to the impression of inequitable decisions being adopted, the very existence of the UN as a powerful player within the international communities might find itself threatened.

⁵ See e.g. Security Council resolution 1267 (1999), 1373 (2001), 1822 (2008).

⁶ UN Charter, art. 1

1.1 Purpose

The purpose of this study is to analyse the legal boundaries of the Security Council as well as looking in to the question of if there is a judicial body that might have jurisdiction to try a possible act of ultra vires, committed by the Security Council. In the light of this, this essay also touch upon the question whether there might be reason for concern regarding the special composition of the Council.

The problems are illustrated through the use of an example - a close study and analysis regarding the legality of the targeted sanctions mentioned above is used to exemplify the issues regarding the question of legality. The reason for choosing this particular matter on the implementation of targeted sanction as an example is not a coincidence; Matters concerning international terrorism have in recent time received a lot of notice by the Council and it has acted both swiftly and unified to an extent that is rarely seen. This is a cooperation that has been applauded by many; at the same time it has also created a great deal of concern regarding the intentions of the Council. As a part of these measures, targeted sanctions were adopted, directed against individuals suspected of involvement in terrorist groups. These have rendered a lot of criticism, mainly because of alleged breaches of the right to a fair trial or a fair hearing. Through an extensive analysis of the legal framework regarding these human rights I wanted to find out whether this is a legitimate concern or not. Therefore, the purpose of my study is also to cast a light over the legal issues of this very political case that has rendered so much attention in recent years, as well as to bring some clarity of the allegations that the resolutions are contrary to the human rights.

1.2 Methodology and material

In my study I have used the traditional legal dogmatic method, involving a descriptive as well as analytic approach to the sources of law that have been used. However, the subject of my thesis is an area where politics is a factor that cannot be excluded for an accurate analysis, and although the primary focus is given to the legal issues, I also touch upon political tendencies and developments that are likely to influence this area of international law in the future.

The study is based on the specific case of targeted sanctions stemming from the UN Security Council, and through analysing these in the light of international human rights on the one hand, and the laws and practice surrounding the UN Charter on the other, the aim is to illustrate the current legal status of the Security Council, as well as the targeted sanctions, in a wider context. The material I have used is foremost based upon official UN

documents and international treaties; another well-used source is the case law, mainly stemming from the European Court of Human Rights, in particular in connection to the analysis regarding relevant human rights articles. Doctrinal work on the subject has also been used, to clarify the legal status as well as current tendencies.

1.3 Delimitations and terminology

I have limited my study to Security Council resolutions concerning the targeted sanctions that freeze the funds of individuals suspected of association with terrorist groups, pursuant to resolution 1267. There are also other targeted sanctions currently used, directed against other groups and individuals, which are not to be mistaken with the example I am basing my study upon, although the general conclusions should apply to them as well.

When using the term “The targeted sanctions”, it is the sanctions that freeze funds of suspected individuals that are referred to. The expression “Council” is frequently used, meaning the United Nations Security Council. The UN Security Council Sanctions Committee, established pursuant to resolution 1267, is often referred to simply as the “Sanctions Committee”.

1.4 Outline

This thesis is divided into six chapters. First, the relevant laws and practice is explained in order to create an understanding for the legal situation in its full context. Thus, chapter two and three are mainly descriptive, explaining the role of the Security Council and the creation of the targeted sanctions this essay is based upon.

In chapter four, the Security Council and the targeted sanctions will be placed in the context of relevant human rights, including an extensive analysis of the legal implications.

In chapter five, recent case law is used to demonstrate current, interesting developments in the area, and the last chapter is mainly dealing with different possibilities of improvements that could be made, based on the conclusions of the study.

2 The Security Council

In today's international community, the most powerful deciding body is undoubtedly the Security Council. It has taken on the role of law enforcer as well as legislator in matters of international peace and security, and the world looks to the Council to legitimise or delegitimise actions of force⁷; Whenever such actions are taken by one state against another it is often considered to be of great importance to receive the support of the Council in order to obtain broad international acceptance.⁸ Thus, the importance of the Security Council on the international scene can hardly be underestimated, and the purpose of this chapter is to give an understanding of its legal framework as well as a short reflection of how the Council has come to operate in practice. This will be put in relation to the obligations of some of the international human rights treaties, following in the next chapters.

However, in order to understand the Council's construction, balance of power and revolutionary authority in international affairs, it is inevitable to first look at the historical political context under which it was created.

2.1 Creation of the Security Council

To fully appreciate why the Security Council, as well as the Charter of the United Nations, are shaped the way they are, the circumstances under which it was created is vital to be aware of. Therefore, a short, historical overview will follow.

In 1945, big parts of the world were in ruins after the end of the Second World War and there was a strong movement towards new international cooperation to create a stable world and advance human welfare. The negotiations and developments were led by the victory powers of the war and resulted in the creation of the United Nations.⁹ Although cooperation between states as well as the creation of conditions to enable the respect for human rights and economic and social welfare is the main purpose of the UN¹⁰, international peace and security was considered to be of absolute priority for any chance of success. This task was primarily given to the Security Council.

One of the basic principles upon which the UN rests can be found in the initiating articles of its constitutional Charter: the principle of sovereign

⁷ Claude, Inis, *The new United Nations*, p.167

⁸ *Ibid.*

⁹ San Francisco conference, 1945

¹⁰ UN Charter, art. 1

equality of all its members.¹¹ Nonetheless, when the composition of the Council was decided, another principle was used: the primacy of the “superpowers”. Thus, the political reality of 1945 is very apparent as five of the eleven seats in the Security Council (today it is fifteen¹²) were made permanent, corresponding entirely to the winning nations of the war: China, France, Russia, The United Kingdom and the USA. This political structure of the late 1940s is also literally manifested in a few articles of the UN Charter: “Enemy state clauses” are still referring to the crushed nations of the Second World War.¹³ The reason why these privileges of five nations were accepted by the rest of the states parties was most likely because of the fear that the extensive powers given to the UN and the Security Council would never have been realized without granting the superpowers permanent membership and veto in the Security Council.¹⁴ It was also believed that these privileges would have the effect of insuring the support of the leading states of the world in all of the decisions taken by the Council, which in that way would receive an automatic status of special significance. Another aspect of the composition was the idea that the Council itself would work as a safety mechanism against abuse of the great powers vested in the Council: although limited, the diversity of ideology and interests between the permanent members were thought to put an effective end to any action that did not correspond to the purpose and principles of the UN, through the use of veto.¹⁵ The effects of this safety constellation unfortunately kept the Council paralysed for many decades. Right from the start, the emerging Cold War made cooperation impossible between the permanent members and for a long time the Council was to be associated with its incapacity to take any action in international conflicts, all due to the constant use of vetoes blocking resolutions from being adopted.

Thus, the UN Charter is built on a structure that partly reflects a world order that no longer entirely correspond to the reality we live in today. Considering this, it might seem surprising that only a few amendments have been made to the Charter. One explanation for this slow rate of textual changes could be that the UN members simply do not want to take the risk of assembling a meeting to change the Charter, since the outcome would be unpredictable. Also, the permanent members holding the right to veto any amendment¹⁶ have showed little interest in such a renewal process. Another explanation is the far-reaching interpretations of the Charter; this constitutional treaty was meant to last over a long time and despite the lack of changes or amendments, the Council has partly managed to use the Charter in a dynamic way, making extensive and innovating

¹¹ UN Charter art. 2(1)

¹² Ibid, art. 23

¹³ Ibid, articles 53, 77, and 107. The General Assembly accepted in 1995 to delete these clauses at its earliest appropriate future.

¹⁴ Per Sevastik, *Reflections on the interpretation of the UN Charter and its binding force*, in Amnéus and Svanberg-Torpman, *Peace and security: current challenges in international law*, p. 40

¹⁵ See e.g. Susan Lamb, *Legal limits of United Nations Security Council powers*, p. 361

¹⁶ UN Charter, art. 108

interpretations¹⁷, possible through its own discretion to determine the boundaries of the relevant articles in the UN Charter. This evolution has not only been met with positive reactions, as will be discussed below. Especially since the fall of the communist era in the early 1990s, the situation in the Council drastically changed. When the constant use of vetoes ceased it enabled the Council to act in a way that was not possible before. Consequently, the worries in the international community are no longer concerning the dangers of a paralysed Security Council, but what dangers might be involved in this new and close cooperation of the permanent members.

2.2 The role of the Security Council and its constitutional framework

The constitutional framework of the UN, and thus the Security Council, is found in the Charter of the United Nations. The Charter defines the role of the Security Council and is therefore of great importance in order to understand the functions, possibilities and limits of the Council. The Charter was created in 1945 and all members of the UN must be part to it. In the Charter, four chapters relate to the Security Council: chapters V, VI, VII and XVIII. According to the Charter, the primary responsibility of keeping world peace and security rests in the hands of the Security Council, as described in art. 24 of the UN Charter:

1. In order to ensure prompt and effective action by the United Nations, its Members confer on the Security Council primary responsibility for the maintenance of international peace and security, and agree that in carrying out its duties under this responsibility the Security Council acts on their behalf.
2. In discharging these duties the Security Council shall act in accordance with the Purpose and Principles of the United Nations. The specific powers granted to the Security Council for the discharge of these duties are laid down in Chapters VI, VII, VIII, and XII.
- ...

The different approaches the Security Council can use in order to meet this responsibility of maintaining international peace and security can be divided into three different categories:

- i) Recommendations to the parts of a conflict¹⁸,
- ii) Recommendations to the General Assembly of the UN¹⁹ and
- iii) Binding decisions, as described above in art. 24.

¹⁷ E.g. Per Sevastik, *Reflections on the interpretation of the UN Charter and its binding force*, in the collected work of articles by Diana Amends and Katinka Svanberg-Torpman, *Peace and Security, The Procedure of the UN Security Council*, p.26

¹⁸ See e.g. articles 32(2), 36(1) or 40 in the UN Charter.

According to art. 25, the states parties to the UN Charter have to accept and carry out all the decisions made by the Council, in accordance with the Charter. This is regarded to be one of the most central principles of the UN: to unite in the Security Council decisions through mutual assistance and cooperation. The effects of art. 24 and 25 is further strengthened by art. 103 of the Charter:

“In the event of conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail.”

This is a very effective clause since in practice it gives the UN Charter primacy over all other international agreements as very few are dated before the signing of the UN Charter, thus making the Charter very powerful.²⁰

2.3 The balance of power within the Security Council

When considering the extensive powers the Security Council dispose of, as seen above, it becomes clear that the composition of the Council is of great importance for the outcome of its work and its choice of focus and interest. It is also a determining factor for the question of its legitimacy; the Council is a strictly political organ and although it represents all members of the UN, with only a few seats available in the Council the scope of interests is limited.

The question of legitimacy can be divided into two parts in particular: First it increases the chances of a more diversified area of interests since a geographical and political spread is likely to bring different perspectives and interests into the Council. Second, a geographical and ideological spread might increase the notion that the interests of the Council do expand above the interests of the permanent members, thus strengthening the impression of legitimacy.

Therefore, an analysis of how well this corresponds to the actual practice of the Council will follow.

¹⁹ See e.g. articles 4 - 6, 94(2) or 97 in the UN Charter.

²⁰ The legal limits of this article are analysed in chapter 3.

2.3.1 The five permanent members

The Security Council consists of fifteen members of which five are permanent and seven are rotating every second year. The five permanent members, China, France, Russia, the United Kingdom and the USA, play a very special role in the Council. It is not so only because of their right to veto; the advantage of uninterrupted presence gives these nations the tools to influence the direction of the Council in ways that are difficult, if not impossible, to accomplish for members that are there for two years only.²¹ The UN delegations of the permanent members have collected enormous amounts of experience over the years and it is often the case that the diplomats representing the permanent seats in the Council have been there for several years. Although factors such as talent and persistence certainly can play a role, the advantages for the permanent states are massive and grant them a position that should not be underestimated. The power of veto is also an effective tool to obtain full insight in all matters since the other members of the Council are most likely to consult them before presenting a proposal for a voting- unless, for political reasons, the desired effect is to force a permanent member to use its veto. This special status of the five permanent members has also been explicitly recognized by the General Assembly, which on many occasions has expressed the special responsibility these states have in establishing peace and security as well as contributing with financial support for peace and security operations.²²

2.3.2 Non-permanent members and geographical equity

The seven non-permanent members in the Council are each elected for terms of two years by the General Assembly.²³ All members of the UN are entitled to candidate for a position in the Council, although the chances of being elected are small since at the present there are 180 candidates to share the ten elective seats of the Council. There is no possibility for the non-permanent members to be re-elected immediately after the two-year term has ended, and they have no right to veto a decision. This weak position clearly seems to clash with the fundamental UN principle on equality of *all* its member states²⁴, considering that the UN Charter allows the most powerful body of the UN to favour five states over all others. However, the non-permanent members are far from powerless: Security Council votings concerning matters of non-procedural nature require the

²¹ Bailey and Daws, *The procedure of the UN Security Council*, p. 138

²² SCOR: 189th meeting (20 August 1947), p. 211; 363rd meeting, (6 October 1948) p. 10; 679th meeting (10 September 1954) 38-9

²³ UN Charter, art. 23(2)

²⁴ *Ibid*, art. 2(1)

affirmative vote of nine members.²⁵ Thus, it is impossible for the five permanent members alone to pass a decision without the support of at least four of the non-permanent members. Nonetheless, it is also to bear in mind that to work against some of the most powerful states in the world have a prize, and in reality the practice of such “coupes” are probably not too common.

The election of the non-permanent members to fill the ten available seats in the Security Council is made after a strict geographical pattern to ensure an equitable geographical distribution in the Council.²⁶

African States	3
Asian States	2
Eastern European States	1
Latin American States	2
Western Europe and other States	2

This practice ensures a geographical, as well as ideological, diversity of the members representing the Council, although seen as a whole, the number of seats given to the “western world” (six) is still high. Three of the permanent members belong to the “western society”, sharing many values and political interests. However, even in an ideal world, it would be impossible to come even close to guaranteeing the representation of all normative and political values of the world, and it would probably not even be desirable to do so. Still, the absence of representatives of some of the world’s larger ethnical groups in the permanent seats is perceived as worrying for many nation of the world. For example, the international measures to fight terrorism are often directed towards Muslim states or citizens, a group that is not represented by the permanent members. Demands of reform have been expressed for many years, especially the inclusion of more seats in the Council. In 2004 a panel was appointed by the Secretary General to review the objects and structures of the UN, and the panel recommended an improvement of the democracy and accountability in the Security Council and that more countries should be involved in its decisions. The secretary general said in a speech in 2006:²⁷

“do not underestimate the slow erosion of the UN’s authority and legitimacy that stems from the perception that it has a very narrow power base, with just five countries calling the shots.”

In September 2008 the General Assembly agreed to start negotiations on the possibility of expanding the number of seats in the Council, in order to

²⁵ Ibid, art. 32. Also, according to the wording of the article 27, the concurring votes of all five permanent members are required. However, it is since long accepted that the abstention of a permanent member in a voting does not prevent the Council to take affirmative decisions.

²⁶ Bailey and Daws, *The procedure of the UN Security Council*, p. 152

²⁷ Kofi Annan, London, 31 January 2006

achieve a better and more equitable representation of the world. It remains to be seen how successful this attempt of improvement will be.²⁸

2.4 The Security Council's powers of interpretation

The reason why the Security Council is considered to be so powerful is its unique competence to make decisions that are binding upon all states parties in questions of the maintenance of international peace and security, matters traditionally considered to belong to the absolute sovereignty of each individual state. In the initial discussions leading to the creation of the UN, it was considered that such intrusions were necessary in order to maintain international peace, save with regard to the sovereignty of the five permanent members of the Security Council, who all have the power to stop a decision through the use of veto.²⁹ Not all decisions are binding, still it is rare that the Council make any reference to relevant articles in the Charter when adopting a resolution. Instead, the nature of the resolutions has to be interpreted according to its wording, context and intention. This makes it more complicated to review the resolutions, and it has probably helped to facilitate the acceptance of the Council's increasingly extensive interpretation of the UN Charter. The provisions for these decisions, allowing the Council to take enforcement measures binding upon all members, are found in chapter VII of the UN Charter, and the rules determining the conditions of application is described in art. 39:

“The Security Council shall determine the existence of any threat to the peace, breach of the peace, or act of aggression and shall make recommendations, or decide what measures shall be taken in accordance with Articles 41 and 42, to maintain or restore international peace and security.”

When the Council is of the opinion that a threat or breach of international peace exists, it has the power to use a range of tools, from the imposition of sanctions to military actions.³⁰ In this determination, the Council has chosen not to stop at the “traditional” aggression of one state attacking the other, it can also be a situation of internal humanitarian crisis causing a breach or threat to the peace according to the newer interpretations of the Council.³¹ This extensive interpretation of the Charter is, as already touched upon above, not uncontroversial. The legal limitations of the Security Council, coupled with the limited number of seats in the Council, have gained new speed since the dead-lock caused by the political tensions of the Cold War

²⁸ United Nations General assembly sixty-third session, 16 September 2008

²⁹ Bailey and Daws, *The procedure of the UN Security Council*, p. 40

³⁰ UN Charter art. 41-42

³¹ See e.g. Susan Lamb, *Legal limits to United Nations Security Council powers*, in Goodwin –Gill and Talmon, *The reality of international law*, p. 367

ceased and a new era of cooperation between the permanent members emerged. The most common position seem to be that an extensive interpretation of the Charter is absolutely necessary for a strong UN, or else it would be hopelessly outdated and paralysed.³² On the other hand, there is also the recognition of the dangers involved considering the limited possibilities of reviewing the decisions of this powerful, and in recent time also united, Council. The reason for these limitations is partly due to the practice of the UN, giving all its bodies, including the Security Council, the right to work according to the so-called principle of “*compétence de la compétence*”.³³ This means that each UN body has the superior right to interpret the parts of the Charter that is applicable to them. Thus, there is no real custodian of the UN Charter who can make binding decisions in a situation where doubts arise as to whether an adopted measure comply with the provisions of the Charter or not. Nevertheless, the possibilities of the Security Council to adopt measures of force are not without limits. Although it enjoys a broad political discretion in the determination of the existence of threats to international peace, they are always bound to the purpose and principles of the Charter.³⁴ The problem with these articles of limitation is again the principle of the “*compétence de la compétence*”; if there is no type of judicial review there can be no consequences of overreach of the boundaries as set in the UN Charter.

The question of the possibilities to try the legality of a binding Security Council resolution is considered to be especially relevant in cases of the authorisation of force, since the consequences of such actions are incomparably severe. However, as recent developments have showed, also sanctions used according to art. 41 of the Charter are seriously questioned and have showed the need for clarity regarding the possibilities of legal review. According to the purposes and principles of the Charter, all peaceful means applied must be used “in conformity with the principles of justice and international law”³⁵, and one of these principles is the right for individuals to a fair hearing. According to art. 2. (7), measures taken under Chapter VII of the Charter are *excluded* from these purposes and principles found in chapter I of the Charter, and in art. 24 it is provided that the Council has to act in accordance with chapter I, which allow this exception. This indicates that no laws at all may limit the Council when acting under chapter VII. Fortunately, some limitations are still possible to discover. The wide political discretion the Council enjoys when determining a threat to

³² See e.g. Susan Lamb, *Legal limits to United Nations Security Council powers*, in Goodwin –Gill and Talmon, *The reality of international law*, p. 362 or Per Sevastik, *Reflections on the interpretation of the UN Charter and its binding force*, in Amnéus and Svanberg-Torpman, *Peace and security: current challenges in international law*, p. 27

³³ E.g. *Reflections on the interpretation of the UN Charter and its binding force*, in Peace and Security, *Current challenges in international law*, p. 27; *Legal limits to United Nations Security Council powers*, in *The reality of international law. Essays in honour of Ian Brownlie*, p. 363

³⁴ The course of action must always be in line with the purposes and principles of the UN, as defined in articles 1 and 2 of the Charter. This is also guaranteed in art. 24 (2). See also above in chapter 2.2, p 12.

³⁵ UN Charter art. 1 (1)

international peace and security cannot follow into the actual implementation of the measure.³⁶ This means that at the very least, all UN sanctions must be implemented with respect of international law. As a result, even when the Council is acting *intra vires* regarding the determination of a threat or breach of peace and security according to art. 39 of the Charter, it has to act in accordance with international law. Thus, it is legally possible to question the legality of the implementation of a sanction if it is considered to be incompatible with international law.³⁷

2.5 Possibilities of reviewing Security Council resolutions

2.5.1 The International Court of Justice

When looking at possible judicial organs that might have the jurisdiction to limit the extensive powers of the Council, the International Court of Justice, the ICJ, is the natural place to start since it is the judicial body closest to the Council.

The ICJ and the Security Council are the only two organs in the UN that have the power to take binding decisions upon its members and deciding for the Court's possibilities of review is the division of competence between these powerful organs. According to art. 92 of the UN Charter, the ICJ is the "principal judicial organ" of the UN, it also has the function of settling international disputes and is therefore involved in the maintenance of international peace and security, indicating that it might have jurisdiction to ensure that the Council is acting in conformity with the Charter as well as international law. The question is which body has primacy over the other? In case of doubts concerning the legality of a decision made by the Security Council, does the ICJ have the power of review? In the UN Charter there is no direct reference made about this type of situation. Article 36(3) provides that in cases where the Security Council is making pacific recommendations in the settlement of a dispute, the Council should also take into consideration that any legal disputes should as a general rule be referred to the ICJ. There is however no indication in the Charter what situations the term "legal disputes" include and apart from one occasion the Security

³⁶ Bailey and Daws, *Legal Limits to United Nations Security Council powers*, p. 370

³⁷ This is displayed in the opinion of the ICJ in the *Lockerbie case*. It is also supported by Ian Brownlie, in *International law at the fiftieth Anniversary of the United Nations, General Course of International Law*, p. 218-19, and Susan Lamb in Goodwin –Gill and Talmon, *Legal Limits to United Nations Security Council powers*, p. 370

Council has refrained from doing so.³⁸ Perhaps the fact that the Court decisively outnumbers the five permanent members has contributed to this evolution.³⁹ This question of referring matters to the ICJ has been on the agenda a number of times and the Court has taken the view that just the fact that a matter is also dealt with by the Security Council will not prevent the Court from reviewing the case and that both proceedings could be pursued *parti passu*⁴⁰. Further, the Charter does not give *exclusive* responsibility for the maintenance of peace and security to the Security Council. In the Nicaragua case from 1984, the Court made the following reflections in relation to the conflict between the ICJ and the Security Council:

“The Council has a function of a political nature assigned to it, whereas the Court exercises purely judicial functions. Both organs can therefore perform its separate but complementary functions with respect to the same events.”⁴¹

In a few cases, for instance the Lockerbie case of 1992, and the Genocide case from 1993, the ICJ had the opportunity to address the legality of Security Council resolutions. This possibility of judicial review have caused a lot of scholarly debate, and different conclusions have been reached as to whether the ICJ legally does have this power of judicial review or not⁴². It seems clear from the provisions in the UN Charter that it has no automatic right to control the Security Council and there is no legal right for the ICJ to pass any directly binding decisions on the legality of any adopted Security Council resolution. There is also no possibility to routinely pass judgements on Security Council decisions. This is because the organs of the UN are not hierarchically ordered, leaving each body to interpret its own set of rules derived from the UN Charter. Despite this there have been a number of occasions where judicial review was made regarding issues of *ultra vires*.

In the Lockerbie case⁴³, concerning Libya, the UK and the USA, the Security Council demanded the extradition of two Libyan nationals in resolution 731, following the Lockerbie incident⁴⁴. This decision was a direct breach of international law: the rules of extradition are very clear, requiring an extradition treaty, and no such treaty existed between the states in question. However, the Council acted according to chapter VII, normally giving priority to the UN Charter.⁴⁵ Nonetheless, Libya still claimed that

³⁸ Rosanne Shabtai, *The law and practice of the International Court 1920-2005*, p 128

³⁹ Ibid, p. 129

⁴⁰ *Corfu Channel case*, 1947, U.S Diplomatic and consular staff in Teheran case, 1979, Military and parliamentary activities in and against Nicaragua case, 1984

⁴¹ Rosanne Shabtai, *The law and practice of the International Court 1920-2005*, p. 131

⁴² Susan Lamb, *Legal limits to United Nations Security Council powers*, in *The reality of international law*, p. 363. The potential role of the ICJ to serve as a constitutional control upon the Security Council has historically been overlooked. See e.g. the San Francisco conference where a provision granting the explicit right of the ICJ to review what concerned the UN Charter was refused, indirectly suggesting that each organ on its own is competent to interpret the sections of the UN Charter, which concerns them.

⁴³ *Libya v UK; Libya v USA*

⁴⁴ In an act of terrorism, a bomb was detonated inside a civil airplane, causing it to explode and crash over the Scottish town of Lockerbie in 1988.

⁴⁵ UN Charter art 103

according to the Montreal Convention on the safety of civil aviation⁴⁶, it fulfilled its international obligations and instituted proceedings against the UK and the USA regarding the interpretation of this treaty.

Is it really conceivable that the refusal to extradite the two suspected individuals could threaten the international peace and security? Perhaps, though the decision of the Security Council has remained controversial and is suspected to correspond to the desire to punish a disobedient state rather than to preserve peace and security. The Court found that the Montreal Convention had lost its legal effect due to the supremacy of the Security Council resolution, in this case acting contrary to the convention, in accordance with art. 103 on the primacy of the UN Charter.⁴⁷ The Security Council was not found to be in breach of any international law, but this conclusion of the Court meant that, for the first time, it had actually reviewed the legality of the adopted resolution.

In the Genocide case from 1993⁴⁸, the ICJ took a step back from this type of incidental review. In the case, Bosnia and Herzegovina instituted proceedings against Yugoslavia, regarding the Security Council arms embargo. Bosnia claimed that this sanction had to be constructed in a manner that did not deprive the state of its right to self-defence according to art. 51 of the Charter, as well as under customary law. The appellants made a request for an indication of provisional measures, and one of the underlying intentions was to obtain a reinterpretation of Security Council resolution 713 from 1991 by the Court, in order to exempt Bosnia from the arms embargo imposed on the whole area of Yugoslavia, under chapter VII of the Charter. The reason for this was that the embargo did not have the intended effect of preventing conflict; instead it had the incidental result of leaving Bosnia defenceless against Serbia, which did not respect the arms embargo. Hence, the case also raised questions of international humanitarian law and the rules of jus cogens. The Court held that it had no jurisdiction to go beyond the Genocide Convention in its review and therefore the request to change a Security Council resolution was not within its competence.⁴⁹ Consequently, the type of review previously made in the Lockerbie case was not repeated in this judgement.

In the separate opinion of judge Lauterpacht, the powers of the Security Council was touched upon:

“ (it cannot be sad) that the Security Council can act free of all legal controls...The Court has already, in the *Lockerbie* case, given an extensive interpretation of the powers of the Security Council when acting under Chapter VII, in holding that a decision of the Council is, by virtue of Articles 25 and 103 of the Charter, able to prevail over the obligations of the parties under any other international agreement. The present case, however,

⁴⁶ Montreal Convention for the suppression of unlawful acts against the safety of civil aviation, 1971

⁴⁷ Art. 103 of the UN Charter gives that there is an obligation to the parties to respect the primacy of the Charter over their obligations under any other international agreement.

⁴⁸ The application of the Convention on the Prevention and Punishment of Genocide, 1993

⁴⁹ UN Charter, article 25 and 103

cannot fall within the scope of the doctrine just enunciated. This is because the prohibition of genocide, unlike the matters covered by the Montreal Convention in the *Lockerbie* case to which the terms of article 103 could be directly applied, has generally been accepted as having the status not of an ordinary rule of international law but of *jus cogens*. Indeed, the prohibition of genocide has long been regarded as one of the few undoubted examples of *jus cogens*... One only has to state the opposite proposition thus - that the Security Council may even require participation in genocide - for this unacceptability to be apparent.”⁵⁰

To conclude, the absolute power of the Security Council to determine the existence of threats to or breaches of international peace and security does not extend to the determination of legality in particular situations where the implementation of a measure is clearly wrong in law. If the Council does not remedy this non-conformity, it is in risk of being challenged. The ICJ has showed that it can, and will, examine and analyse resolutions when it is necessary in order to make a decision in a case. However, the Court has not yet taken the step to actually declare a resolution invalid. It is also unclear what kind of consequences this would have on the UN system, thus this is an area that remains ambiguous.⁵¹

2.5.2 Review through the norms of Jus Cogens

The rules of Jus Cogens are considered by some to be at the top of the normative hierarchy in international law, superior even to binding Security Council resolutions.⁵² The definition of exactly which norms are included is not undisputed, however, there seems to be a general agreement that there are some core norms that do belong in this category, such as genocide, outlawing aggression, slavery and piracy. But also other norms such as self-determination and fundamental human rights are by many considered to fall into the norms of Jus Cogens. Thus, in theory, these norms could very well have the required primacy over the binding decisions of the Security Council. The Council must follow the rules of the UN Charter, and articles 25 and 103 of the UN Charter normally granting priority to the decisions of the Council over ordinary international law, cannot override fundamental norms of international humanitarian law. The problem is that there is no given custodian of the norms of Jus Cogens, and therefore it would have to be a national or regional court making the review.

⁵⁰ The case concerns the application of the Convention on the prevention and punishment of the crime of genocide (*Bosnia and Herzegovina v Yugoslavia* (Serbia and Montenegro)), Provisional measures, Order of 8 April 1993, para. 39.

⁵¹ Shaw, *International law*, p. 1151

⁵² The concept is included in the Vienna Convention on the Law of Treaties, article 53, defining them as “peremptory norms” from which “no derogations are permitted”. In a recent judgement the concept of jus cogens was applied by the European Union Court of First Instance in the *Kadi and al-Barakaat cases*.

As mentioned above, the ICJ touched upon the matter in the Genocide case but chose not to take position in the question of Jus Cogens, rejecting the claims.⁵³ In the separate opinion of judge Lauterpacht, as quoted above, he acknowledged that the resolution should have been open for review and comments concerning the effects of the Bosnian Muslims according to the norms of Jus Cogens.⁵⁴ In a more recent case, the possibility for a court to review Security Council resolutions on their conformity with Jus Cogens was used explicitly; the targeted Security Council sanctions freezing the assets of individuals or entities were indirectly tried in the courts of the European Community in the Kadi and al-Barakaat cases. In the judgements of the European Court of First Instance (CFI), the Community regulation imposing the Security Council sanctions was examined with regard to its compatibility to the rules of Jus Cogens. The Court found no such breach, but it did not hesitate to conduct such an examination on any grounds of jurisdiction or uncertainty of the legal status of Jus Cogens. However, this decision was appealed and the European Court of Justice, the ECJ, stated that even if there was a breach of Jus Cogens, it was not the place of the European Community Courts to try this.⁵⁵

Besides the question of who should assume responsibility for this type of judicial control, there is also the problem of enforcement: a judgement from a regional or national court finding such a breach could only apply to the state/states within its jurisdiction since it is not binding on the Security Council. Hence, there is no possibility to actually force forward a change of adopted resolutions. Even if a national or regional court would find it to be in breach of international law, it is only the Security Council itself that has the power to change its decisions.⁵⁶

2.6 Conclusions

Two main issues have been dealt with in this chapter: the composition of the Security Council and the possibilities of reviewing Security Council resolutions. To start with the latter question, the chances of any legal review is very limited. On a few occasions, the ICJ has touched upon the subject, but despite the incidental review of the Security Council resolution in the Libya case, there is no tendency towards more judgments of that kind being made at the moment. Although in theory it might have been possible for the Court to successfully, and legally, claim jurisdiction to review the judicial functions of a resolution according to the UN Charter, it has chosen not to

⁵³ Case concerning the application of the Convention on the prevention and punishment of the crime of genocide, ICJ Reports 1993.

⁵⁴ Ibid, para. 39

⁵⁵ Judgement of the Court of Justice in Joined Cases C-402/05 P and 415/05, para. 294

⁵⁶ The UN Charter is used by the principles of “Compétence de la compétence”, e.g. Per Sevastik, Reflections on the interpretation of the UN Charter and its binding force, in Diana Amnéus and Katinka Svanberg-Torpman, Peace and Security, Current challenges in international law, p. 27; *Legal limits to United Nations Security Council powers*, in *The reality of international law. Essays in honour of Ian Brownlie*, p. 363

pursue this way. The Court has showed that it is careful not to make any extensive interpretations, choosing a strict interpretation of its competence regarding its possibilities to review binding decisions made by the Security Council. An interesting parallel is that the Security Council has taken the exact opposite approach, using extensive and innovating interpretations of its powers, also in relation to the ICJ. In my opinion, this is a sign of unhealthy balance of power, and a more extensive and daring approach from the ICJ would be desirable.

The norms of Jus Cogens probably present a good possibility of review, at least in theory, since they most likely give national and regional courts the jurisdiction to do so. The recent judgement of the CFI might give courage to other courts to follow its example. Nevertheless, it is a fact that international law is interpreted in the light of political factors, and even courts consider, beside the law, the effects a judgement might have on society.⁵⁷ Thus, in my opinion, not too much hope should be put to the chances of achieving much change through this possibility of review.

Seeing these limited possibilities of any chances of legal control, is perhaps the construction of the Council, thought to work as a built-in protection against overuse, protection enough? According to the voting procedures, even though the permanent members have many advantages, it is not possible for them to adopt resolutions without the support of several other non-permanent members, taking away some of the fears of abuse of the super powers. There is also a strict procedure of geographical representation applied, insuring a certain diversity of ideology, views and interests, which might help to prevent the most severe forms of overuse of the Council's powers under chapter VII of the Charter. Can this be considered to be an adequate protection? No, for the reasons mentioned above, the risk of overuse must still be considered as extensive. As already mentioned above⁵⁸, negotiations have started in the General Assembly to expand the number of rotating seats in the Council. If this were to succeed it would certainly help to increase the respect and legality of the Council, at least in the eyes of the public, and it might increase the will of critical nations to cooperate and fully comply with Council resolutions. Other options in the creation of a better and more equitable Council could be to demand clear, written motivations whenever the right to veto is used, explaining exactly the reasons for making use of this right. This would give a more transparent procedure and perhaps make the permanent members more careful before making use of this instrument.

There is also the question of balance of power to consider when discussing the legitimacy of the Council: would it really be desirable to give a court or a legal organ the power to review the decisions of the most powerful political organ in the world? Constitutional courts are not uncommon in the member states, and their function of giving a strict legal interpretation and to, in cases where a non-conformity with national laws and obligations is

⁵⁷ E.g. CFI in *Kadi v Council and Commission* and *al-Barakaat v Council and Commission*.

⁵⁸ See chapter 2.3.2, p. 14

found, referring the matter back to the politicians for appropriate changes, is considered to be an important safety net against abuse of power. A similar solution could be applied to the Security Council: the Council would still be able to act instantly and forcefully in times of emergencies since any review would only take place retroactively. Further, such a judicial organ would not dispose of any powers of enforcement, however, it would mean that the most vital parts of international law will be watched over also when it comes to Security Council decisions, and this might induce the Council to take further measures to insure increased conformity with the human rights they are there to protect.

In the next chapters, the case of the targeted Security Council sanctions freezing private assets will be used to demonstrate what can happen when objections, coming in from all corners of the world, claim that the measures imposed are contrary to international law.

3 The use of targeted sanctions

In a world where new situations and humanitarian emergencies can appear overnight, the extensive powers of the Security Council serve an important function. The Council has the ability to quickly produce and adopt legislation, well adapted to the situation at hand, and, perhaps more importantly, the power to enforce this legislation into actions.

If the same measures were to be created through the normal procedure of treaty making, the procedure could last for years before an agreement had been met. Hence, the important role of the Security Council in this regard should not be overlooked or forgotten. Nevertheless, the use of binding decisions is not unproblematic. These quick responses rely entirely on the political will, support and agreement of the members of the Council, especially the veto powers. It is an arbitrary process, as seen in the previous chapter, and the deficits of an equitable division of values, and the geographical spread of the Council, especially among the five permanent members, is creating a notion of illegitimacy.⁵⁹ This notion includes the use of targeted sanctions, and the implementation of the measures to freeze funds belonging to private persons and entities suspected of terrorist involvement is a perfect example of enforcement measures questioned for their legality.

In chapter two, the extensive powers of the Council were described, and in relation to this a close look at the focus of this essay, the targeted economical sanctions directed against individuals suspected of terrorist involvement, will follow. In the next chapters, the legality of these sanctions will be closely analysed in the context of existing human rights.

3.1 Possibilities and limitations of the use of sanctions

When it comes to the prevention of terrorism, it is often made through international cooperation in the form of bi-lateral or multi-lateral agreements. In this cooperation the Security Council plays an important role in the coordination as well as in the determination of what kind of measures are appropriate. Different kinds of sanctions are often used, and for this purpose, numerous Security Council resolutions have been passed in recent years, e.g. obligating the states parties of the UN to criminalize any financial support of terrorist groups and to freeze and hold assets that might be used for this purpose.⁶⁰ Because of the far-reaching consequences, a closer look at the way these sanctions are used is relevant.

⁵⁹ Alan Boyle and Christine Chinkin, *The making of international law*, p. 114

⁶⁰ See e.g. Security Council resolution 1267

When a threat or breach of the peace and security is determined to exist, the Security Council has three different possibilities, if it chooses to take action, according to chapter VII in the UN-charter: i) provisional measures according to art. 40; ii) sanctions under art. 41; iii) military actions according to art. 42. If a peaceful settlement cannot be reached, the next step usually involves the use of sanctions since force is normally only used as a last resort. Article 41⁶¹ of the UN Charter provides that:

“The Security Council may decide what measures not involving the use of armed force are to be employed to give effect to its decisions, and it may call upon these Members of the United Nations to allow such measures. These may include complete or partial interruption of economic relations and of rail, sea, air, postal, telegraphic, radio and other means of communication, and the severance of diplomatic relations.”

Thus, a vast amount of different kinds of sanctions can be used. However, as already pointed out, in this study all focus will be directed to the use of *targeted* sanctions.

The use of sanctions is considered to be a very powerful tool in the preservation of peace and security, next to the use of armed forces. In recent years the type of sanctions used by the Security Council has changed, going from the “traditional” embargoes of states to more specific, targeted measures, directed towards individuals or entities rather than a whole society. The traditional state embargoes, often isolating a whole nation through different economical measures and travel bans, were increasingly criticized because they did not have the desired effect. In fact, it seems they tended to do more harm to the suffering population in the implicated state rather than the “disobedient” governments they were meant to put pressure on⁶², and it was considered by many that the costs in form of human suffering were just too high in relation to the limited results. As the consensus among the permanent members of the Security Council grew in the 1990s, the interest to find new, effective sanctions increased. The first step was taken in problematic situation of Haiti 1994, when targeted, or “smart sanctions” were used for the first time. In 2000, a working group was established by the Council to deal with the question.⁶³ Important conferences were hosted in Germany, Switzerland and Sweden, and the result was the creation of “smart sanctions”, or targeted sanctions. Its design was intended to “have a high probability of directly hurting those responsible for the targeted policies while sparing the general population.”⁶⁴

⁶¹ In article 41, the word “sanction” is not used; instead it refers to “measures not involving the use of armed force”.

⁶² There are many examples; Claude Bruderline, United Nations office for coordination of humanitarian affairs, *An OCHA perspective*, 1998; Boutros Botrus-Ghali, *The 50th anniversary report*, 1996, p.18, Bailey and Daws, *The procedure of the UN Security Council*, p. 368

⁶³ See e.g. its report from Working group I, *Travel sanctions; first expert seminar: smart sanctions*, Bonn, 21-23 November 1999.

⁶⁴ Michael Brzoska, *From dumb to smart? Recent reforms of UN Sanctions*, Global Governance, vol. 9, 2003

Since then the Council has come to apply this type of sanction on many occasions and it has become an important measure in the efforts to reduce the financing of terrorist groups as well as the safe havens and possibilities to free travel for suspected terrorists and their supporters. This change towards the increased use of smart sanctions has significantly improved the humanitarian impact on the civil populations. Nevertheless, the targeted sanctions also brings new requirements of due regard to individual rights as protected by international law, issues that are now presenting new challenges to the Council. In particular it is the freezing of economical assets belonging to individuals suspected of being involved or supporting terrorist groups that require special caution. When applied, the targeted measure brings severe consequences for the individual: economical problems, damage of reputation or collateral effects for the families or employers of targeted individuals to name a few.

3.2 Targeted “smart” sanctions

Targeted sanctions, also called “smart” sanction, usually have the purpose of either changing or preventing an unwanted behaviour. The freezing of property belonging to individuals suspected of terrorist involvement is a typical example of the use of smart sanctions, and according to the Security Council they belong to the latter category.⁶⁵

If targeted sanctions are to be effective, the Security Council has to have access to information regarding the targeted individuals, groups or entities. It is common that the targets keep their assets under false names, through front companies or in states where it is still possible to stay anonymous. Thus, it is not an easy task to identify these assets and to receive accurate information regarding the targets financial situation, where and how assets are held and what front figures are being used. The UN has no intelligence agencies of its own and as a result its members must supply the information for it. Traditionally, banks and other private actors are reluctant to reveal information about their clients, although governments too have proved to be hesitant to reveal too much of their collected intelligences, one explanation being the fear that the UN is not capable of keeping secrets from leaking. It is not uncommon that states choose to keep their sources to themselves, especially when the objective pursued by the Council is of no particular relevance to the state holding the information.

⁶⁵ See e.g. Security Council resolution 1822, p. 2.

3.3 Resolutions ordering targeted sanctions in the fight against terrorism

A lot has been written on the adopted resolutions regarding the targeted sanctions directed against the Taliban and the al-Qaida and the large number of changes made to the listing procedure during a short timeframe has resulted in a rather confusing situation. Fragmented quotes from different resolutions is leaving the reader unsure of the current legal status and statements made in reports are inaccurate even though only recently published, giving the impression of contradictions. Therefore, a close chronological study of the developments regarding the adopted resolutions will follow, with the intention to clarify the course of changes to the current situation.

The attacks on September 11 in 2001 made the world aware of the horrific developments in Afghanistan. The Security Council had started to take measures some years before, adopting resolutions against the Taliban and Afghanistan in order to activate and coordinate member states in their efforts to fight terrorism.⁶⁶ Far-reaching measures were encouraged, for example the criminalizing of financial support to terrorist groups.⁶⁷ The resolutions obligate states to implement several different kinds of targeted sanctions, such as the freezing of funds, sale and supply as well as to implore travel restrictions. However, in my study the focus is concentrated to the measures concerning the freezing of funds, with special notice of measures taken to insure procedural fairness, such as the standard of proof when listing individuals or entities or the procedures concerning the listing and de-listing. First, the most important changes in the resolution will be explained, whereupon it will be shortly comment on.

3.3.1 Economical sanctions against terrorism: Resolution 1267

Resolution 1267 was to be the first in a long list of anti-terrorist resolutions, all of them based on the obligations stemming from this original one. In the resolution, the Council expresses its deep concerns regarding the violations

⁶⁶ The definition of terrorism has been and still is a sensitive issue and despite extensive discussions in the international communities, no agreement has been reached so far. Thus one could argue that none of the UN resolutions give a precise content or meaning to the obligations they refer to. See for example *“The war on terror and the framework of international law”*, p. 38, by Helen Duffy. Thus, the definition of the concept of terrorism remains unanswered, leaving the peculiar situation of the Security Council calling on its members to criminalize an activity that is undefined.

⁶⁷ See e.g. the trial in Malmö Tingsrätt, B 8056/06, where a man is suspected of sending money to the terrorist classified group Hamaz in Palestine, “Välgörenhet inom Hamas fall för rätten”, Svenska Dagbladet, 3 February 2009.

of international law and human rights, and in particular over the developments in the Afghan territories where the Taliban sheltered and trained terrorists, and as a response to this, one of the sanctions the Council decided to implement was the freezing of funds and other financial resources as designated by the Sanctions Committee⁶⁸, which was also established in the resolution. The states parties of the UN were to make sure that no funds or financial resources were made available to terrorists by their nationals or by any other person within their territory.⁶⁹ The responsible Sanctions Committee was to consist of all the members of the Security Council with the purpose to undertake the task of monitoring the implementation of sanctions in the member states, to make periodic reports to the Security Council on the impact of the measures and alleged violations and to consider requests for exemptions from the measures.⁷⁰ It is not mentioned what kind of exemptions the Council had in mind, but most likely, considering the wording in later resolutions, it is referring to basic expenses considered to be necessary to live, such as food and rent.⁷¹ This first resolution was at large directed towards the Taliban regime in Afghanistan, the al-Qaida and Usama bin Laden but it clearly states that it is the list decided by the Committee that decides whose funds are to be frozen, leaving a large discretion to the Committee.

Many have criticized this resolution, and others that followed, for the lack of emphasis on the importance of implementing the measures in accordance with human rights. It is also criticized for the absence of any transparency in the work of the Committee, and the lack of any possibilities to challenge a listing. This heavy critique was initially met by the Council and its Committees by stating that it is not the place of these organs to take special regard to the respect of human rights but instead it is up to the member states in accordance with their international obligations to respect these rights, also in this regard. However, step-by-step this opinion started to shift.

3.3.2 The role of the Sanctions Committees

Considering the important role the Sanctions Committee has to play in the terrorist listings, it deserves a closer examination before moving on to the following resolutions. For practical reasons, the members of the Security Council do not incorporate the individuals and entities in the resolutions themselves when a decision has been taken to impose targeted sanctions. One reason for this is that each new change of the list- and there are many required- would call for the adoption of a new resolution, hence, it would be very impractical and perhaps even impossible to do so. Thus, in order for the sanctions to be efficient, updated and flexible, the Security Council appoints a “Sanctions Committee” to organize the listings. As a rule, a new

⁶⁸ For further reading, see chapter 2.3.2, p. 14

⁶⁹ Resolution 1267, para. 4

⁷⁰ Ibid, para. 6

⁷¹ See e.g. resolution 1452, para. 1.

Committee is established as a standard procedure when the Council adopts a decision to impose new sanctions. The Committees consists of all the members of the Security Council and work as its subsidiary organ. The Committee meet in private with only limited distribution of the documentations of the meeting, published one or two months afterwards.

For the Sanctions Committee established pursuant to resolution 1267, special guidelines for the conduct of its work have been adopted.⁷² In the guidelines it is stated that it may invite any member of the UN to participate in meetings concerning questions of which the interests of that member are especially affected. Appropriate experts may also be invited to give assistance. The purpose of the Committees is to make sure the sanctions decided by the Security Council are implemented effectively and states have to submit updated reports on all steps taken to implement the obligatory measures. Member states may also make requests, which will be considered. The collection of information from intelligence agencies coming in from the member states are to be given directly to the Committee. Based on this information the Committee list the individuals and entities that are to be sanctioned. It is required to keep regular contact with the Security Council, to report on the over all work and to make recommendations on how the sanctions can be improved. The decisions are made in consensus of its members, and if such agreement cannot be reached in a particular issue, the matter may be submitted to the Security Council. The Council decides the mandates of the Committees, and when sanctions are to be terminated, the Committees are usually resolved, leaving little room for the development of an “institutional memory”, or a uniform practice among the committees.

3.3.3 Moving towards conformity with Human Rights law- resolution 1333

There are no drastic changes made in the next resolution, 1333 from 2000. The Sanctions Committee is requested to undertake the additional tasks of establishing an updated list based on information provided by states, on individuals and entities designated as associated with Usama bin Laden.⁷³ Further, the Committee is to make a report on the humanitarian impact of the measures, to be handed in to the Secretary General and the Security Council.⁷⁴ The Council also expresses the promise that if the Taliban regime were to comply with the conditions as set in the resolution within a 12-month period, the measures would to be terminated.

Already in the second resolution, small steps towards implementing the targeted sanctions in accordance with a certain respect for the demands of

⁷² Guidelines of the Committee for the conduct of its work, Security Council Committee established pursuant to resolution 1267 (1999) concerning al-Qaida and the Taliban and associated individuals and entities.

⁷³ Res. 1333, para. 16

⁷⁴ Ibid, para. 15 d

Human Rights are made. The promise to end the sanctions, if the regime were to follow the demands made, suggests that at this point the measures had the aim to *change* behaviour rather than to prevent, or at least both elements existed simultaneously.⁷⁵

3.3.4 Developments post 11 September

In the days following the terrorist attacks of the 11 September 2001 in New York and Washington, the Security Council passed several resolutions, condemning the acts:

“such acts, like any act of international terrorism, as a threat to international peace and security”.⁷⁶ All states were urged to “bring to justice the perpetrators, organizers and sponsors”, and to hold accountable “those responsible for aiding, supporting or harbouring” them, and to “prevent and suppress terrorist attacks”.⁷⁷

In resolution 1373, the emphasis on states to comply with the measures of the previous resolutions on sanctions against this group of terrorists were sharpened and the targets of the sanctions are explicitly expanded to apply to anyone committing, or attempting to commit, terrorist acts.⁷⁸ The emphasis on the importance for states to cooperate is made stronger, going beyond earlier resolutions. It establishes the obligations for all states to afford other states the greatest measure of assistance when dealing with criminal investigations or proceedings relating to the financing or support of terrorist acts.⁷⁹ The Council also calls on states to ratify relevant existing terrorism conventions, and as a result there has been an increased number of states parties, providing a framework of cooperation.

The next resolution, 1390, is adopted in January 2002 and requests the Committee to make a regular update of the terrorist list on the basis of relevant information provided by the member states and regional organizations. A new, important requirement is that the Committee from now on has to make publicly available any information it considers relevant, including the list.⁸⁰

For the first time, a small window of opportunity to a limited access to the lists was allowed, making it possible for the listed individuals to learn that they are in fact listed. This could be seen as a sign that the international demands of better transparency in the work of the Sanctions Committee have had an effect. The resolution is also made open ended because there is

⁷⁵ Compare to the change of wording in resolution 1822, clearly stating it is a preventative measure.

⁷⁶ Resolution 1368, para. 1

⁷⁷ Ibid., para. 3

⁷⁸ Ibid, para. 1

⁷⁹ Ibid, paras. 2 and 3

⁸⁰ Ibid, para. 5(e)

no connection between the targeted groups and individual, or any specific territory or state: the focus is now on the global activities of the al-Qaida, Usama bin Laden and their associates.⁸¹

In resolution 1452, also from 2002, a new important step towards a more human rights friendly use of targeted sanctions is taken; from now on the state implementing the measure has the opportunity to make a *request* to the Committee to exempt certain assets belonging to the individuals on the list, considered necessary for basic expenses.⁸² The possibility existed already, mentioned in resolution 1267, however, the conditions surrounding this procedure were less clear and explicit.

Resolution 1526 from 2004 encourages all states to share all information they keep with the Committee regarding the individuals or entities they have proposed to be listed, including background information to the greatest extent possible.⁸³ In the resolution, the states parties are also strongly encouraged to inform, to the extent possible, the targeted individuals and entities of the Committee's list about the measures imposed on them.

Thus, even though improvements have been made, there is still no *obligation* to inform an individual of the sanctions imposed, despite the severe consequences following the implemented sanctions.

In resolution 1617 from 2005, it is more precisely defined what kinds of activities are considered to indicate association with bin Laden, the al-Qaida or the Talibans. The definition includes participation in the financing, planning, facilitating, preparing or perpetration of acts in support of these terrorist groups or any other cell or splinter group. Thus, it is made clearer what actions the Council considers to fall within the reach of the sanctions. For the first time, states are *requested* not only to inform the individuals or entities on the list, but also to inform about the listing and de-listing procedures as well as the guidelines of the Committee.⁸⁴ It is also decided that states proposing names for the consolidated list from now on *have to* include a statement of case, describing the basis of the proposal to the Committee.⁸⁵

3.3.5 Procedures for de-listing

In 2006, a new procedure for de-listing was introduced. Resolution 1730 expresses the Council's commitment to ensure the presence of fair and clear

⁸¹ Ibid, para. 2

⁸² Res. 1452, para.1

⁸³ Since the UN has no intelligence agency of its own and therefore entirely dependant on the information provided by the member states, who are often reluctant to give away the sources of their intelligence material. See also p. 27 above for more reading.

⁸⁴ Res. 1617, para. 5

⁸⁵ Ibid, para. 4

procedures when placing individuals and entities on the lists as well as when removing them. A de-listing procedure is adopted, giving each listed individual or entities the possibility to make a request directly to the Committee.⁸⁶ A Focal Point was established within the Secretariat (the Security Council Subsidiary Organs Branch) to receive and handle the incoming de-listing requests. Petitioners seeking to submit a request for de-listing can also choose to do so through their state of residence or citizenship.⁸⁷ After a request has been received by the Focal Point, it is to be sent to the designated governments as well as the governments of residence and citizenship. The Council strongly recommend these parts to consult each other on the matter before making a recommendation. If any of the governments are willing to recommend a de-listing, this request coupled with an explanation is to be sent to the Sanctions Committee. If three months pass without any of the governments indicate that they are processing the matter, the members of the Committee will be notified and receive copies of the individual request. If no member of the Committee recommends de-listing within a month, it shall be deemed rejected. The voting procedure requires consensus among its members and after a decision has been made the petitioner shall be informed of the result by the Focal Point.

This new procedure giving an individual right to ask for de-listing was an important step in the direction of the international demands of a fair trial for the listed persons and entities. However, the conditions are still not even close to corresponding to the standards of the fair trial according to international law⁸⁸: There are no guarantees that a case will be tried and for an affirmative decision it is necessary to have, besides consensus of all members, the support of either a government or a member of the Committee. If not, the matter will not be discussed and voted upon by the Committee at all. Thus, even if a case is coupled with a strong case of evidence, there is no requirement to even try the petition.

In resolution 1735, also from 2006, it is specified what kind of information is required by states when they propose names to the Committee for listing, including a detailed statement of case, including:(i) specific information supporting a determination that the individual or entity meets the criterion of the statement of case, (ii) the nature of the information, (iii) supporting documents or information that can be provided, states should also include details of any connection between the proposed designee and any currently listed individual or entity.⁸⁹

The designated states are also requested, at the time of the submission, to identify those parts of the statement of case that may be publicly released upon request to interested states.

⁸⁶ Res. 1730, para. 1

⁸⁷ Ibid, para. 1 and attached annex. States still have the possibility to address the de-listing request directly to the focal point.

⁸⁸ Compare to ICCPR art. 2.3, or ECHR, art. 13. For more reading see p. 51.

⁸⁹ Res. 1735, para. 5

In the resolution it is also decided that the Committee may consider: i) whether the individual or entity was placed on the consolidated list due to a mistake of identity, ii) whether the individual or entity no longer meets the criterion set out in relevant resolutions.⁹⁰ To evaluate the latter criterion, the Committee shall in particular consider whether the individual is deceased or if it is shown that the individual or entity has any association according to resolution 1617 with the al-Qaida, the Taliban or Usama bin Laden.

In June 2008, resolution 1822 requires more regular review of the individuals and entities in the list.⁹¹ The resolution also reaffirms that states proposing names to the consolidated list shall provide detailed statements of case and it is decided that for each proposal, the state shall identify those parts of the statement that can be used by the Committee as a summary to notify listed individuals.⁹² Another important change is that the Committee is required to make a narrative summary of reasons for listing available on its website, including names added to the list prior to the date of the adoption of this resolution.⁹³ It is also decided that the Secretariat shall contact the permanent mission of the designated states within a week after a name is removed from the list, and the concerned states are demanded to take measures of notification to these individuals in a timely manner. Again, the Committee is encouraged to continue to ensure that a fair and clear procedure in the listing of individuals and entities continues, for removing them as well as for granting humanitarian exemptions and active review. The Security Council also reiterates that the measures of freezing funds are *preventative* in nature and are not reliant on upon criminal standards set up in national laws.

This last statement could be seen as an answer to the ongoing debate regarding the legal status of the targeted economical sanctions: The right to a fair trial is protected by a number of international conventions and the question debated is whether the freezing of assets of individuals fall within this category of protection or not. Clearly the Council does not consider this to be the case. For example, some of the criteria determining the criminal charge are considered to be *punitive* in nature. Thus, if the sanctions are preventative in character, which is what the Council is urging through this statement, the indication that the freezing of funds should be considered as criminal charges is weekend.⁹⁴ However, this determination is made independently by courts, hence the relevance of this statement should be interpreted with caution.⁹⁵

⁹⁰ Ibid, para. 14

⁹¹ Res. 1822, para. 25-26

⁹² Ibid, para. 12

⁹³ Ibid, para. 13

⁹⁴ For more reading see p. 46 on Criminal Charges.

⁹⁵ See chapter 4 for more reading on the autonomous interpretation of the courts.

3.4 Conclusions

It would seem as if the Security Council has partly listened to the many critical voices regarding the lack of remedies for the persons and entities on the “terrorist list”. In the years following 2001, the language in the relevant resolutions changes form, from the initial resolutions almost only addressing security issues, to an increasing notice of humanitarian impacts and human rights when implementing the measures. However, to this day there is no recognition of the right to a fair hearing or review for those who are affected with these serious sanctions.

The international approach regarding “traditional” sanctions, directed against states or state like entities, have for long been that a wide range of use is justified. The side effects, as mentioned above, that a large number of innocent people might suffer from it, is also considered to be justified up to a certain point, since a certain level of collateral damage has to be accepted. When it comes to the new, targeted sanctions, no clear approach has yet been established. To see them as a new type of economic warfare, an alternative to trade sanctions measured with the same standards of acceptable side effects, would be a dangerous development in my opinion. It is individuals and not states that are the targets and this makes the smart sanctions fundamentally different. Hence, it would be more appropriate to make an analogy of the requirements of due process of law when approaching targeted sanctions.⁹⁶

As to the procedure of the de-listing, the principles according to which the Committee is reviewing the individual requests are unknown, and it is not required to consider the requests at all if a government or member of the Committee does not support it. The possibility for states to express their opinion in the matter has been pointed out as a poor protection, seeing that listed individuals are often political opponents that might lack the support and will to receive any protection from their state, and third states are rarely interested in objecting to a listed name or entity that might cause political disruptions. Consequently, there is no guarantee of an effective investigation of arguable claims, and there are undoubtedly no guarantees for an examination whether any substantive convention right has been violated.⁹⁷ Not even the basic requirements of objectivity, independence and equal treatment are insured, and the attempts of the Council to categorize the freezing of property as if falling outside the scope of human rights clauses concerning the individual rights to a fair trial or an effective remedy is in my opinion not convincing.

⁹⁶ Fredrik Stenhammar, *UN smart sanctions*, p. 170, in the collected work of articles by Diana Amends and Katinka Svanberg-Torpman, *Peace and Security, The Procedure of the UN Security Council*

⁹⁷ Mowbray, Alastair, *Cases and Materials on the European Convention on Human Rights*, p. 799

The opportunity to be heard, and to have the possibility to some sort of an objective presentation of evidence when subjected to such invasive sanctions seems reasonable and, in the next chapter, a close study of the international human rights treaties will follow to give a close examination of the legality of these targeted economical sanctions.

4 Human Rights law: guidelines in the fight against terrorism

In a world struggling to combat terrorists with no respect for human lives and suffering, is it possible to respect the human rights at all times? Is it reasonable that the possibilities for states and international organisations to act in order to protect themselves are limited and weakened because of the principles protecting the human rights? When the Human Rights conventions were signed, it was because of the conviction that some values were worth protecting, even in a time of difficult challenges. Perhaps it is *especially* in such times of turmoil and unrest these principles are important to follow, considering that public demands of quick response and forceful action might increase the risk of committing human right violations.⁹⁸

The right to a fair trial or procedure is absolutely essential in any legal system based on the rule of law and in the cases of the global actions taken to fight terrorism there are several human rights that are in danger of being violated. The most serious are the prohibition of torture and the right to a fair trial, but also the liberty and security of person and the right of self-determination and private life are threatened. Furthermore, there is a risk that other effects will “spill over” to the rest of society, e.g. discrimination against certain groups because they share the same religious beliefs as the members of a terrorist organisation. Another danger often mentioned in this connection is how the derogations from human rights law, in favour of a more powerful police and intelligence services, will not only be used against the terrorist groups: there is always the risk that they might also be put to use against the rest of the civilian population in various contexts. However, in this study the analysis will be limited to fair trial issues in connection to the targeted Security Council sanctions ordering the freezing of assets belonging to civilians.

The use of targeted sanctions can have severe consequences on the lives of the individuals affected and all though the powers of the Council are extensive, as seen in chapter 2, it is not exempt from obligations stemming from international human right laws when measures are to be implemented.⁹⁹ In the previous chapter, the extent of the resolutions that demand the freezing of assets belonging to individuals suspected of terrorist involvement was set out. With knowledge of this background, an analysis of their compliance with the relevant human rights laws will be made, in order to determine whether the listing procedures of the Sanctions Committee are in fact in breach of international law or not. The next step will be to look at

⁹⁸ See Opinion of Advocate General Maduro in *Kadi v Council and Commission*, para. 45

⁹⁹ See p. 16

what can happen in practice when it is clear that such a breach is a matter of fact.

First, a look at the substantive convention rights defining these human rights is necessary.

4.1 Applicable Human Rights conventions

Since the start of the UN, there have been several frameworks of human rights agreed upon. The first one is the Universal Declaration of Human Rights, adopted in 1948. The regional European Convention on Human Rights (ECHR) was adopted in 1950 and the Covenant on Civil and Political Rights (ICCPR) was adopted in 1966. Other important international human rights treaties to be mentioned is the Charter of fundamental Rights in the European Union¹⁰⁰, the American Convention on Human Rights and the African Charter on Human and Peoples` rights.

The focus of the study will mainly be on the ECHR, with its unique right for individuals to make a direct petition to its supervisory organ, the European Court of Human Rights (EctHR), as well as the ICCPR and the UDHR, with the latter two having the advantage of a very high number of the world`s states as parties: e.g. two thirds of the world`s states are parts to the ICCPR, which affords it not only a wide range but also a substantial legitimacy. Further, the ICCPR offers a minimum of protection that all the signing states have to respect in their national legislation and its supervisory organ, the Human Rights Committee (HRC), has a function based on state reports, through which it monitors the implementation of the covenant. The direct applicability for the nationals o the states parties is limited, the only possibility for individual complaints can be found in the first optional protocol, according to which the Committee is authorized to consider allegations from individuals concerning violations of their civil and political rights if all national remedies have been exhausted.

4.2 The right to a Fair Trial

The strongest protection for the right to a fair trial is found in art. 14, ICCPR and art. 6, ECHR. In the UDHR, the right to a fair trial is generally included and it can be found in art. 10.¹⁰¹ The protection is especially strong in cases

¹⁰⁰ The fundamental rights of the EU are included in the Lisbon treaty. Although it is not yet binding upon its members, it is used in practice by the European Courts, indicating that these rules have a general acceptance and application, independent of the rules of treaties.

¹⁰¹ The convention text of art. 10 UDHR reads: "Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him."

of criminal offences, where there are a number of special rights included to protect the individual. In relation to the targeted sanctions, the most relevant rights for this study are the presumption of innocence, the right to be informed of a charge, adequate time to prepare the defence, the claim to be tried without undue delay, the right to defence, calling and examining witnesses and finally, the right to appeal.

The convention text of art. 6. ECHR and art. 14 ICCPR are almost identical and although I have chosen to recite selected parts of art. 14 ICCPR, the same meaning applies to art. 6 ECHR.

Article 14 ICCPR gives that:

1. All persons shall be equal before the courts and tribunals. In the determination of a criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law. The press and the public may be excluded from all or part of a trial for reasons of morals, public order (ordre public) or national security in a democratic society, or when the interests of private lives of the parties so requires, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice; but any judgement rendered in a criminal case or in a suit at law shall be made public except where the interest of juvenile persons otherwise requires or the proceedings concern matrimonial disputes or the guardianship of children.

2. Everyone charged with a criminal offence shall have the right to be presumed innocent until proved guilty according to law.

3. In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality:

- a) be informed promptly and in detail in a language which he understands of the nature and cause of the charge against him;
- b) To have adequate time and facilities for the preparations of his defence and to communicate with council of his own choosing;
- c) To be tried without undue delay;
- d) To be tried in his presence, and to defend himself in person or through legal assistance of his own choosing; to be informed, if he does not have legal assistance, of his rights and to have legal assistance, assigned to him, in any case where the interests of justice so require, and without payment by him in any such case if he does not have sufficient means to pay for it;
- e) To examine, or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;
- f) To have the free assistance of an interpreter if he cannot understand or speak the language used in court;

g) Not to be compelled to testify against one or confess guilt.

...

5. Everyone convicted of a crime shall have the right of his conviction and sentence being reviewed by a higher tribunal according to law.

...

First of all the term *determination*, second sentence in 14.1, requires a closer look. When a civil right or obligation or a criminal charge is to be determined, two basic requirements have to be obtained. First, there has to be some sort of judicial review available and second, the body reviewing the matter must be competent to make binding decisions. There have been many cases of administrative proceedings not complying with this requirement, e.g. so-called “quasi-criminal proceedings”. This procedure in itself does not have to be a violation of the article. The HRC as well as the EctHR has found it may be allowed, as long as either the body taking the initial decisions comply with the procedural requirements of art. 14 ICCPR or art. 6 ECHR, or it is under the control of a judicial body that does, at least in a suit at law.¹⁰² In the word *determination* lies also the fact that there has to be a final decision made at some point.¹⁰³

4.2.1 Equality before courts

When a person is entitled to a fair hearing, the specific rights as defined in the conventions must be guaranteed. A short summary of the most relevant in the case of the targeted sanctions will follow, to facilitate a comparison to the de-listing procedure the Security Council offers¹⁰⁴.

4.2.1.1 Right to a fair and public hearing

”All persons shall be equal before the courts and tribunals”. This first sentence of art. 14, referring to equality, is to be understood as an absolute right, without any distinctions, to equal access to a court.¹⁰⁵ It also means that no special courts may be established for various races, religions etc. However, exceptions may be allowed and a special tribunal does not have to be a violation per se, however, this is usually only accepted in exceptional cases and only if the full guarantees of a fair trial are present.¹⁰⁶

The right to receive a fair and public hearing is the absolute core of any suits at law or criminal matters. To ensure this right there are a number of

¹⁰² *Ettl and Others case*, 23 April 1987, Series A, No. 117, *Skärby case*, 28 June 1990, Series A, No. 180-B

¹⁰³ *Delacourt case*, 17 January 1970, Series A, no. 11, p. 14, para. 25

¹⁰⁴ See chapter two and three, in particular section 3.3.5, p. 32, for further reading.

¹⁰⁵ Nowak, U.N. *Covenant on Civil and Political Rights*, p. 308

¹⁰⁶ *Cavanaugh v. Ireland case*

provisions and measures that states have to guarantee and the rest of the article deals exclusively with this issue.

4.2.1.2 Hearing before a tribunal

“In the determination of a criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law.”

The most important reason for the guarantee of a tribunal is that any of the matters above should not be heard and decided by political institutions or administrative authorities, following directives given to them. Thus, the requirements of independence and impartiality are absolute. The tribunals are to be competent and established by law; this is to ensure the independence, and to avoid arbitrary outcomes. This applies also to judges, who have to be appointed for a relatively long time to ensure independence.

4.2.1.3 Equality of arms

The fair hearing is to be protected through the principle of “equality of arms” between the plaintiff and the respondent or the prosecutor and defendant. Such violations could, for instance, include that the defendant is excluded from a hearing when the prosecutor is not, or if there is not an equal access to central records and evidence in the case. However, when it comes to documents stemming from secret surveillance to protect state security, courts have had to face big challenges, trying to balance the two interests; it is difficult to live up to the principle of equality of arms if the defendant, his or her lawyer, or even the court itself, may not examine key evidence against the defendant. At the same time, it is considered necessary to be able to use state intelligence material in courts, especially against terrorists and organized crimes, as it is an effective tool to bring them to justice.¹⁰⁷

The special nature of this information makes it necessary to protect informers as well as the identity of agents and intelligence methods. There is not much case law on this subject in connection to the ICCPR; however, the EctHR has tried several cases. As noted above, the general rule requires full access of material for the court and both parts of the case. If exceptions are made, there has to be compensatory safeguards, such as a more active role for the trial judge or to provide a sanitized version of the evidence to the defence. In some cases other options have been used, such as a security approved counsel to represent the interests of the accused.¹⁰⁸

¹⁰⁷ Iain Cameron, Human rights and terrorism, p. 225, in the collected work of articles by Diana Amends and Katinka Svanberg-Torpman, *Peace and Security, The Procedure of the UN Security Council*

¹⁰⁸ Ibid, p.226

4.2.1.4 Publicity of justice

The importance of the public hearing can hardly be underestimated and is considered to be an absolute corner stone in a democratic society to enable public control of the legal system. This right can be divided in two parts; the rights in connection to the ongoing trial, and the supervision of the trial once it is concluded. The right for the public to attend a trial is not very strong for many different reasons, and exceptions are granted as long as the principles of a democratic society are followed. However, the publicity of the decision is a requirement that few exceptions are given to¹⁰⁹, and according to the ECHR this right is absolute.

Hence, the obligation to make decisions public is strong. Exceptions are rare and very restrictive; violations have been found even though reference was made to national security.

4.2.2 The definition of the Criminal Charge and the Civil Rights and Obligations

Since the conventions makes the clear distinction that it is only criminal charges and civil rights and obligations that enjoy this strong protection, a lot of cases will consequently fall outside the scope of these rights. Thus, the determination of which type of cases that meet the requirements in art. 14 ICCPR and art. 6 ECHR become very important. Put into relation to the targeted sanctions, the outcome of this determination is really the key question: First, the determination will decide what level the evidence used must have when listing a person. E.g., if the sanctions were to be considered as having the character of a criminal charge, the evidence would have to meet the requirements of “beyond reasonable doubt”. On the other hand, if the characterization instead proves to belong to a lower category, say, administrative, the requirements of evidence for listing are also lowered.

Another reason why the analysis is important is that the characterization of the sanctions has direct consequences for the possibilities of review. A criminal charge would require a judicial trial, while the right to an effective remedy in art. 2.3 ICCPR gives no such guarantees, which also means a lower standard of protection. If the case were to be that the targeted sanctions *do* fall within this category of protection, the requirements of the fair trial would be applicable to the listing and de-listing process, a procedure that is not used in practice by the Sanctions Committee today.

¹⁰⁹ On some occasions, it has been accepted not to publish a judgement when the case concerns juveniles or divorces, Nowak, U.N. Covenant on Civil and Political Rights, p. 328. An other example is a number of cases involving military secrets in Uruguay, where the Committee held that there had been a breach of the duty to publish the judgement, Nowak, U.N. Covenant on Civil and Political Rights, p. 329

In order for these guarantees to apply, there has to be a right, an obligation or a charge at play, and this determination is crucial for the extent of which rights will be protected. The convention articles alone do not provide much information on what situations are to be included. Unfortunately, the HRC have not provided much case law in this area, nevertheless, the EctHR has dealt with the question in many cases and, as already mentioned above, it is generally considered that the interpretation of the two conventions correspond in this matter.¹¹⁰ This is also the case regarding the civil rights and obligations, even though the two conventions are using different words to describe it: “civil rights and obligations in a suit at law” (ICCPR) and “civil rights and obligations” (ECHR).¹¹¹

4.2.2.1 Civil Rights and Obligations

The case law of the EctHR regarding the definition of civil rights and obligations is problematic because it is not conform and offers no clear definition of the term, making it difficult to determine the exact limits in individual cases. However, the basic requirement for the applicant is to have an arguable right under domestic law. A crucial judgement that displayed the essence of what the Court found to fall within the concept was made in the Ringeisen case from 1972, where the EctHR held that the phrase “civil rights” covers “all proceedings the result of which is decisive for private rights and obligations”¹¹². This means that all forms of legal proceedings, also when held in front of administrative authorities, could fall within art. 6(1). It is also possible for administrative bodies that are not tribunals to decide in these matters, as long as this body is ultimately subject to a body that does meet the requirements of the article.¹¹³

In the König judgement of 1978, the Court held that: “Whether or not a right is to be regarded as civil...must be determined by reference to the substantive content and effects of rights- and not its legal classification- under the domestic law of the State concerned. In the exercise of its supervisory functions, the Court must also take account of the object and purpose of the Convention and of the national legal systems of the other contracting states...”¹¹⁴. This is a principle that was primarily established in cases determining the concept of “charge”(criminal proceedings). The Court held that this principle was applicable also in the determination of civil rights and obligations. What is important here is that a state cannot escape the obligations of art. 6 just by classifying a matter as administrative: this determination has to be made by the EctHR or else the object and purpose of the convention would be jeopardised. Thus, the term “civil rights and obligations” has an *autonomous* meaning.

¹¹⁰ Nowak, U.N. Covenant on Civil and Political Rights, p. 243

¹¹¹ E.g. opinion expressed by Nowak, U.N. Covenant on Civil and Political Rights, p. 244

¹¹² Case of Ringeisen v Austria, para. 94

¹¹³ Clayton and Tomlinson, The law of human rights, p. 221

¹¹⁴ König v Germany, para. 89

The following principles have been established as decisive when the Court has to determine whether a case involve civil rights or obligations:¹¹⁵

1. The character of the right or obligation
2. Any consensus from the national laws of European states in connection with the classification of the matter as public or private
3. The classification of the right or obligation in domestic law

There are a number of different types of cases that can fall within the ambit of a civil right or obligation. It can concern a matter between two persons, but also between an individual and the state, acting in its sovereign capacity.

When it comes to the determination of the latter category, it is less clear-cut than proceedings between individuals. In the *Ringeisen* case it was made clear by the Court that it was not necessary for both parts to be private in order to characterise it as “private rights and obligations”. Instead it was the result of the proceedings that constituted the determining factor. This basic principle applies to proceedings where the outcome is directly related to the determination or substantive content of a private right or obligation. For example it could be statutory provisions of certain obligations in the public interest, binding on businesses engaged in hazardous activities, without specifying the intended beneficiaries of those obligations. In such a case, the affected may claim their right to be heard.¹¹⁶ Other examples are expropriation of land and other property interests.¹¹⁷ In the case of *Zander v. Sweden*, the applicant owned a piece of land on which the Swedish state gave a company permission to expand its industrial waste, giving no opportunity for the applicant to challenge this decision. The Court held that “the right of property is clearly a “civil right” within the meaning of Article 6(1)... “¹¹⁸ and held that there had been a breach of art. 6(1).

The most important factor seems to be if there are any financial interests at stake, in relation to which the state action is directly decisive and in more recent years, social benefits have in some cases been considered to fall within this right.¹¹⁹ The stage at which the right must be applied is the point at which proceedings are commenced, but it can also start even before.¹²⁰

Examples of cases falling outside the scope of the civil rights and obligations are tax assessments¹²¹, discipline of prisoners¹²² and immigration and nationality¹²³. Even though all these cases involve elements of civil rights, the connection is considered to be too weak, or the

¹¹⁵ Established in the *König case*, see also *Feldbrugge v. Netherlands*, 1986, and *Deumeland v. Germany*, 1986

¹¹⁶ Donna Gomie, David Harris, Leo Zwaak, *Law and practise of the European convention on human rights and the European social charter*, p. 178

¹¹⁷ See *Tre Traktörer Aktiebolag v. Sweden*, 1989

¹¹⁸ *Zander case*, para. 27

¹¹⁹ *Schuler-Zraggen v. Switzerland*, 1993

¹²⁰ *Golder v. UK*, 1975

¹²¹ *X v. France*, 1983

¹²² *McFeely v. UK*, 1980

¹²³ See e.g. *P v. UK*, 1987

consequences are too remote to suffice.¹²⁴ This was the case in a deportation decision, where the individuals private right to a contract of employment were not protected by art. 6 since the connection between employment and deportation was too far-reaching. Disciplinary proceedings can be civil when it comes to continue in a professional practice.¹²⁵ More rare is the right to enjoy honour and a good reputation.¹²⁶

A case that has some interesting similarities to the Security Council sanctions is the Raimondo-case¹²⁷, concerning temporary state seizures and confiscations. In the case, Italian authorities had, for preventative purposes, seized and confiscated property belonging to Mr Raimondo, mainly vehicles and real estates, because of the suspicion that he was engaged in a mafia-type organisation. He was also placed under special supervision and house arrest according to domestic law but was later acquitted on grounds of insufficient evidence. However, the measures against him were not invoked until months later. The respondent state claimed there had been no breach of art 6.1 of the convention. The EctHR disagreed and found that art. 6 was indeed applicable to the case:

“on the matter of confiscation, it should be noted that art 6 applies to any action whose subject matter is “pecuniary” in nature and which is founded on an alleged infringement of rights that were likewise of a pecuniary character”.¹²⁸

The statement above is a direct reference to the Editions Pèriscope-case of 1992, where the question of whether a matter was to be considered a civil right according to art 6.1 was determined:

“The Court notes that the subject-matter of the applicants company’s actions were “pecuniary” in nature and that the action was founded on an alleged infringement of rights which were likewise pecuniary rights. The right in question was therefore a “civil right”, notwithstanding the origin of the dispute and the fact that the administrative courts had jurisdiction”.¹²⁹

Unfortunately the Court does not comment specifically on the nature of the *seizures* in the Raimundo case, which must be considered to be closer related to the targeted sanctions than a *confiscation*, where the final stage is the loss of ownership. It is not impossible that both terms were implied in the quoted statement above. Applied to the targeted sanctions, could it be said that they are pecuniary in nature? It might be argued that the foundation of any appeal for de-listing is to regain control of the frozen assets, perhaps to continue business activities, previously impossible due to the freezing. A

¹²⁴ The HRC has not dealt with this question, it is therefore not clear if it is also excluded according to the ICCPR. *I.P v. Finland*, Communication no 450/1991, para. 6.2

¹²⁵ *König v. Germany*, 1978

¹²⁶ *Tolstoy Miloslavsky v UK*

¹²⁷ *Raimondo v. Italy*

¹²⁸ *Raimondo v. Italy*, para. 43

¹²⁹ *Editions-Pèriscope v. France*, para. 40

lot of economical damage may have been caused due to the imposed sanctions, and according to art. 50 ECHR, just satisfaction to the injured party may be afforded. The infringements of rights are certainly pecuniary, as it involves the right to dispose of your own property, including the right to conduct business and investments and a lot of economical values may have been lost because of the decision to impose sanctions.

Off course, it is only possible to speculate about the opinion of the Court if a case regarding the targeted sanctions were to be tried, however, the parallels between the two cases are, in my opinion, interesting.

4.2.2.1.1 UN sanctions as Civil Rights and Obligations?

To conclude, it is not impossible that the sanctions could be said to violate civil rights and obligations. Although all cases in the EctHR are decided on a case-to-case basis, and it is widely recognized that it is not possible to derive any clear principles from the case law, it is nevertheless apparent that some of the characteristics of the sanctions- the freezing of property belonging to private persons- could fall within the ambit of a civil right according to art. 6 ECHR. For instance, as pointed out by the Court in the Raimondo case mentioned above, when an action is pecuniary in its nature and is founded on alleged infringements of rights, which are also pecuniary, art. 6 apply.

However, it must be said that the current situation of unclear guidelines is unsatisfying, and it has been suggested from many directions that there is a need for the EctHR as well as the HRC to adopt a new approach to avoid the current unsatisfying situation of uncertainty.¹³⁰

4.2.2.2 The Criminal Charge

The strongest guarantees of protection have been given to the trial of criminal charges. If a case is considered to fall within the scope of the criminal charge in art. 14 ICCPR, or art. 6 ECHR, the accused has a right to enjoy a long list of procedural safeguards as described in the conventions. Just like the definition of civil rights and obligations art. 14 is considered to correspond to the interpretation of the EctHR also in matters of criminal charges, and since there is not much case law on this topic coming from the HRC, the extensive case law of the EctHR can probably be used for both conventions.¹³¹ However, much alike the definition of civil rights and obligations, it is unclear what sanctions qualifies as punishment. This is because the case law is not uniform, hence, it is difficult to make any safe conclusions as to what is to be considered a criminal charge.

¹³⁰ Clayton and Tomlinson, *The law of human rights*; Nowak, *Law and practise of the European convention on human rights and the European social charter*

¹³¹ Nowak, *U.N. Covenant on Civil and Political Rights*, p. 244

When it comes to the definition of *charge*, it is not meant in a formal but in a *material* way, and it has been given an autonomous meaning, determined by substance rather than form. The definition refers to the actual case, when the authorities have informed about the charges made against an individual. But it does not have to be an official announcement. According to the Öztürk case, it can also be more implicit if the consequences of the charge are as severe as if it had been publicly announced. It can take the form of an arrest, knowledge of an investigation, or the freezing of a bank account.¹³² It is not relevant who is the initiator of the procedure, as long as the consequences of the sanctions can be considered punishments of a criminal offence.¹³³

The EctHR has held that a criminal charge is to be considered to exist from the moment the individual's situation is "substantially affected"¹³⁴ by governmental acts founded on a suspicion. The standard of the term "substantial effect" can be the launching of a police investigation, the questioning of witnesses or other activities without a direct effect for the individual.

In the determination of what constitutes a crime, the Court has chosen to use a wider perspective than the limits of national legislation, because even though all nations have some sort of concept of the term, the meaning and definition differs: there is no inherent, natural concept of what constitutes a crime. When an evaluation is made, the nature, severity and the type of the sanction, is considered. Similar to the determination of civil rights and obligations, the classification made by the state is not necessarily of any relevance¹³⁵, only the nature of the sanctions is important. This key principle was concluded in the Engels case, concerning an action against members of the armed forces of the Netherlands. Proceedings had been taken against them for breaches of military discipline, which in the Netherlands was not classified as a criminal charge but a disciplinary proceeding. However, the EctHR did not let this classification decide its work, and made an independent investigation to determine if it was in fact a criminal charge according to art. 6 of the Convention. Three criteria were established:

1. Whether the provisions defining the offence belong, according to the legal system of the respondent state, to criminal law, disciplinary law or both concurrently.
2. The nature of the offence
3. The degree of severity of the penalty that the person concerned risks incurring. Relevant is also the importance the convention attaches to the right in question.

¹³² *Funke v. France*, 1993

¹³³ *Minelli*, GH 62, 1983, 475

¹³⁴ *Eckle v Germany*, para. 73

¹³⁵ A domestic classification is always accepted if it is labelled as a criminal offence.

The first criterion is not considered to be of great importance since the nature of the sanction is really decided in the second criterion; only in cases where the offence is already accepted as criminal according to national law this is accepted without further investigations. In the second criterion, special importance is given to the laws of other states, and this collective definition of an offence forms the foundation of the decision of the Court. If a determination cannot be made according to the first two criteria, the third criterion regarding the severity and nature of the threatening sanction is taken under consideration. These are alternative, however, a cumulative approach may be used if each criterion on its own does not lead to a clear conclusion.¹³⁶

The judgement of the Engel's case gives that two days of imprisonment is not found to be sufficient in order to fall within the scope of art. 6 and the military court that had tried the case were found to have provided the applicants with a fair hearing. However, the reason why this judgement is important is because it established the autonomous nature of the term "criminal". This means that even though national authorities are of the opinion that the sanctions they impose are only at the level of disciplinary proceedings, it is in no way decisive for the Court in its determination; It will make its own assessment as to whether the domestic proceedings should be regarded as criminal.

The second criterion was given a greater importance than the first one in the Öztürk case, where German authorities had decided to bring less severe motoring offences, punishable by fine, out of the criminal order. The Court found, applying the Engel's criterion, that the purpose of the fine was deterrent as well as punitive, which was enough to show the criminal nature of the matter:

"If the Contracting States were able at their discretion, by classifying an offence as "regulatory" instead of criminal, to exclude the operation of the fundamental clauses of Article 6 and 7, the application of these provisions would be subordinated to their sovereign will. A latitude extending thus far might lead to results incompatible with the object and purpose of the Convention."¹³⁷

The criterion to define the criminal charge is thus extended to include regulatory offences. Even though the Court respects its respect for the German government's reasoning on the importance of an effective legal system through decriminalisation of petty offences, it still gives more importance to the fact that the nature of the sanction clearly must be considered to fall within the category of punishments of criminal offences. When a sanction is not only preventative, such as temporary loss of drivers licence, but also retributive and it is directed at the general public and not a specific group of persons or professions, it is by the ECHR considered to be a punishment, regardless of the severity.

¹³⁶ Clayton and Tomlinson, *The law of Human Rights*, chapter 11

¹³⁷ *Öztürk v Germany*, para. 49

4.2.2.2.1 UN sanctions as Criminal Charges?

The lack of guidance from the HRC and the contradictory case law of the EctHR are making any certain determinations almost impossible. However, there are some tendencies to go by. First, the targeted sanctions must be examined according to the Engel's criteria. The first step in the determination is to look at the provisions defining the offence; is it categorized as criminal, disciplinary or both concurrently?

The Security Council and its Committees have made several statements on this topic and have consistently held that the sanctions cannot be seen a part of neither criminal proceedings nor a suit at law. The Monitoring team of Security Council resolution 1267 stated that:

“After all, the sanctions do not impose a criminal punishment or procedure, such as detention, arrest or extradition, but instead apply *administrative* (authors emphasis) measures such as freezing assets, prohibiting international travel and precluding arms sales”.¹³⁸

It has also held that:

“The list is not a criminal list. Rather it contains the names of those who have engaged in or supported al-Qaida or Taliban terrorism in some tangible way, regardless of whether any authority has formally charged them with a criminal offence”.¹³⁹

In the fourth report of the analytic team report it was said,

“ The list is intended as a preventative, rather than a punitive measure”.¹⁴⁰

It has also been directly dealt with in Security Council resolution 1822 from 2008:

“the measures referred to in paragraph 1 of this resolution, are preventative in nature and are not reliant upon criminal standards set out under international law”.¹⁴¹

Clearly, the Security Council classifies these targeted sanctions as administrative in character. However, remembering the Engel's criteria, this is of limited relevance as it is only the second criterion that is of real importance. The terms “criminal charge” and “civil rights and obligations” are both autonomous in character, as described above, and must be determined independently. In the case of the targeted sanctions, the offence is most likely suspected financial support of terrorist organizations. Since the nature of the offence is decided after viewing what appears to be the collective opinion of the majority of the states parties, this is where to start.

It seems that the opinion on this matter is right now rapidly changing, seen from an international perspective. Starting from a more tolerant legislation,

¹³⁸ UN DocS/2005/572, paras. 39 and 41.

¹³⁹ Ibid.

¹⁴⁰ Ibid. Also in the teams fourth report para. 32.

¹⁴¹ Resolution 1822, p. 2

where financial support even to known terrorist groups was tolerated, more and more states are now outlawing this activity. Recently, the EU decided to amend a recent decision to create a common terrorist legislation, where the funding of terrorist activities in the future will be considered as a criminal offence in all its member states.¹⁴² For instance, in Sweden the decision is at the moment pending in the Riksdag to be accepted.¹⁴³ This new legislation is stemming from the pressure of the Security Council resolutions¹⁴⁴, and in my opinion it is rather ambiguous of the Council to proclaim an act serious enough to criminalize it, and at the same time declare the targeted sanctions, aiming to prevent the same offences, to be of administrative character only. In this case the powerful tools of the Council to create new international legislation might actually work against itself, since through its actions there might be good grounds for considering the nature of the action- donations to terrorist networks- to be criminal.

To conclude, it cannot be excluded that the nature of the offence is criminal.

If the offence itself does not resolve the question of whether the targeted sanctions would fall under the definition of art. 6.1, the third Engel's criterion regarding the degree of severity of the *penalty* becomes relevant. In the case of the terrorist listings, the concerned individuals have lost access to personal accounts, with the exception of the possibility to ask for exemption for means to cover life necessities such as food and rent. This could be considered as fairly severe measures. Although the right to property does not enjoy a strong protection in the human rights conventions, national legislations often guarantees this right in some way as well as the right to property according to customary law. The freezing of economical assets might be classified as fairly severe, especially considering the lack of guarantees of a fair proceeding and independent review. Another factor making the matter more severe is that there are no time limits; some of the sanctions have been applied for years now, with no relief in sight. This is speaking for a high degree of severity: the longer a sanction is applied, the more serious and harmful the effects are.

However, is the purpose of the sanction more akin to preventive or punitive measures? Probably it is preventive as they are said to be used to prevent future transaction, not to punish what has been done in the past. Even so, it is the total impact that has to be decided upon. The Engel's criterions are not cumulative, but in cases where it is not sufficient to point out just one criterion, a cumulative use is possible. Thus, the determination of what constitutes an offence according to the majority of member states, coupled with the severity of the sanctions when implemented, might through a cumulative account lead to the conclusion that the sanctions should be dealt with as a criminal charge. Does the absence of an official criminal charge directed against the targets of the listings pose a problem? Not necessarily, as described above regarding the EctHR judgement in the Öztürk case, an

¹⁴² 2002/475/RIF

¹⁴³ Prop. 2008/09:25

¹⁴⁴ E.g. Security Council resolution 1373 from 2001, para. 1.a

official notification is not required in order for it to be considered as a criminal charge, it is enough that the *consequences* are just as severe as they would have been if there had been an official notification. Even the initiator of an investigation does not necessarily have to be connected to a criminal proceeding; it can suffice if it is an administrative organ as long as the consequences can be considered to have an effect on the individual.¹⁴⁵ In the cases of the targeted sanctions the consequences for the individuals or entities listed is of course primarily the freezing of all their known funds, and this measure is certainly affecting the targets just as severely as an official investigation could.

4.3 The right to an effective remedy

There are other options available apart from art. 14 ICCPR/ art.6 ECHR, according to the UN and European systems; a case does not have to be classified as a criminal charge or a civil right or obligation to enjoy certain rights, and the right to have an effective remedy exists as long as a right recognized by the conventions or its optional protocols is violated. The requirements of the trying body is however less severe. Art. 2.3 ICCPR reads:

...

3. Each State Party to the present Convention undertakes:

- a) To ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy, notwithstanding that the violations have been committed by persons acting in an official capacity;
- b) To ensure that any person claiming such a remedy shall have his right thereto determined by competent, judicial, administrative or legislative authorities, or by any other competent authority provided for by the legal system of the State, and to develop the possibilities of judicial remedy;
- c) To ensure that the competent authorities shall enforce such remedies when granted

There is no mention of a court or tribunal¹⁴⁶, thus, a lesser standard is accepted when reviewing according to art.2.3. Its narrow scope is also limiting since it is only violations of rights named in the convention that gives the possibility to remedy. The EctHR has held that an arguable claim of a substantial violation of such a right suffices for a claim to a remedy, an interpretation that is considered to correspond to the ICCPR. What constitutes an “effective remedy” is decided on a case to case basis, depending on the relevant circumstances in the case, national laws and the

¹⁴⁵ Frowein and Peukert, *Europäische Menschenrechtskonvention, EKHR- Kommentar*, p. 132

¹⁴⁶ Compare to art. 14 ICCPR, where the higher level of a tribunal is required.

severity of the right allegedly violated; a violation as serious as the prohibition of torture, where no exceptions are allowed¹⁴⁷, will naturally demand a higher standard of the remedy given, and in some cases the HRC has even held that an effective remedy can be no less than a criminal process, recognising the rights of victims to receive a proper investigation. Hence, the context of the case is of great importance. The EctHR and the HRC both have concluded that an effective remedy must include a deciding authority with the right to change the decision if a violation is found, as well as to give reparation to the victims through restitution, compensation, rehabilitation, satisfaction and guarantees of non-repetition.¹⁴⁸ The nature of the violation as well as the potential severity of the consequences is thus essential, as well as the procedural guarantees and authority of the institution involved¹⁴⁹.

The problem using the ICCPR in the case of the terrorist listings is that none of the articles in the convention gives a clear right to property, which would be the most serious violation in the freezing of assets. In art. 1.2 it is said that “All peoples may, for their own ends, freely dispose of their natural wealth and resources without prejudice to any obligations arising out of international economic cooperation, based upon the principles of mutual benefit, and international law. In no way may people be deprived of its own means of subsistence.” It is unclear exactly what this includes and the HRC has dealt very little with this question. The only significant statements that have been made were in the context of the recognition of indigenous land rights, such as the Swedish Same people’s rights to their traditional lands and economic activities.¹⁵⁰ The situation is unclear as to whether the right to property is included here or not, making the use of the ICCPR uncertain.

In the UDHR, the right to a fair trial is generally included and it can be found in art. 10:

“Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him.”

The right to an effective remedy is found in art. 8:

“Everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law”

The UDHR thus offers a wider range of the right to an effective remedy since it does not limit the scope to the fundamental rights listed in the convention, as long as it exists in national law. The convention also requires *tribunals* to take on the task of ensuring the effective remedy, clearly aiming at a higher standard than art. 2.3 ICCPR that allow administrative bodies.

¹⁴⁷ ICCPR, art. 7

¹⁴⁸ Nowak, U.N. Covenant on Civil and Political Rights, p. 70

¹⁴⁹ *Klass v. Germany*, 6 September 1978, para. 67

¹⁵⁰ UN doc. CPPR/CO/74/SWE; No.747/1997, para. 9.2

4.3.1 Case Law on what constitutes an Effective Remedy

In the ECHR, the right to property is found in the first optional protocol of the Convention, therefore it clearly applies to cases where assets have been frozen. The case law of the EctHR again reveals better what is considered to be included in the term “effective remedy”. However, it seems as if the interpretation of the meaning is not sure to correspond entirely to the interpretation of the ICCPR.¹⁵¹

Since it does not have to be a court or tribunal that tries the case, the guarantees of the authority involved as well as the severity of the alleged violation are of great importance.

In the Klass case, concerning secret surveillance, a group of lawyers filed a complaint against the German law on restrictions on the secrecy of the mail, post and telecommunications. The applicants claimed that individuals targeted by secret surveillance did not receive the possibility to an effective remedy according to art.13 ECHR, since they had no possibility to even know that a given right might be violated. The Court held that it was enough if the remedy was as “effective as could have regard to the restricted scope for recourse inherent in any system of secret surveillance.”¹⁵² Hence, the Court found no breach of art. 13 since a right to be informed during an operation considered to be necessary in the interests of national security and for the prevention of disorder or crime would not be compatible with the convention read as a whole. The circumstances in the case gave that if a person suspected to be a target of secret surveillance, the possibility existed to appeal to the national Constitutional Court as well as to the special commission established in connection to this law, even though the possibilities of success admittedly were small. The Court also noted that after the secret surveillance had been terminated and the individual had been notified, various legal remedies could be pursued before the national courts: in an action for a declaration there was a possibility to have an administrative court to review the lawfulness of the application of surveillance as well as the conformity with the law of the surveillance measures ordered; there was also the possibility to bring an action for damages in a civil court if prejudiced, and finally, if none of these remedies were successful, the possibility to apply to the Federal Constitutional Court for a ruling as to whether there has been a breach of the Basic Law was possible.

In the Leander case, Swedish military authorities had prevented a naval museum employee to continue his work that gave him access to the neighbouring naval base after reading secret files on him. The authorities never allowed Mr Leander to see these files, nor would they comment them. The EctHR held that:

¹⁵¹ Nowak, U.N. Covenant on Civil and Political Rights, p. 67

¹⁵² The Klass case, para. 71

“It is uncontested that the secret police-register contained information relating to Mr Leander’s private life. Both the storing and the release of such information, which were coupled with a refusal to allow Mr Leander an opportunity to refute it, amounted to an interference with his right to respect for private life as guaranteed by Article 8(1).”¹⁵³

This right is however not absolute and the Court found that the Swedish police register was necessary for the security of the state. Enough procedural safeguards had been established to satisfy the requirements of art. 8 ECHR: a formal appeal to the government; a request to the police board to see these documents, and if refused, the possibility to appeal to the administrative courts; a complaint to the Chancellor of Justice, supervising public authorities; a complaint to the parliamentary Ombudsman. All of these remedies, not one by one, but considered all together, were found to meet the requirements of art. 13. Especially the Court notes that both the Chancellor of Justice and the Ombudsman have the competence to receive individual complaints coupled with the duty to investigate, and both have access to the secret police records. Several decisions from the Ombudsman showed that such investigations had been made in similar matters of personnel control systems already. They were also considered to be independent of the government.¹⁵⁴

4.3.2 Does the de-listing procedure correspond to the right to an effective remedy?

As described above, there is a reasonable chance that the targeted sanctions fall within the right to an effective remedy, at least according to the ECHR art. 13 and the UDHR. The already existing de-listing procedure is by some said to satisfy the requirements of the Human Rights, and therefore a comparative study of the UN procedure and the procedure of an effective remedy according to the ECHR is of interest. Considering its less demanding character it might also be considered to be better suited for the de-listing procedure, leaving more space to the Council to decide appropriate measures and at the same time offering a reasonable protection to the individual.

4.3.2.1 Shortcomings in autonomy

The Sanctions Committee is today the only authority that decides which individuals or entities are to be included in the “terrorist list” as well as who

¹⁵³ The Leander case, para. 48

¹⁵⁴ Even though the ECHR found no breach of art 13, Swedish authorities still changed opinion and allowed Mr Leander access to his personal files, which later lead to him receiving economical compensation from the Swedish state for illegal registration of opinion (olaga åsiktsregistrering). The case also started a political debate, leading to changes in the procedures surrounding secret intelligence material (sekretesslagen).

is to be removed.¹⁵⁵ In a comparison to the requirements of art. 2.3 ICCPR and art. 13 ECHR, the Committee seems to correspond to the demands of an effective remedy to some extent: since it has the power to remove names from the list it fulfils the important requirement of full authority to give reparation. However, no compensation for the damages caused is possible.

As to the requirement of independence the conformity with art. 13 are less convincing, since the body trying the complaints is the same body that made them in the first place. There are several different problems to be pointed out. First, there is a clear conflict of interests and it seems very difficult to insure that the decisions taken are entirely objective. A second problem is that the Sanctions Committee in no way can be said to be independent from the Security Council, who gave the Committee the mission to put together these lists. In fact, the members of the Committee are composed as a replicate of the composition of the Security Council. Furthermore, it answers directly to the Council¹⁵⁶, whose member's in their turn answer to the directives of their governments, and the only purpose of the Sanctions Committee is to assist the Council in the application of the terrorist sanctions for as long as it is considered necessary. Hence, there is no autonomy of the Sanctions Committee and the risk of arbitrary decisions is apparent.

4.3.2.2 The handling of secret intelligence material

Does the fact that the Committee is basing its decisions on documents considered to be secret intelligence material, which would allow certain derogation from the principles of a fair hearing, make the listing and delisting procedures legal according to the convention texts?¹⁵⁷ In order to evaluate if the current procedure are legal, they have to be placed in a context of proportionality to the possible violations committed. Since the Committee is dealing with sensitive and secret state information, which is considered to be acceptable to use in the interests of state security¹⁵⁸, it is enough if the remedy is as "effective as could have regard to the restricted scope for recourse inherent in any system of secret surveillance."¹⁵⁹, hence, a certain concealment regarding the deliberations behind the decisions and the information and evidence this is based upon has to be accepted.

In addition, the freezing of personal assets is not a right that affords the highest protection in the conventions; it might not even be included in the ICCPR.¹⁶⁰ When adding to the facts that exceptions can be made for food and general living expenses, the consequences of the sanctions are less

¹⁵⁵ See chapter three, in particular section 3.3.2 on the role of the Sanctions Committees, p. 29

¹⁵⁶ Guidelines of the Committee for the conduct of its work, Security Council Committee established pursuant to resolution 1267, (1999) concerning al-Qaida and the Taliban and associated individuals and entities, para. 2

¹⁵⁷ E.g. the *Klass case* and the *Leander case*

¹⁵⁸ See *Klass. v Germany*, para. 48 and para. 68

¹⁵⁹ *Ibid.*

¹⁶⁰ See p. 54 for further reading

harsh. However, the fact that there is no time limit to the measures makes it more severe, especially in the cases that have lasted for years. The possibility to complain to national authorities exists, but it cannot be considered as an *effective* remedy, since in practice the national courts do not have the competence to over rule the UN Security Council. Hence, in reality, the Committee is the only effective authority to direct a complaint to.¹⁶¹

The Committee has proved that they are willing to make use of this possibility to review and as a consequence, several names have been removed from the list. However, there are serious faults in the review mechanism; there is no guarantee of a “trial” and the process as well as the decision is in great risk of being arbitrary due to the dependency of the Committee. The possibility of the member states to make recommendations of de-listings is not security enough to ensure an effective remedy; few will be so lucky as to catch the interests of a state to speak on their behalf to the Committee. Yet, this is a crucial part of the de-listing process and the recommendations, without which there most likely will be no review of a de-listing request at all, are entirely voluntary.

The Committee is first of all ruled by political considerations, and in a situation where states have different opinions on the matter; political pressure will certainly be used to influence the result of the voting. This lack of independence is working against one of the most basic principles of law. Regarding the lack of the “defence’s” access to important evidence, the Klass case principle says that this can be accepted, as long as the remedy is as effective as can be, including the sharing of evidence. Considering the present procedure in the Sanctions Committee, I do not think these conditions have been met.

4.4 Permissible derogations from the Fair Trial in times of public emergency

It is sometimes argued that measures intended to stop terrorism are legal due to the immediate and serious threat of more terrorist attacks; safety comes before the human rights. Indeed, in some situations instant and forceful actions are required and must be allowed to stop an immediate threat to society. It is therefore of relevance to look at what kinds of derogations are permitted in the ICCPR and ECHR, and to which extent, to see if the targeted sanctions could fall within the scope of these articles.

¹⁶¹ This might appear contradictive considering the recent judgement from the ECJ (Joined cases C-415/05 P and Case C-402/05 P), which was made by a regional court. However, it conducted an *indirect* and incidental review of the Security Council sanctions and the decisions of the Sanctions Committee and therefore cannot be included to the possibilities of an effective remedy in the decisions of the Sanctions Committee in the de-listing procedure.

4.4.1 The derogation clause: The attacks of 11 September

Under certain circumstances, states are permitted to derogate from their international obligations concerning certain rights. These clauses can be found in various treaties and norms of customary law and in practice it frees states from the responsibility of actions committed contrary to the obligations of the conventions.

These derogations are however only permitted in exceptional cases of grave threat to the survival and security of a nation and the clauses are intended to be of temporary use only. The ICCPR does not contain a general limitation clause; instead the limitations are included in various provisions. Some of the articles are subject to no limitations, such as prohibiting slavery and torture. In the case of art. 14 ICCPR concerning the right to a fair trial or art. 2.3 ICCPR guaranteeing an effective remedy, the rights are not absolute and derogations are therefore possible. In art 6 ECHR, the pronouncing of judgements in closed sessions is possible, the possibility to restrict other aspects of the trial has not been dealt with by the EctHR, leaving the situation unclear, though it seems as if not all rights may be restricted.¹⁶² In art. 4 ICCPR and art. 15 ECHR, the rules for a state's request to derogate from its obligations are codified, and the use of the derogation article could be compared to the individual's right to self-defence in a criminal proceeding. Situations that might call for a state to make use of the article could be the threat of irreparable damage to the general public resulting from international or civil war, an attempt to overthrow the constitutional order or grave natural or environmental catastrophes.

Applied to the situation that probably caused the Security Council to adopt decisions to use the targeted sanctions, at least to the extent they are used today, could it be conceivable that these circumstances were serious enough to motivate the use of these emergency clauses? Is it possible that the limitations of the civil and political rights the sanctions might impose may be excused through the use of the derogation clauses?

The obvious point to start would be the attacks on 11 September 2001, where the Security Council responded very quickly, adopting a new resolution on the very next day, 12 September. The resolution proclaimed that the attacks constituted a "threat to international peace and security"¹⁶³, giving the right to self-defence in accordance with the charter. Implicitly it thus recognized the terrorist action as an armed attack under art. 51 of the UN charter, giving the right to self-defence.¹⁶⁴ The Council later adopted resolution 1373, widening the scope of the sanctions imposed against terrorists and its supporters, binding upon its members to take financial,

¹⁶² See the Tinnely case, 10 July 1998, para. 72

¹⁶³ Security Council resolution 1368

¹⁶⁴ Steiner, Alston and Goodman, *International human rights in context*, p. 380

penal and other regulatory measures against individuals and organizations involved designated as involved in terrorist activities.¹⁶⁵ According to the convention, the situations that can call for derogations are found in art. 4.1, ICCPR:

“1. In time of public emergency which threatens the life of the nation and the existence of which it is proclaimed, the States Parties to the present Covenant may take measures derogating from their obligations under the present Covenant to the extent strictly required by the exigencies of the situation...

According to art 4(3), the use also requires:

3. Any State Party to the present Covenant availing itself on the right of derogation shall immediately inform the other State Parties to the present Covenant, through the intermediary of the Secretary-General of the United Nations, of the provisions from which it has derogated and of the reasons by which it was actuated. A further communication shall be made, through the same intermediary, on the date on which it terminates such derogation.”

These articles are not to be interpreted in an extensive way; rather it has to be an actual and directly threatening situation to an exceptional extent.¹⁶⁶

The measures imposed must also stand in proportion to the existing threat.¹⁶⁷ The EctHR have held the following criterion to be the indicative for a state wanting to make use of emergency derogations:

“a true, direct threat, whose effects concern the entire nation and make uncertain the continuation of the community’s organized life, that cannot be sufficiently averted with normal possibilities for limitations of rights”.¹⁶⁸

A case that demonstrates this is the British derogation measures in the Northern Ireland conflict, that were approved by the EctHR as well as the HRC, where a geographically limited emergency was found to effect and threaten the lives of the nation.¹⁶⁹ However, in the prolonged state of emergency in Chile, also described as the threatening of the life of the nation, the HRC expressed doubts about the legality, much alike the opinion of the European Commission on Human Rights in the Greek case.¹⁷⁰ In the Landinelli Silva case it was not enough to simply declare a state of emergency: the reasoning in the official proclamation was insufficient. Thus, important for the legality of derogations is not only a proclaimed state of emergency through official notification: it may then only last during a short period.

¹⁶⁵ The Security Council had already started to impose similar sanctions in 1999 through resolution 1267, however, after the events of 11 September, the measures clearly were sharpened as well as extended.

¹⁶⁶ Nowak, *U.N. Covenant on Civil and political rights*, p. 73

¹⁶⁷ *Ibid.*, p. 84

¹⁶⁸ *Ibid.*, p. 78

¹⁶⁹ *Ibid.*, p. 79

¹⁷⁰ *Ibid.*

To conclude, there is little support for the possibility of derogations according to art. 4 ICCPR or art. 15 ECHR. First of all, the Council has made no official proclamation.¹⁷¹ Even the strong language of the relevant Security Council resolutions can hardly be interpreted as the proclamation of a state of emergency required in the conventions. Also, the Council has not made any public statements suggesting that a derogation clause would be applicable. Apart from this, the strict requirement that only allow the use of these measures for a limited time is not corresponding to the imposed sanctions that can last for years.

4.4.2 Conclusions

These committees are, just like the Security Council, *political* organs consisting of diplomats following the instructions of their governments. The examinations and decisions they make are not equal to the work of a legal body. The fact that the Committees are dissolved after the termination of a sanctions regime also gives little opportunity to create an “institutional memory” or a uniform practice among the different Committees.

A close analysis of the human rights treaties regarding the right to fair trial or effective remedy show that these rights are quite extensive. Although the area is surrounded with uncertainties connected to the application of the articles, there is enough case law to suggest that legally, the collected circumstances of the targeted sanctions very well could be considered to fall within the scope of the fair trial¹⁷², or even more likely so, the right to an effective remedy, at least according to the ECHR¹⁷³. The Security Council’s installation of a de-listing procedure at UN level does not suffice for the right of individuals to be heard. In reality it is an intergovernmental consultation, without the obligation for the sanctions committee to take into account the view of the petitioner, or to justify a rejection of removal from the list. The demands of an autonomous body trying these cases are not met. Further, there is a lack of representation for the persons and entities that are being tried for the possibility of de-listing, a lack of requirements to justify the appearance of the names on the list and a lack of requirements to give reasonable access to this information to the “defence”. These are all rights guaranteed to the fair trial and effective remedy, and a close analysis of these articles reveal that the case of the targeted sanctions does not qualify the judicial safety net included in these standards.

¹⁷¹ Whether art. VII of the UN charter offers grounds for declaring a state of emergency is not clear. *Strengthening targeted sanctions through fair and clear procedures*, p. 14

¹⁷² Art. 14 ICCPR, art. 6 ECHR

¹⁷³ Art. 2.3 ICCPR, art. 13 ECHR

5 Judgement of the European Court of Justice on targeted sanctions

The far-reaching powers of the Security Council to adopt measures binding upon all its members seems to stand more or less unchallenged, as seen in previous chapters. The ICJ has, with some exceptions, chosen a passive role when it comes to reviewing the legality of Security Council resolutions and, so far, no court has found a breach of the disputed rules of Jus Cogens.

Nevertheless, there are several human rights conventions regulating what kind of measures may be used and, according to the UN Charter, these rules are binding also upon the Security Council.¹⁷⁴ In relation to the targeted sanctions, that freeze assets of individuals and entities suspected of involvement in terrorist activities, it is in particular the rights to a fair trial and effective remedy that are at risk of being violated. As previously discussed in chapter four, according to the requirements of the ICCPR and the ECHR it is very possible that the de-listing procedure now available is indeed contrary to these human rights principles. The problem is the lack of jurisdiction of any court to try if this is the case or not.¹⁷⁵ National courts can very well be used by the individual to bring civil actions, e.g. against a bank that froze funds in accordance with the list of the Sanctions Committee. However, this is hardly to be considered as an effective remedy since the national courts most likely will find that a review of a Security Council resolution, even indirectly, does not fall within its jurisdiction.

Considering this background, the recent judgement of the European Court of Justice, ECJ, is nothing less than astonishing, and it offers a new dimension to the possibilities of reacting, on legal grounds, to Security Council resolutions that are by many considered to be contrary to fundamental international laws and norms. The two groundbreaking cases are the Kadi and al-Barakaat cases, and bearing in mind the scope of this paper, the focus will be limited to the parts of the judgments relating to the jurisdiction of courts and to the possible breaches of fundamental rights.

5.1 Context and background to the judgement

During the latest years, several cases have come to stand before courts around the globe, challenging the Security Council measures passed under

¹⁷⁴ See p. 16 for further reading

¹⁷⁵ See p. 18 for further reading

chapter VII of the UN Charter, targeting individuals. So far, no national court has invalidated any national measure taken in accordance with the obligations of the resolutions and the Sanction Committee's decisions. However, in September 2008 two ground breaking and very important judgements came from the European Court of Justice, the ECJ, regarding the Sanctions Committees procedures of listing and de-listing individuals and entities. The Yusuf and al-Barakaat and the Kadi cases are very similar and deal with the position of UN obligations within the EC legal order.¹⁷⁶ In these cases, later joined for the purposes of the oral procedure in the ECJ, the Court of First Instance ruled upon the legality of Council Regulation¹⁷⁷, based on several Security Council resolutions.

Since the member states of the European Community are also members of the UN, they are bound by the UN Resolutions¹⁷⁸, whereas the EC itself is not, which may cause difficulties to arise as can be seen in the *al-Barakaat* and *Kadi* cases, where the applicants assets were frozen as a result of the inclusion on a list in Annex I to the contested regulation, based on the list drawn up by the Sanctions Committee. The applicants asked for the annulment of the contested regulation, partly because of alleged breaches of fundamental rights.

The cases of Kadi and al-Barakaat concern certain European Community regulations that were adopted in order to give effect to the Security Council resolutions on targeted sanctions, starting on 15 October 1999, directed against the Afghan territory, the Taliban, the al-Qaida and Usama bin Laden and their international networks. The Council of the European Union took the view that Community action was necessary and consequently adopted regulations that ordered the freezing of the assets belonging to individuals and entities listed by the Sanctions Committee.¹⁷⁹ In 2001, the list included Mr Kadi, a Saudi Arabia national, and the company al-Barakaat, established in Sweden. Consequently, the European Community imposed these sanctions, freezing the designated assets. In December of 2001, Mr. Kadi as well as al-Barakaat instituted proceedings before the Court of First Instance of the European Community, the CFI. The appellants requested annulment of the adopted regulations in so far as those measures concerned them, and for this several arguments were presented, in essence concerning breaches of fundamental rights.¹⁸⁰ The cases are close to identical and in the judgement of the ECJ, the cases are in fact joined.

Mr Kadi put forward three claims supporting his application before the CFI:
i) breaches of the right to be heard; ii) the right to respect of property and

¹⁷⁶ Case T-315/01 *Kadi v Council and Commission* and case T-306/01 *Yusuf and al-Barakaat International Foundation v Council and Commission*.

¹⁷⁷ Council Regulation (EC) 881/2002.

¹⁷⁸ For instance, according to Article 24(1) of the UN Charter the Security Council "acts on their behalf."

¹⁷⁹ The first adopted regulation was no 337/2000, since then it has been modified on many occasions to reflect the modifications of the UN Security Council's list.

¹⁸⁰ Regulation no. 467/2001, and regulation no. 881/2002, replacing regulation no. 467/2001, regulation no. 2062/2001 and regulation no. 2199/2001

the principle of proportionality; iii) breaches of the right to effective judicial review.

al-Barakaat also based its claims on three grounds, although slightly different from Mr Kadi's. First of all, it is argued that the Council lacked the required competence to adopt the contested regulations, the second claim concern a breach of Article 249 EC, and the third concern a breach of the right to effective judicial review.

Defendants were the Council and the Commission of the European Union, Spain, France and the Netherlands gave additional support to the Council, and France and the UK acted as additional support for the Commission. In my study, the focus is limited to the reasoning of the Courts regarding the right to review the so called "contested regulations", meaning the regulations used to implement the Security Council resolution, and the alleged breaches of fundamental rights.

5.2 Judgement of the Court of First Instance

In relation to the claims alleging breaches of fundamental rights the Court first of all held that the mandatory nature of the Security Council resolutions is binding upon all its states parties to respect the primacy of their obligations under article 103 of the UN Charter:

"In the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail."

However, this article is not binding on the European Community since it is not a member of the UN. According to Community law, there is nevertheless a mandatory force binding the Community to respect the Security Council resolutions, also confirmed and established by the case law of the EC,¹⁸¹ as well as various provisions in the EC-treaty and the Treaty of the European Union¹⁸². The CFI therefore concluded that it could not make an autonomous judgement on the matter of the alleged violations of fundamental rights. According to the Court, its only possibility to review a regulation based on a Security Council resolution adopted under chapter VII of the UN Charter was with regard to Jus Cogens, understood as a higher set of rules of public international law, having a binding force even on the UN, and from which no derogations are allowed. However, in this case, the CFI held that the contested regulations and its restrictive measures involved no

¹⁸¹ Joined cases 21/72 to 24/72 International fruit company and others (1972)

¹⁸² In the EC-treaty: art. 5, 20, 297, 307, Treaty of the European Union: art. 5. In particular, art. 307 EC in conjunction with art. 103, UN Charter.

such infringements. In short, it reasoned that the individual right of access to a court is not absolute and the limitations of this right in this case was justified since the public interests of peace and security outweighed the interests of the applicants, seeing that they were identified by the Security Council as a clear threat to international security.

Thus, the Court ruled it had no jurisdiction to review the implemented measures except in the light of *jus cogens*, but that these fundamental rights had not been violated in the cases of *Kadi* and *al-Barakaat*. In November 2005, the appellants appealed the judgement.

5.3 Opinion of the Advocate General

In the opinion of the Advocate General Poiares Maduro in the *Kadi* and *al-Barakaat* cases, a daring new view was presented, quite revolutionary in its form.¹⁸³ His analysis is in my opinion insightful as well as clarifying, and therefore worth a closer look.

In his conclusions he contradicts all of the points made in the CFI judgement, wanting the EC to move towards a higher standard in the protection of fundamental rights, an opinion that will later prove to be very similar to the opinion of the ECJ in its final judgement of the cases. The Advocate General did not stop at the ordinary judicial analysis of the situation; he also chose to touch upon a political and philosophical level of the question. One important factor he commented on is the fact that this is a matter that involves politics at the highest level.¹⁸⁴ The opinion that this is really a political question that consequently should be dealt with by politicians rather than the courts is common, and the Advocate General agrees that it is indeed important for courts and tribunals to be mindful of the international context it operates in, and to be aware of the consequences its rulings might have, also outside the Community. However, respect for other legal systems is wise only when there are a mutual respect for certain core values, as well as the mutual commitment to protect them. Thus, Advocate General Maduro holds that just because of the fact that it is a measure made the aim of securing peace and international order it cannot go so far as to silence the general principles of community law and deprive individuals of their fundamental rights. Also when it might be true that the Security Council generally is more competent than courts to decide if such measures of security are necessary or not, the task still remains for the

¹⁸³ Advocate general's Opinion: *Kadi v Council and Commission*, 16 January 2008, Case C-402/05 P and, *al-Barakaat v Council and Commission*, C 415/05 P

¹⁸⁴ Numerous states are actively involved in the question to a degree that is quite rare, having interests of their own to defend. A good example of this is the uncommon support of several states on the side of the defendants in these cases (note especially the permanent Security Council members France and the UK), spending a lot of efforts to defend the position that Security Council resolutions are to be immune even from indirect review by the Community Courts.

courts to decide whether the measures are in fact in compliance with established principles, in particular fundamental rights, or not.

There is also the determination of proportionality; there has to be a proper balance between the security risk on the one hand and the breaches of fundamental rights of individuals on the other. In particular in circumstances where there is a strong political pressure to act, and the political actions easily can be overly responsive to these popular concerns, it is important for the courts to play their role to make sure the rules of law are protected. The Community cannot just ignore the values and fundamental rights it is legally bound to protect, even when political interests surround the issue.

The fact that this regulation originally is stemming from the UN Security Council should not inhibit the courts of the European Community to fulfil their duty to preserve the rule of law. On the contrary, only through such review is possible to impose the limits of law on political decisions.

In regard to the alleged breaches of the fundamental rights, Maduro is of the opinion that the impairment of the right to a effective remedy in the contested regulation is unacceptable in a democratic society. The allegations directed towards the appellant are very serious, the imposed sanctions are severe, and still, the fundamental right of having an independent tribunal to assess the fairness of these allegations is entirely rejected to these individuals. Thus, the Community has no way of knowing if the allegations are in fact disproportional or misdirected and the mere existence of this possibility is not compatible with a society that respect the rule of law. Any inconvenience the Community and its members might have because of it on the international stage does not change the fact that the Community Court does have the jurisdiction to review the matter, and therefore also the obligation to protect these fundamental rights.

5.4 Judgement of the European Court of Justice

The appealed judgements of Mr Kadi and al-Barakaat were made into a joint case and the judgement of the ECJ was announced on 3 September 2008.

5.4.1 Jurisdiction of the Court

The CFI judgement was appealed on three grounds: The first two concern the legal framework of the EC legal order and will therefore only briefly be accounted for, while the third ground concerning breaches of fundamental rights will be closely examined. The Council and Commission contended that the Court should reject the appellants appeal.

The first claim of the appellants alleged that the Commission did not have the legal basis for the implementation of the regulation in EC law, and the second that the regulation had no general application and therefore contravened article 294 of the EC Treaty. The ECJ dismissed these two grounds: In relation to the first ground the Court concluded that the EU was competent to adopt such regulations on the basis of articles 60, 301 and 308, agreeing with the CFI. The second ground of appeal was dismissed since the Court could find no such violation of article 249 of the EC Treaty.

The third ground of appeal alleged that the regulation was violating the fundamental rights of the applicants. Considering first of all the limits of review by the EC Courts, the ECJ took account of the relationship of the EC and international legal order of the UN. The Court held, much corresponding the opinion of Advocate General Maduro, that it did have jurisdiction to review the internal lawfulness of the contested regulation, thus overruling the CFI. This was based on the fact that the EC is a community based on the rule of law, in which measures incompatible with respect for human rights are not acceptable¹⁸⁵, and no international agreements can prejudice this autonomy of the Courts. The case law as well as the mentioned provisions, such as art. 307 EC, referred to by the CFI as grounds for exempting review of regulations stemming from UN Security Council resolutions from this principle, cannot be interpreted so extensive that it would allow derogations from the principles of human rights and fundamental freedoms. This principle is enshrined in Article 6(1) EU, providing the very foundation of the European Union. No derogations can be allowed; even though UN Security Council resolutions may have priority to European law, this does not extend into its primary law¹⁸⁶. Hence, immunity could not be given through the alleged primacy of the Security Council resolutions, since that hierarchy of norms does not apply in the Community legal order.¹⁸⁷ However, the Court also emphasized that its review of lawfulness apply only to the internal EC act that gives effect to the international agreement, not the international agreement as such.

5.4.1.1 Response on the listing procedures of the Sanctions Committee

One argument the Commission brought forth was that, even if the Court were to find review of the contested regulation possible, the UN has changed and improved its listing procedure, especially the de-listing procedure, making it unnecessary for the Court to review the matter. The ECJ recognised that there has been improvements made by the UN, such as the entry and removal of the names on the sanctions list. However, it also notes, this was done *after* the adoption of the contested regulation and cannot be taken under consideration in these appeals. The Court adds:

¹⁸⁵ The Court refers to Case C-112/00 *Schmidberger* (2003), ECR I-5659, para. 73 and *Opinion 2/94*, para. 34

¹⁸⁶ Joined cases C-402/05 P and C 415/05 P, para. 308

¹⁸⁷ *Ibid*, para. 305

“In any event, the existence, within that United Nations system, of the re-examination procedure before the Sanctions Committee, even having regard to the amendments recently made to it, cannot give rise to generalized immunity from jurisdiction within the internal legal order of the Community. ...for clearly that re-examination procedure does not offer the guarantees of judicial protection”.¹⁸⁸

The Court also comments on the procedures of the Sanctions Committee:

“...the procedure before that Committee is still in essence diplomatic and intergovernmental, the persons or entities concerned having no real opportunity of asserting their rights and that committee taking the decisions by consensus, each of its members having a right of veto.”¹⁸⁹

In addition, the Court disapproved on the lack of representation, the lack of requirements to justify the appearance of the names on the list and the lack of requirements of giving, even restricted, access to this information. The same applies to the rejection of removal from the list that does not have to be justified.

In the conclusion of the ECJ, the Court held that the CFI had erred in law when finding that no review of the internal regulation was possible, except concerning its compatibility with the rules of Jus Cogens. For the first time, the ECJ confirmed its full competence to review acts of the EC that are originally stemming from a Security Council resolution.

5.4.2 Breaches of Fundamental Rights

When dealing with the claims of breaches against the right to defence and the right to effective judicial review, the Court refers to articles 6 and 13 of the ECHR, guaranteeing the two concepts of fair trial and effective judicial review.¹⁹⁰ It considers these articles to form the foundation of the general principles upon which the Charter of Fundamental Rights of the European Union is based, and hence has to be respected. That the Community is bound to abide by the principle of effective judicial remedy is also confirmed by Community case law, which in this particular case gives the effect that the EC judicature is required to communicate grounds for inclusion on the list as far as possible, in order for the persons or entities listed to have the possibility to bring action.¹⁹¹

This is by the Court considered to be important especially for two reasons: first, so that the individuals subjected to the measures can defend their rights

¹⁸⁸Ibid, paras. 321 and 322

¹⁸⁹ Ibid, para. 323

¹⁹⁰ Seep. 38 for further reading.

¹⁹¹ Joined cases C-402/05 P and C 415/05 P, para. 336, see also Case 222/86 Heylens and others, para. 15

in the best way possible, and second, it is only with such knowledge it is possible to make any conclusion as to whether it is useful or not to make an appeal at all.¹⁹²

Since in these cases, the information is related to issues of national security, the Court considers that it is not appropriate to inform or hear the concerned individuals *before* they are put on the list, since this could jeopardise the effectiveness of the measure. However, this is not the same as to escape all judicial review, once the list has been put in effect. It is the task of the Community judicature to apply techniques that can accommodate both national security and procedural justice.¹⁹³ In the opinion of the Court, the contested regulation does not include these rights and safeguards; at no time the appellants were informed of the evidence that justified their inclusion on the list, nor were they informed of their presence on the list when it was presented for the first time. This is making it impossible for the appellants to use their right to defence, in particular the right to be heard. This lack of access to any evidence against them, as well as their impaired right to defence, leads further to the consequence of an infringement of the right to effective remedy. In relation to the position of the European Council in the case, the Court also notes that:

“the infringements have not been remedied in the course of these actions. Indeed, given that according to the fundamental position adopted by the Council, no evidence of the kind may be the subject of investigation by the Community judicature, the Council has adduced no evidence in that effect.”¹⁹⁴

Thus, the Court’s lack of access to the relevant evidence used by the Council as grounds for inclusion on the list made it impossible for the Court to make any review of the matter regarding the lawfulness of the contested regulation, as applied to the appellants. This fact in itself leads once again to the conclusion that the fundamental right to effective legal remedy has not been fulfilled. The Court also found that the plea of Mr Kadi, regarding the measure that freeze his assets was a breach of the right to property, was correct: it found that this right had been infringed due to the same circumstances of lack of defence and effective legal remedy, as discussed above. The Court considered that the right to respect for property had been violated in a significant way, and therefore enjoys the protection of judicial review.¹⁹⁵ The ECJ therefore concludes that the regulation, in so far as it concerns the appellants, must be annulled. However, it also recognizes the risk that an immediate termination of the imposed measures might seriously prejudice the implementation of the regulation, seeing that the measures directed against the appellants might very well be well founded. Therefore, the ECJ decided that the effects of the contested regulation would be

¹⁹² Ibid, para. 337

¹⁹³ Ibid, para. 344: The ECJ make reference to the EctHR judgement in *Chahal v UK* of 15 November 1998

¹⁹⁴ Ibid, para. 350

¹⁹⁵ Ibid, paras. 357-371

allowed to be maintained unchanged for a period of three months to give the Council the opportunity to remedy the infringements.¹⁹⁶

5.5 Conclusions

This is an important judgement, and there are many interesting aspects to be found as well as important support for the view that the targeted sanctions indeed in nature are severe enough to be coupled with judicial protection and safeguards. First of all, the ECJ took a big step when it allowed indirect review of Security Council resolutions. Not only did the Court condescend itself to have the jurisdiction to do so, it also quashed the internal implementation of the contested regulation, having the effect that the Security Council resolutions are indirectly implicated as unlawful.

Second, the ECJ spoke of the right to independent review for the targeted individuals, mentioning both article 6 and article 13 ECHR.¹⁹⁷

Unfortunately, the Court did not take position in the matter by determining the legal status of the targeted sanctions; on the other hand, it clearly did not exclude that the high standards of the fair trial guaranteed in the process of determining a criminal charge or a civil right or obligation might apply, leaving space for the possibility that the sanctions might fall within the application of any of the articles.

The ECJ judgement, along with the enormous number of concerned reports and articles published regarding the lack of efficient remedy, shows that there is a broad international consensus that today's procedure at the UN level regarding the handling of targeted measures against individuals and entities is not acceptable from a human rights perspective, and the effects this will have in the future might be significant.¹⁹⁸ It is the first time a regional court finds that an implemented UN regulation, with the aim to fight terrorism, is violating some of the fundamental rights, thus, this judgement is actually creating new boundaries to the powers of the UN Security Council.¹⁹⁹ Although limited to the internal legislation of the EC,

¹⁹⁶ Ibid, paras. 373-376. This timeframe expired on 3 December 2008, and on 29 November 2008 the Commission adopted decision 1190/2008, deciding that after sending the collected UN version of the evidence against them, and after a careful study of the responsive claims of al-Barakaat and Mr Kadi, to keep them on the sanctions list.

¹⁹⁷ Art. 6 guarantee a fair trial, which is the highest degree of protection, given in the determination of civil rights and obligations or criminal charges. Art.13 gives a more general right to an effective remedy, however, the degree of protection is less strong.

¹⁹⁸ A negative effect sometimes mentioned in this connection is the risk that such a judgement would give strong reasons to question the legality of Security Council measures in general, which in turn might lead to the situation where states eventually stop respecting Security Council decisions. This was seen in 1998, when the Organisation of African Unity announced it would stop the enforcement of sanctions directed towards Libya. "The crisis between the Great Socialist People's of Libya Arab Jamahiriya and the United states of America and the United Kingdom", 8-10 June 1998, AHG/DEC.127 XXXIV.

¹⁹⁹ Misa Zgonec-Rozej, "Kadi & Al Barakaat v. Council of the EU & EU Commission: European Court of Justice Quashes a Council of the EU Regulation Implementing UN Security Council Resolutions", p. 2

the Courts of the European Community might come to play an important role as an instrument of control. The mere existence of a respected judicial body having the jurisdiction, as well as the courage, to review, also when only indirectly, a binding Security Council resolution, might induce a stronger will in the Council to insure conformity as well as respect for the human rights in its future decisions.

6 Concluding remarks

The procedure surrounding today's use of the targeted sanctions is problematic to say the least. After conducting a close study, mainly consisting of the case law of the EctHR, on the rights to a fair trial and effective remedy, it seems likely that the procedure of the Sanctions Committee has crossed the line of what can be considered as legal according to the international norms and principles of human rights law. This, in my opinion, shows that there is a need for some kind of legal control or review of the Security Council decisions. There are several reasons for this view: To start, seen from an ethical perspective, the idea that the Security Council, whose main purpose is to defend core values through the preservation of international peace and security is itself in practice freed from such obligations, is immoral. This will inevitably lead to international dissatisfaction and anger, causing the Council to lose credibility in its actions. The power of the Security Council is reliant on the compliance of the UN members; should this start to fail in that its decisions were ignored by an increasing number of state parties, its existence would be threatened. In my view, the UN and the Security Council does have an important role to play in the international communities, and an evolution in this direction is therefore not desirable.

However, this is not a clear cut question: seeing that the Security Council is the highest political organ we have to watch over international peace and security, is it really appropriate, or even desirable, to make its decisions subjects to legal review? This is a question that concerns legal issues as well as politics, and a certain margin of appreciation and interpretation is often considered to be appropriate when the Council determines the legal boundaries of international law. However, this margin of appreciation should perhaps be less dominating when it comes to the absolute norms of Human Rights law. It is not an uncommon view that *any* type of legal review would be directly inappropriate, not least seen in the recent Kadi and al-Barakaat cases²⁰⁰, where e.g. Great Britain and France strongly advocated against any indirect review of the ECJ. In relation to the same case, the Advocate General Poiares Maduro made an insightful comment in relation to these concerns that courts are ill-equipped to deal with such political assessments and therefore should not determine if a measure decided upon is appropriate or not:

“...in doing so, the Court is reaffirming the limits that the law imposes on certain political decisions.”, and “Especially in matters of public security, the political process is liable to become overly responsive to immediate popular concerns, leading the authorities to allay the anxieties of the many at the expense of the rights of a few. This is precisely when courts ought to get involved, in order to ensure that the political necessities of today do not become the legal realities of tomorrow. Their responsibility is to guarantee

²⁰⁰ See chapter five on the ECJ judgement of the Kadi and al-Barakaat cases, p. 60

that what may be politically expedient at a particular moment also complies with the rule of law without which, in the long run, no democratic society can truly prosper.”²⁰¹

In my view, this is really the core of the issue: the political decisions of the Security Council ought to stay within the limits of the rule of law, at least in regard to the fundamental rights. When the Security Council on the one hand is dictating respect for human rights but on the other chooses not to abide by these rules itself it is bound to create a destructive development, and any dangers involved with a procedure of legal review of Council decisions must in my opinion be considered inferior to the dangers of a Security Council with almost unlimited powers, especially bearing in mind its special structure and composition²⁰².

Just how should such a judicial organ work? The composition, structure and jurisdiction are just a few questions that would require a lot of focus and energy and I will not attempt to make any suggestions on the matter in this paper, but will stop at the conclusion that new measures to enable legal review of Security Council resolutions for their compatibility with our most fundamental rights is necessary.

However, the United Nations special rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, professor Martin Scheinin, has made some interesting, alternative suggestions, at least as far as the targeted sanctions are concerned, to solve the issue of their unconformity with international human rights. He recently published a report on the topic “Fair trial”, presenting his view of improvements that could be made.²⁰³

“So long as there is no independent review of listings at the United Nations level, there must be access to domestic judicial review of any implementing measure. A person subject to such measures must be informed of the measures taken and to know the case against him or her, and be able to be heard within a reasonable time by the relevant decision making body.”²⁰⁴

In his opinion, this is gaining more and more support, especially considering the ECJ judgement in the Kadi and al-Barakaat cases. He proposes different options, corresponding to his view of the available choices for the Security Council when it is to be decided how the sanctions are to evolve in the future.

1. If the Council of the European Union, as well as the governments concerned, were given sufficient information on the grounds for the listing

²⁰¹ Advocate general’s Opinion: Kadi v Council and Commission, Case C-402/05 P, para. 45

²⁰² See chapter two on the Security Council, p. 10

²⁰³ Martin Scheinin, *Combating terrorism while protecting human rights*, The 2008 Fair Trial Report

²⁰⁴ Ibid, paras. 16 and 45

of a person or entities, the national and regional courts could offer the possibility of contesting the imposed regulations. The problem with this solution is that the Security Council itself is probably not in possession of enough relevant information to live up to the Requirements of the ECJ. This can be explained by the fact that the Security Council is dependent on the intelligence it is given from the states parties. This is a very delicate matter, often involving sensitive material that states are unwilling to let go of.

2. The introduction of an independent review mechanism at the UN level. The suggestion is to establish a quasi-judicial body, composed with independent security experts, as this would probably be recognized as sufficient protection of due process.

In his report, the Special Rapporteur writes:

“ At a minimum, the standards required to ensure fair hearing must include the right of an individual to be informed of the measures taken and to know the case against him or her as soon as, and to the extent, possible, without thwarting the purpose of the sanctions regimes; the right to be heard within a reasonable time by the relevant decision-making body; the right to effective review by a competent and independent review mechanism; the right to counsel with respect to all proceedings; and the right to an effective remedy.”²⁰⁵

3. Cancel the 1267 resolution all together, including the Sanctions Committee and its terrorist listings, and let resolution 1373 form the legal basis for each nation to make their own lists, based on the collected information from the counter terrorism committee. This would also give full review to the national courts and the human rights would have to be respected according to the obligations of the states.

The current situation of the procedures surrounding the targeted sanctions requires immediate changes, and considering the pressure put on the Security Council to accomplish such a change, I do not think it is impossible that we will see improvements that will satisfy the worst critics, even if the strict requirements of the Fair Trial, or even the right to an Effective Remedy, probably will not be lived up to.²⁰⁶ However, the original problem of the Security Council enjoying almost unlimited powers will still remain, and I can only hope that strong efforts will be made to changes this so that in the future *all* of our fundamental rights will enjoy reasonable protection, also from decisions coming from the highest political arena.

²⁰⁵ Ibid, para. 16

²⁰⁶ See chapter four, p. 38, for further reading.

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