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## **UN targeted sanctions and the European framework of human rights**

*Legal and policy perspectives in Europe as a “bottom-up” pressure  
toward compliance with human rights norms in the Security Council*

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## Introduction:

In the aftermath of the 9/11 terrorist attacks on the United States, the United Nations Security Council (UNSC) entered into a frenetic phase concerning the adoption of counter-terrorism Resolutions,<sup>1</sup> especially regarding the terrorist organization Al-Qaeda.<sup>2</sup> A consensus of all Security Council members was generally reached concerning such measures as terrorism had to be combatted by all means.<sup>3</sup>

The UNSC acquires its competences through article 24(1) of the Charter of the United Nations, which provides that the UNSC has the primary responsibility to maintain or restore international peace and security. In doing so, the UNSC shall however act in accordance with the Purposes and Principles of the United Nations.<sup>4</sup> Moreover, article 39 provides for the discretionary determination of a threat to international peace and security as an *a priori* condition concerning the exercise of the UNSC's Chapter VII powers. Such determination is not susceptible of judicial review and remains discretionary to the decision of the UNSC. Additionally, article 41 gives the Council the possibility to decide on non-forcible measures to be employed to give effects to its decisions, such as sanction regimes.<sup>5</sup> These regimes, established by the UNSC, are imposed on member states in application of articles 25 and 48 of the Charter, and benefit from the primacy of UN obligations provided by article 103.

The UNSC used this tool for the first time against South Rhodesia<sup>6</sup> and subsequently against South Africa to counter the apartheid regime.<sup>7</sup> However, the cold war appeared to be a highly mitigating factor concerning the efficiency of these sanctions, as the Resolutions were not fully implemented.<sup>8</sup> Nevertheless, the Council continued to use economic sanctions against States in the form of embargoes, as against Iraq after the invasion of Kuwait.<sup>9</sup>

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<sup>1</sup> G. Nesi, *International Cooperation in Counter-Terrorism: the United Nations and Regional Organizations in the Fight against Terrorism*, Ashgate, 2004, Preface

<sup>2</sup> See, *inter alia*, UNSC Res 1390 (2002), 1455 (2003), 1526 (2004), 1617 (2005), 1735 (2006), 1822 (2008), 1904 (2009), 1989 (2011) and 2083 (2012)

<sup>3</sup> UNSC Res 1822 (2008), Preamble

<sup>4</sup> UN Charter, Article 24(2)

<sup>5</sup> A. Tzanakopoulos, *Disobeying the Security Council: Countermeasures against Wrongful Sanctions*, Oxford University Press (hereafter OUP), 2011, at 2

<sup>6</sup> UNSC Res 221 (1966)

<sup>7</sup> UNSC Res 418 (1977)

<sup>8</sup> UNSC Res 460 (1979) at Preamble and para 4

<sup>9</sup> UNSC Res 661 (1990)

One major drawback of these economic sanctions was that the civilian population was more affected by the sanctions than the individuals truly targeted by the Council, which led to humanitarian damage.<sup>10</sup> After the adverse impact of the Iraqi sanctions, it appeared necessary for the UNSC to provide a sanction system that would leave innocent bystanders unaffected while hitting those responsible for the breach of international peace.<sup>11</sup> Thus, ‘targeted’ sanctions were developed as coercive pressure on specific individuals and entities, which minimizes unintended economic and social consequences for vulnerable populations.<sup>12</sup>

Targeted sanctions are generally composed of three complementary elements that are assets freeze, arm embargoes and travel bans.<sup>13</sup> With the rise of terrorism, the nature of threats the Council has to face has flowed from an inter-state sphere to non-state actor bases. Such novelty explains the adoption of new regimes to more realistically counter breaches of international peace and security. Considering the Al Qaeda sanctions framework – or 1267 Sanctions Committee stemming from Resolution 1267 (1999) - the Council adapted to these threats by imposing sanctions against individuals who are suspected of terrorism or who could generally be associated with Al-Qaeda and the Taliban.<sup>14</sup> Such a sanction system appears to be efficient from the Council’s perspective, as it blacklisted the terrorist group Boko Haram on the 1267 list in May 2014.<sup>15</sup> Thus, the 1267 Sanction Committee possesses the main function to monitor the implementation of targeted sanctions upon individuals and entities that it has nominated on a consolidated list. It is now also responsible for a delisting procedure for individuals and entities contesting their affiliation to Al-Qaeda. In 2011, the Sanctions Committee concerning the Taliban was split from the 1267 regime - a new sanction committee was created for them<sup>16</sup> - whereas the 1267 Committee remains competent for Al-Qaeda.<sup>17</sup> The UNSC also developed other counter-terrorism committees that will be left aside here since these regimes have different goals, structures and working methods and do not deal with targeted sanctions as such.<sup>18</sup>

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<sup>10</sup> B. Van Ginkel, *The practice of the UN in Combating Terrorism from 1946 to 2008 – Questions of Legality and Legitimacy*, Intersentia, 2010, at 22; A. Ciampi, *Security Council Targeted Sanctions and Human Rights*, in B. Fassbender, *Securing Human Rights? Achievements and Challenges of the UN Security Council*, OUP, 2011, at 101

<sup>11</sup> B. Simma, D-E Khan, G. Nolte et al, *The Charter of the United Nations, A Commentary*, Oxford Commentaries on International Law, 3<sup>rd</sup> Edition, 2012, article 41, at 1309 para 6

<sup>12</sup> D. Cortright, G. Lopez, *Smart Sanctions: Targeting Economic Statecraft*, Rowman and Littlefield, 2002, at 2

<sup>13</sup> UNSC Res 1267 (1999)

<sup>14</sup> UNSC Res 1822 (2008), para 9

<sup>15</sup> Press release, 1267/1989 Committee, 22 May 2014, UN Doc SC/11410

<sup>16</sup> UNSC Res 1988 (2011)

<sup>17</sup> UNSC Res 1989 (2011)

<sup>18</sup> UNSC Res 1373 (2001) and UNSC Res 1540 (2004)

This thesis will therefore focus on the 1267 Sanction Committee, which is qualified as the most significant case of targeted sanctions.<sup>19</sup> It will be analysed through the prism of obligations provided by human rights instruments in Europe. The growing contestation from states and courts have indirectly urged a reform at the Council toward increased protection of human rights. Indeed, the rights to property, to freedom of movement, to a fair hearing and to effective judicial review may be affected through the use of these sanctions.<sup>20</sup> However, it needs to be established whether the Council, and *a fortiori* the 1267 Committee, is actually bound to respect those standards in its activities.

The European framework carries great weight in the foregoing analysis: it constitutes a very advanced and comprehensive mechanism for the protection of human rights. Indeed, European citizens have their rights protected by two major international organizations: the European Union (EU) that enjoys a supranational authority within its member states, and the Council of Europe (CoE) that also requires its member states to implement the European Convention of Human Rights (ECHR). Within the EU, member states cannot autonomously incorporate targeted sanctions within their national legislation, EU legislation being required *a priori*.<sup>21</sup> The CoE has strengthened its protection both with the jurisprudence of the European Court of Human Rights (ECtHR) and through additional protocols under the ECHR. Concerning the EU, the European Court of Justice (ECJ – previously CJEC) also developed its jurisprudence concerning individual rights<sup>22</sup> and adopted the idea that rights must be protected to a similar extent at the community level and at the national level.<sup>23</sup> The two protective systems are now working in better coordination through their case law<sup>24</sup> and their binding instruments.<sup>25</sup> The protection framework can henceforth be considered as equivalent between the EU and the ECHR.<sup>26</sup>

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<sup>19</sup> B. Fassbender, *The Role of Human Rights in the Decision-Making Process of the Security Council*, in B. Fassbender, supra n10, at 6

<sup>20</sup> T.J. Biersteker, *Targeted Sanctions and Individual Human Rights*, International Law Journal Vol 65 No 1, 2009-2010, at 104

<sup>21</sup> B. Van Ginkel, supra n10, at 23

<sup>22</sup> Court of Justice of the European Communities (CJEC), *Stauder v City of Ulm*, 12 November 1969; CJEC, *Nold v Commission*, 14 May 1974, para 13.

<sup>23</sup> Italian Frontini case (No 183), Corte Costituzionale, 27 December 1973; German Handelsgesellschaft case, (First *So Lange* case), Bundesverfassungsgericht, 29th May 1974; *see also*, H. G. Schermers, D. F. Waelbroeck, *Judicial Protection in the European Union*, Kluwer Law International, 2001, at 172

<sup>24</sup> ECtHR, Grand Chamber, *Bosphorus v. Ireland*, Case No 45036/98, 30 June 2005

<sup>25</sup> H. G. Schermers, D. F. Waelbroeck, supra n23, at 46; Charter of Fundamental Rights of the European Union (hereafter CFREU), article 52.

<sup>26</sup> Article 52(3), 53, CFREU; ECJ, *Melloni v Spanish Ministerio Fiscal*, 26 February 2013, Case No C-399/11, Recital 50

Therefore, *can the Security Council, and a fortiori the 1267 Sanctions Committee, be considered as legally bound by human rights norms? Moreover, to what extent does political pressure originating from domestic and regional spheres generates a reform at the Security Council toward respect for human rights norms?*

This thesis will thus develop two parts: firstly, an analysis of the 1267 Sanctions Committee's procedures, legality and legitimacy will be performed. An evaluation of whether the UNSC is legally bound by human rights obligations and what the consequences for potential breaches are will also be outlined (I). Secondly, an overview over the relevant European jurisprudence toward standards of judicial review will be provided. Motivations of legal and political nature triggering reform in the 1267 regime will also be analysed. Finally, the possible consequences of the European jurisprudence and pressure mechanisms upon the Security Council will be determined (II).

# **Part I: The uncertainty regarding the legally binding character of human rights on the Security Council and the 1267 Sanctions Committee**

## **Chapter 1: the creation of the 1267 Regime is legal and legitimate under the Charter of the United Nations**

The individual is generally the mere recipient of rights and duties in international law, which it can neither protect nor invoke without being a fully constituted subject of international law.<sup>27</sup> In the paradigm instituted by the 1267 Committee, the Council nevertheless reaches directly to individuals and private entities without giving them a corresponding right of access to it for purposes of challenging the accuracy of the basis on which their designation is made.<sup>28</sup> Thus, the individual is constrained by sanctions and duties but unable to claim remedy for the violation of its rights. However ‘Kafkaesque’ this situation might be,<sup>29</sup> it does not purport its illegality *ipso facto* under international law. Indeed, the creation of 1267 Sanctions Committee appears to be consistent with the competences conferred to the Security Council by the UN Charter (1), a consistence, however, that is contested relating to the Principles and Purposes of the Charter (2).

### **1. The creation of the 1267 Sanctions Regime as legal and legitimate under the competences conferred to the Security Council**

#### **i) The Security Council acted within its competences when creating the 1267 Committee**

It is commonly admitted that the Security Council acquires its competences through article 24 of the UN Charter. This article provides for the primary responsibility of the UNSC

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<sup>27</sup> Max Planck Encyclopedia of Public International Law, A. Pellet and A. Miron, *Sanctions*, 2011, para 37

<sup>28</sup> A. Addis, *Targeted Sanctions as a Counterterrorism Strategy*, Tulane Journal of International and Comparative Law, Vol 19 No 1, 2010, at 195

<sup>29</sup> *Abousafian Abdelrazik v The Minister of Foreign Affairs and the Attorney General of Canada*, 2009 FC 180, Canadian Federal Court, at 20 para 53

for the maintenance of international peace and security. In order for the UNSC to fulfil such responsibility, Chapter VII of the UN Charter provides for a wide range of measures that the Council can discretionarily deem to be appropriate to restore international peace in a given situation.<sup>30</sup> The establishment of the 1267 Sanctions Committee thus falls under article 29 of the Charter as the Council established it after determining a threat to international peace and security.<sup>31</sup> Thus, the Sanctions Committee appears lawfully created as a non-violent measure under article 41 of the Charter.<sup>32</sup> It is admitted that the Council is competent to create subsidiary organs under Chapter VII, as it has previously established various international criminal tribunals.<sup>33</sup> Moreover, it can be submitted that as long as the delegation of powers to the subsidiary organ concerns the Council's normative powers, there is no reason for it not to legally delegate them to a specific committee.

It is therefore more problematic to admit the creation of a subsidiary organ possessing competences beyond those attributed to the Security Council. It has thus been contemplated that the UNSC broadened the scope of its actions well beyond the initially envisioned and circumscribed responses to particular crises provided by the Charter, and has turned into a legislator on a broad range of issues related to peace and security.<sup>34</sup> However, such delegation of powers does not render the establishment of the 1267 Committee illegal. Additionally, the decision to take targeted sanctions under article 41 is genuinely linked to the restoration of international peace and security and is thus a proportionate action under article 39.<sup>35</sup> Moreover, sanctions on the international sphere do not necessarily serve the purpose of enforcing a legal norm.<sup>36</sup> Thus, even with a pre-emptive aim, targeted sanctions are not *ipso facto* illegal and beyond the competences attributed to the Council under the Charter. Indeed, the ICTY determined that the UNSC had a wide margin of discretion under article 39, in order to evaluate the suitability and appropriateness of the measure chosen to restore international peace and security.<sup>37</sup>

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<sup>30</sup> H. Kelsen, *The Law of the United Nations*, Stevens & Sons, 1950, at 727

<sup>31</sup> UNSC Res 1267 (1999), UNSC Res 2083 (2012)

<sup>32</sup> M. Eriksson, *On assessing targeted sanctions blacklists*, in I. Cameron (ed.), *EU Sanctions: Law and Policy Issues Concerning Restrictive Measures*, Intersentia, 2013, at 49

<sup>33</sup> UNSC Res 827 (1993) and UNSC Res 955 (1994)

<sup>34</sup> B. Simma et al, *UN Charter Commentaries*, supra n11, at 1309 para 8

<sup>35</sup> A. Tzanakopoulos, supra n5 at 64, International Criminal Tribunal for the former Yugoslavia (hereafter ICTY), 2 October 1995, *Prosecutor v Dusko Tadic, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction*, para 39

<sup>36</sup> J. M. Farrall, *United Nations Sanctions and the Rule of Law*, Cambridge University Press (hereafter CUP), 2007 at 7

<sup>37</sup> ICTY, *Tadic*, supra n35, para 32

Additionally, the International Court of Justice (ICJ) has considered that Security Council resolutions were presumed to be *intra vires* if taken in fulfilment of the Council's stated purposes.<sup>38</sup> Thus, the decision to establish the 1267 Committee appears both adequate to the Council's functions and legal under the UN Charter.

## **ii) The debated legitimacy of the 1267 Sanctions Regime as a measure to restore international peace and security**

It has been considered that legality and legitimacy must be united in order to ensure compliance for a particular norm.<sup>39</sup> It is also recognised that a determination under article 39 is the outcome of political considerations, not legal reasoning.<sup>40</sup> Concerning the 1267 regime, a breach of international peace and security has been determined by the UNSC that has been upheld by the international community in the aftermath of the 9/11 events.<sup>41</sup> Thus, the Council has decided to respond to these attacks by declaring a form of economic warfare against individuals assumed to be terrorists of Al-Qaeda and thus to be the sources of such threat.<sup>42</sup>

It has been considered that the criticism directed to the 1267 Sanctions regime was largely misguided, as the decision to create the regime is consistent with the UNSC powers under the UN Charter. Indeed, it has been determined that targeted sanctions did not undermine the international rule of law.<sup>43</sup> The legality of targeted sanctions is thus generally upheld, however their legitimacy has been increasingly questioned. The imposition of individual travel sanctions has proven uncontroversial on the whole, as placing restrictions upon a target's ability to travel is seen as posing a nuisance to the individual more than infringing their basic rights. Furthermore, the impulse to freeze assets can also be deemed legitimate when upholding the primary responsibility of the UNSC.<sup>44</sup>

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<sup>38</sup> ICJ, *Certain Expenses of the United Nations (Article 17, paragraph 2, of the Charter)*, Advisory Opinion of 20 July 1962, ICJ Reports 1962, p151, at 168

<sup>39</sup> B. Van Ginkel, *supra* n10, at 32

<sup>40</sup> V. Gowlland-Debbas, *The Security Council as Enforcer of Human Rights*, in B. Fassbender, *supra* n10, at 39

<sup>41</sup> UNSC Res 1373 (2001); F. Stenhammar, *United Nations Targeted Sanctions, the International Rule of Law and the European Court of Justice's Judgment in Kadi and Al-Barakaat*, *Nordic Journal of International Law* Vol 79, 2010, at 132

<sup>42</sup> F. Stenhammar, *ibid*, at 128

<sup>43</sup> J. M. Farrall, *supra* n36, at 36 et seq; considering the rule of law to comprise requirements of Transparency, Consistency, Equality, Due Process and Proportionality in the decision-making.

<sup>44</sup> *ibid*, at 220

Nonetheless, the sanctions may appear disproportionate. Indeed, the Council did not establish a specific timeframe regarding the Sanctions nor did it respect basic principles of transparency.<sup>45</sup> Moreover, it is considered that a measure having a negative impact on individuals should be both necessary and proportionate to the aim the measure is meant to achieve.<sup>46</sup> Thus, it might appear that the Council's decision to establish the 1267 Regime indeed breaches due process guarantees for individuals, but is however legitimate as it aims to restore international peace and security. Furthermore, it has been considered by some scholars that if targeted sanctions reflect a form of economic warfare, they do not have to respond to human rights law but rather to international humanitarian law (IHL), as the latter concerns the rules to be respected during warfare.<sup>47</sup> Under the conventional laws of war, it would be permissible to freeze financial assets without judicial review to an extent that peacetime rules do not permit, the proportionality test being more permissive under IHL.<sup>48</sup>

Likewise, no state has objected to the legality of the 1267 Sanctions regime after its creation, which can be considered as implying that states considered such system as having been lawfully established.<sup>49</sup> The absence of a timeframe in the establishment of the 1267 regime does not appear to be an obstacle to its legitimacy either.<sup>50</sup> Thus, the establishment of the 1267 regime appears to be both legal and legitimate under the competences of the UNSC provided to it by the UN Charter, even if human rights concerns triggered a "legitimacy deficit" in the procedure of the 1267 Committee.<sup>51</sup>

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<sup>45</sup> *ibid*, at 201

<sup>46</sup> B. Fassbender, *supra* n19, at 93

<sup>47</sup> E. De Wet, *Human Rights Limitations to Economic Enforcement Measures Under Article 41 of the United Nations Charter and the Iraqi Sanctions Regime*, *Leiden Journal of International Law* (hereafter LJIL), Vol 14 No 2, 2001, at 294; F. Stenhammar, *supra* n41

<sup>48</sup> A. Tzanakopoulos, *supra* n5, at 81

<sup>49</sup> A. Kruse, *Financial and Economic Sanctions – From a Perspective of International Law and Human Rights*, *Journal of Financial Crime*, Vol 12 No 3, 2005, at 218; I. Johnstone, *Legislation and Adjudication in the UN Security Council: Bringing Down the Deliberative Deficit*, *American Journal of International Law* (hereafter AJIL), Vol 102 No 2, 2008, at 308

<sup>50</sup> J. M. Farrall, *supra* n36, at 377-381

<sup>51</sup> D. Shraga, *The Security Council and Human Rights*, in B. Fassbender, *supra* n10, at 34

## 2. The virtual obligation for the Security Council to respect the Principles and Purposes of the UN Charter

### i) Article 24(2) constraining the UNSC and the 1267 Sanctions Committee to “respect and promote” human rights

Some scholars have considered that the UNSC had no legal limits with regard to its Chapter VII powers through interpretation of the *travaux préparatoires* of the UN Charter.<sup>52</sup> However, such position appears hardly sustainable, as the *travaux* are considered as supplementary means of interpretation of the Charter.<sup>53</sup> Indeed, it is admitted that the Charter must be interpreted as a living instrument,<sup>54</sup> and that the UNSC is not *legibus solutus*.<sup>55</sup> Moreover, it can be considered that the Council is bound by obligations under the Charter as well as under general international law.<sup>56</sup> Additionally, the ICJ itself has considered that the UN and its organs were bound by norms of general international law.<sup>57</sup>

Article 24(2) of the UN Charter provides that the UNSC “shall act in accordance with the Principles and Purposes of the United Nations”. Article 1(2) and 1(3) of the Charter thus stipulate that the Council must “promote and encourage respect for human rights and fundamental freedoms”. Such principles are very broad and not elaborated within the Charter, some scholars thus consider that they cannot apply *stricto sensu* to the Council.<sup>58</sup> However, some consider that the Council is bound by the Principles and Purposes of the UN Charter, and that they should henceforth constitute a limit to its powers.<sup>59</sup> Others take the view that the Principles of the Charter are binding on the UNSC only concerning its powers under Chapter

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<sup>52</sup> G. H. Oosthuizen, *Playing the Devil’s Advocate: the United Nations Security Council is Unbound by Law*, 1992, LJIL Vol 12, at 549, A. Tzanakopoulos, *supra* n5, at 54

<sup>53</sup> Vienna Convention on the Law of Treaties (VCLT), articles 31-33

<sup>54</sup> N. J. Schrijver, *The Future of the Charter of the United Nations*, Max Planck Yearbook of United Nations Law (hereafter MPYUNL), Vol 10, 2006, at 34

<sup>55</sup> ICTY, *Tadic*, *supra* n35, para 28

<sup>56</sup> S. Talmon, *The Security Council as World Legislature*, AJIL Vol 99, 2005, at 184

<sup>57</sup> ICJ, *Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt*, Advisory Opinion, ICJ Reports 1980, p. 73 at 37

<sup>58</sup> M. D. Öberg, *The Legal Effects of Resolutions of the UN Security Council and General Assembly in the Jurisprudence of the ICJ*, European Journal of International Law (hereafter EJIL), Vol 16 No 5, 2005, at 885

<sup>59</sup> ICJ, *Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v. United Kingdom)*, Provisional Measures, ICJ Reports 1992, p. 3, Dissenting Opinion judge Weeramantry, at 61; ICJ, *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro)* ICJ Reports 2007, p43, Separate Opinion Lauterpacht, at 101; A. Reinisch, *Securing the Accountability of International Organizations*, Global Governance, Vol 7, 2001, at 136

VI of the Charter.<sup>60</sup> The Council itself has been pressed by the UN member states to abide to such principles in the *World Summit Outcome*.<sup>61</sup> On the outset, the 1267 Sanctions system however appears to be breaching several human rights norms, such as the right to a fair trial or the right to property.<sup>62</sup> Thus, it appears that the functional task and the primary responsibility of the Security Council - to maintain or restore international peace - overrules human rights norms universally recognised. Thus, it does not appear that the Council is bound by such Principles in its Chapter VII activities, as it does not suffer any legal consequences or legal assessment of such breaches at the UN level.

Nevertheless, it can be considered that states and Courts regard the Council to be bound by *jus cogens* norms. Indeed, peremptory norms of international law are binding on the Chapter VII powers of the UNSC.<sup>63</sup> Moreover, such view appears to be steadily upheld by national and regional Courts.<sup>64</sup> However, the Council did not breach *jus cogens* norms by creating the 1267 Regime, nor does this Regime breaches of *jus cogens* norms. The rights affected by targeted sanctions are universally recognised human rights, but they do not yet constitute unanimously recognised norms of *jus cogens*.<sup>65</sup> Hence, the Council did not act in contradiction with legal obligations imposed on it by the UN Charter, as it benefits from a considerable leeway regarding its Chapter VII powers.

## **ii) The problematic lack of consequences in the absence of any competent organ in the UN system to judicially review the Security Council's decisions**

It is important to highlight that there is currently no competent body to judicially review Security Council decisions, especially with regard to the discretion of the Council to establish a threat or breach to the peace under article 39.<sup>66</sup> Even though the ICJ is the

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<sup>60</sup> H. Kelsen, *supra* n30, at 729

<sup>61</sup> *World Summit Outcome*, UNGA Res 60/1, 2005, para 107 to 109

<sup>62</sup> A. Tzanakopoulos, *Domestic Courts Reactions to UN Security Council Sanctions*, in A. Reinisch, *Challenging Acts of International Organisations before National Courts*, OUP, 2010, at 73-74.

<sup>63</sup> A. Orakelashvili, *The Impact of Peremptory Norms on the Interpretation and Application of UNSC Resolutions*, EJIL Vol 16 No 1, 2005, at 61

<sup>64</sup> ICTY, *Prosecutor v Tadic*, Appeals Chamber, Judgment, Case No ICTY-94-1-A, 15 July 1999, at 131; General Court of the EU, Judgment of 21 September 2005 in Case T-315/01 *Kadi v Council and Commission*, 2005, Case ECR II-3649 (hereafter *Kadi GC I*), at 230, *R (on the applicant of Al-Jedda) (FC) v Secretary of State for Defence*, Case UKHL 58 (2008) at 71, Schweizer Bundesgericht, *Youssef Mustapha Nada v SECO*, Staatssekretariat für Wirtschaft, Case No 1A.45/2007, 14 November 2007, at 7

<sup>65</sup> *Kadi GC I*, *ibid*, para 226; B. Simma et al, *UN Charter Commentaries*, *supra* n11, at 1314 para 19

<sup>66</sup> ICJ, *Lockerbie*, *supra* n59, para 42

principal judicial organ of the UN,<sup>67</sup> it does not possess the competence to review determinations made by the UNSC.<sup>68</sup> The only possibility of review that could occur is if the legality of the Council decision forms the material request put before the Court in contentious proceedings.<sup>69</sup> Indeed, as only states can be parties before the Court, it appears very unlikely that a Council decision might be reviewed otherwise.<sup>70</sup> Some judges of the ICJ have however contemplated the possibility to review the *intra vires* character of a UNSC decision, or that the decision did not breach *jus cogens* norms.<sup>71</sup>

Consequently, the only method with which the ICJ could review the legality of Resolution 1267 would be if an inter-state dispute was submitted to it that would concern the application of the Resolution by the a state against one of the nationals of another state. Such a possibility, however, appears far-fetched, as it is unlikely that a state would exercise diplomatic protection for one of its nationals for the implementation of the 1267 sanctions before the ICJ. Some commentators however considered that in theory a claim against the Council could be contemplated, but this is not a fully recognized doctrine yet.<sup>72</sup> Hence, even if the ICTY considered that it was competent to review the legality of the Resolution that created it,<sup>73</sup> it is unlikely to apply before the ICJ. Moreover, it appears that states have implicitly consented to the legality of the 1267 regime by implementing targeted sanctions in their domestic systems. Thus, they can be considered to have forfeited their opportunity to object to the targeted sanctions system, even if it would have been unlawful at the time Resolution 1267 was taken.<sup>74</sup> Thus, as suggested throughout this Chapter, it can be considered that the UNSC is not legally constrained concerning the activities of the 1267 Sanctions Committee, as it appears that it respected the obligations binding it under the UN Charter. Moreover, even if the sanctions would have become unlawful, there is no competent forum to deem them illegal. Thus, the UNSC does not appear to suffer from legal accountability within the UN system.<sup>75</sup>

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<sup>67</sup> UN Charter, article 92

<sup>68</sup> ICJ, *Legal Consequences for States of the Continued Presence of South Africa in Namibia Notwithstanding Security Council Resolution 276 (1970)*, Advisory Opinion, ICJ Reports 1971, p16, para 89

<sup>69</sup> ICJ, *Lockerbie*, supra n59, paras 38-49.

<sup>70</sup> ICJ Statute, article 34(1)

<sup>71</sup> Separate Opinion Lauterpacht, supra n59; ICJ, *East Timor (Portugal v. Australia)*, Judgment, ICJ Reports 1995, p. 90, Dissenting Opinion, Judge Skubiszewski, at 251 para 86

<sup>72</sup> A. Ciampi, supra n10, at 111

<sup>73</sup> ICTY, *Tadic*, supra n35, para 21 et seq.

<sup>74</sup> K. Doehring, *Unlawful Resolutions of the Security Council and their Legal Consequences*, MPYUNL, Vol 1, 1997, at 103

<sup>75</sup> A. Tzanakopoulos, supra n5, at 5

## **Chapter 2: Structural deficiencies of the 1267 Sanctions Regime from a Human Rights perspective**

As shown above, the 1267 Sanctions regime has been considered legal under the UN Charter. However, the Security Council has regularly reformed its procedure since its creation, which now includes a possibility of de-listing through an Ombudsperson (1). Nevertheless, such a structural rearrangement remains unsatisfactory if paralleled to human rights standards, as several due process guarantees remain far from being respected (2).

### **1. Growing concern for human rights leading to structural and procedural reforms in the 1267 Sanctions regime**

#### **i) The blacklisting procedure: from obscure intelligence gathering to public narrative summaries**

Even if the legality and legitimacy of the 1267 Sanctions Committee have been upheld at the beginning, growing concerns over human rights abuses were formulated as soon as 2002.<sup>76</sup> The blacklisting procedure before the Committee has thus been subject to several changes in order to reflect the rising concern of states toward human rights protection. Indeed, the blacklisting procedure has been essentially considered as breaching the right to judicial review, which is universally accepted in human rights instruments.<sup>77</sup> Moreover, due process guarantees appeared to be violated as well, as individuals or entities were neither informed on their blacklisting, nor given any information concerning the activities that led to their nomination.<sup>78</sup> The 1267 Committee is composed of 15 members that are also the members of the UNSC. It also generally uses the same procedures as the Council.<sup>79</sup> Yet, the decision-making process is performed by consensus, which differs from the required majority to be obtained in the UNSC.<sup>80</sup>

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<sup>76</sup> Address of Kofi Annan to the UNSC, 18 January 2002: <http://www.un.org/News/Press/docs/2002/sgsm8105.doc.htm>

<sup>77</sup> Universal Declaration of Human Rights, Article 8; ICCPR, Article 2(3) and 14, ECHR, Article 6.1 and 13

<sup>78</sup> A. Ciampi, supra n10, at 108-110

<sup>79</sup> B. Van Ginkel, supra n10, at 224; A. Ciampi, ibid, at 102

<sup>80</sup> UN Charter, article 27(3) - 9 votes over 15 have to be gathered for a Resolution to be taken for substantive matters

The composition of the Committee has not been controversial, even though the veto power of its members may trigger problems in the listing and de-listing process. Thus, every state could submit a name to the Sanctions Committee, that would decide by consensus whether to include it on the blacklist or not. Before 2005, the listing occurred with a “no objection” procedure in which members of the Committee had to oppose the listing within 48 hours for an individual not to be nominated. After this deadline, the 15 members were considered to have reached consensus.

However, states were unlikely to object to the nomination of individuals or entities as they possessed no or little information concerning the reasons that led a state to ask for the listing. Indeed, the information originated mostly from intelligence services, which states were not keen on spreading.<sup>81</sup> Moreover, the information gathered through intelligence was highly political as well, which rendered it even harder to assess legally.<sup>82</sup> The Council thus took into account the need for the individual to be informed on its listing, even though this started as a mere recommendation.<sup>83</sup> In 2005, the nominating state had to release a statement of case explaining the reasons of the proposal to the Committee on a case-to-case basis.<sup>84</sup>

In 2008, an institutional change in the Committee obliged states to provide a detailed statement of the case and to identify which part of it could be publicly released.<sup>85</sup> Moreover, a Monitoring Group was also responsible to control that states were correctly applying sanctions.<sup>86</sup> Furthermore, the UNSC decided that the Committee, assisted by the Monitoring Group, should now draft a ‘narrative summary’ of the reasons for listing and make it available on the Committee’s website.<sup>87</sup> Thus, even if the creation and procedure of the 1267 Committee was legal from an institutional perspective, it appeared to be drastically criticised from a human rights viewpoint.

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<sup>81</sup> T. J Biersteker, *supra* n20, at 108

<sup>82</sup> United States Court of Appeals, District of Columbia, *People’s Mojahedin Organizations of Iran and Liberation Tigers of Tamil Elam v. Department of State*, Case No 97-1648, 25 June 1999, at 19

<sup>83</sup> UNSC Res 1526 (2004)

<sup>84</sup> UNSC Res 1617 (2005)

<sup>85</sup> UNSC Res 1822 (2008), para 12

<sup>86</sup> UNSC Res 1363 (2001)

<sup>87</sup> UNSC Res 1822 (2008), para 13 – accessible at <http://www.un.org/sc/committees/1267/narrative.shtml>

## ii) Current procedure before the 1267 Committee: de-listing possibilities and creation of an Ombudsperson

Seeking for more than a possibility to access the information that led to their listing, individuals and entities pressured their states toward a possibility of judicial review concerning their listing, as well as a procedure for de-listing. States also regarded such a possibility of judicial review as paramount toward respect for human rights, as even if domestic Courts would perform a judicial review of the 1267 Sanctions Committee's decision to blacklist an individual, they did not possess the competence to remove a name from the list.<sup>88</sup>

In 2006, the UNSC included a set of reasons that could lead to a de-listing by the Committee. Such reasons encompassed, *inter alia*, the naming of the individual or entity as a mistake of identity, the fact that the nominated individual or entity did not meet the criteria set out in other resolutions or that it had ceased every relation with Al-Qaeda.<sup>89</sup> Moreover, the Council established a Focal Point, to which the listed person could expose its demand for de-listing.<sup>90</sup> The Focal Point's main function was to forward the request to the designating state(s) and to facilitate cooperation within the Committee. With that procedure the petitioner could only have its request be put in the agenda of the Committee, which brought some commentators to consider it as no more than a mailbox.<sup>91</sup> The Focal Point had thus been considered as providing a recipe for "how to reject" a petition more than how to take de-listing petitions seriously.<sup>92</sup>

Most importantly, the UNSC created in 2009 an "impartial and independent Ombudsperson" that would replace the previous Focal Point and be competent concerning the de-listing requests from individuals.<sup>93</sup> This independent organ can gather information from a wide range of sources - not just member states - and engage in a dialogue with the designating states, as well as give the petitioner the right to ask questions on its designation. It can furthermore prepare reports and summarize every data available as well as lay out arguments

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<sup>88</sup> *Abdelrazik v. Canada*, supra n29

<sup>89</sup> UNSC Res 1735 (2006)

<sup>90</sup> UNSC Res 1730 (2006) Annex, para 1

<sup>91</sup> C. Eckes, *EU Counter-Terrorist Policies and Fundamental Rights: The Case of Individual Sanctions*, OUP, 2009 at 33

<sup>92</sup> J. M. Farrall, supra n36, at 222

<sup>93</sup> UNSC Res 1904 (2009), para 20

for and against de-listing.<sup>94</sup> It is worth mentioning that without making formal recommendations, the Ombudsperson is the first independent review mechanism created by the UNSC at the UN level to address due process and human rights concerns.<sup>95</sup> As such, it has been considered that its establishment represented, arguably, a “paradigm shift in the Security Council”.<sup>96</sup> Indeed, the Ombudsperson consists of a third party controller of the 1267 listing appointed by the Secretary General of the UN.<sup>97</sup> Thus, the individual or entity is now empowered to appeal the listing decision via the Ombudsperson. However, even if these procedural improvements before the 1267 Committee are significant, the 1267 Sanctions Committee’s procedures of listing and de-listing remains in contradiction with human rights standards, as will be discussed below.

## **2. Insufficient structural improvements regarding human rights standards in the 1267 Sanctions Committee**

### **i) The establishment of the Ombudsperson is unsatisfactory considering due process and fair trial guarantees**

In October 2010, Mrs Post unveiled her approach to her mandate in a briefing directed to the legal advisors of UN member states.<sup>98</sup> From her statement, it appears quite clear that she has a robust approach to her mandate,<sup>99</sup> but also that she is very well aware of the difficulties awaiting her.<sup>100</sup> Indeed, she addresses rather frontally the criticism made to her mandate by the *Kadi* decisions, as she considers that she had no opportunity to be “heard” on her mandate.<sup>101</sup> Moreover, she insists on the efforts made by the UNSC when creating her Office, and affirms that she will genuinely try to provide due process guarantees in the 1267 regime, at least concerning the right to be heard.<sup>102</sup> However, in her 2014 report to the UNSC, it clearly appears that she regrets the policies of states to retain confidential information, as it

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<sup>94</sup> *ibid*, Annex II

<sup>95</sup> T. J. Biersteker, *supra* n20, at 116

<sup>96</sup> B. Fassbender, *supra* n19, at 91, citing Ambassador J. Hernandez of Mexico

<sup>97</sup> UNSC Res 1904 (2009) para 20

<sup>98</sup> Remarks of Kimberly Prost, Ombudsperson, 1267 Al Qaida/Taliban Sanctions Committee delivered to the informal meeting of Legal Advisors, 25 October 2010, accessible at [http://www.un.org/en/sc/ombudsperson/pdfs/2010.10.25\\_E.pdf](http://www.un.org/en/sc/ombudsperson/pdfs/2010.10.25_E.pdf)

<sup>99</sup> L. Boisson, P. J. Kuijper, *Mr Kadi and Mrs Prost: is the UN Ombudsperson going to find Herself Between a Rock and a Hard Place?* in E. Rieter, H. De Waele, *Evolving Principles of International Law: Studies in Honour of Karel C. Wellens*, Nijhoff Publishers, 2011, at 87

<sup>100</sup> Remarks of Kimberly Prost, *supra* n98, at 5-7

<sup>101</sup> *ibid*, at 7

<sup>102</sup> *ibid*, at 5

prevents her from performing her mandate appropriately.<sup>103</sup> The establishment of the Ombudsperson can only be considered as a positive step toward addressing the serious institutional problems that are inherent to individual sanctions. However, it is not commensurate with the lack of due process and transparency that characterize the sanctions regime.<sup>104</sup> Due process guarantees, as provided for in article 14 of the International Covenant on Civil and Political Rights (ICCPR), require that the parties against which coercive power is exercised should be given a fair hearing and granted the opportunity to express their point of view regarding the decision.<sup>105</sup> Allegedly, targeted sanctions are not of a criminal nature, which would discard the application of the ICCPR.<sup>106</sup> However, it has been recognised that even if sanctions would not be of such nature, the right to judicial review would still apply. Indeed, what appears decisive is the gravity of the consequences suffered by the affected person.<sup>107</sup> The ECJ also affirmed that after 10 years of implementation, the sanctions could hardly be described as precautionary anymore, and would thus amount to criminal sanctions.<sup>108</sup>

The Ombudsperson does not appear to provide sufficient guarantees to respect human rights standards concerning due process and fair trial despite the introduction of a reversed consensus procedure by the Council in 2011. Indeed, if the Ombudsperson recommends de-listing, the de-listing now occurs unless all the member states of the Committee object to the de-listing.<sup>109</sup> However, the petitioner remains not allowed to appear before the Committee.<sup>110</sup> Should the 1267 Committee not follow the Ombudsperson's recommendation, the matter could however be put before the Security Council.<sup>111</sup> Yet, such possibility is very improbable, as when a consensus regarding de-listing cannot be reached, a consensus to submit the matter to the UNSC is unlikely to be reached either.<sup>112</sup>

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<sup>103</sup> UN Doc S/2014/73, Letter dated 31 January 2014 from the Ombudsperson to the President of the Security Council, paras 29-35, accessible at: [http://www.un.org/ga/search/view\\_doc.asp?symbol=S/2014/73](http://www.un.org/ga/search/view_doc.asp?symbol=S/2014/73)

<sup>104</sup> E. C. Hersey, *No Universal target: distinguishing between terrorism and human rights violations in targeted sanctions regimes*, Brooklyn Journal of International Law, 2013, Vol 38 No 3, at 1235

<sup>105</sup> J. M. Farrall, supra n36, at 217

<sup>106</sup> The UNSC reiterated that 1267 sanctions « are preventive in nature and are not reliant upon criminal standards » UNSC Res 1735 (2006) para 10; UNSC Res 1822 (2008), para 13; UNSC Res 1904 (2009), para 10

<sup>107</sup> E. De Wet, *Human Rights Consideration and the Enforcement of Targeted Sanctions in Europe: the Emergence of Core Standards of Judicial Protection*, in B. Fassbender, 2011, supra n10, at 162

<sup>108</sup> ECJ, Judgment of 3 September 2008 in Joined Cases C-402/05 P and C-415/05-P *Kadi and Al-Barakaat International Foundation v Council and Commission*, Case No ECR I-6351, 2008, (hereafter *Kadi I*), para 150

<sup>109</sup> UNSC Res 1989 (2011) para 23-27

<sup>110</sup> S. Zappalà, *Reviewing Security Council Measures in the Light of International Human Rights Principles*, in B. Fassbender, 2011, supra n10, at 187

<sup>111</sup> MPEPIL, supra n27, para 43

<sup>112</sup> J. M. Farrall, supra n36, at 222

Thus, the establishment of the Ombudsperson cannot be considered as a sufficient measure to respect the right to a fair hearing by a competent, independent and impartial tribunal established by law.<sup>113</sup> Indeed, she does not have the power to overrule the Committee's decision on a listing procedure and decisions are still taken by the political body that is the 1267 Committee.<sup>114</sup> Moreover, the establishment of the Ombudsperson has been considered by domestic and regional Courts to not constitute an effective remedy for the petitioner that has been wrongfully put on the consolidated list.<sup>115</sup> Thus, the Ombudsperson cannot be a sufficient measure for the Security Council to redress the violation of human rights standards in the 1267 procedure.<sup>116</sup> Consequently, requirements for transparency, consistency and due process necessary to claim respect to the rule of law are not fully fulfilled.<sup>117</sup> Hence, although the Ombudsperson presents a major improvement in the Security Council's manner to address human rights concerns, it remains insufficient to guarantee human rights standards.

## **ii) The consequences of the insufficient procedural reform of the 1267 Committee**

Already in 2005, UN member states had called the Security Council to ensure that the procedure for placing individuals and entities on sanctions lists was *equitable and transparent*, with equally clear guidelines for removing them.<sup>118</sup> The Council thus recognized that threats to international peace and security caused by terrorist acts must be combatted "in accordance with the Charter of the United Nations and international law, including applicable international human rights".<sup>119</sup> However, such guidelines appear to have done little to prevent the Security Council from acting as it sees fit.<sup>120</sup> Indeed, it remains discretionary for states to nominate an individual or an entity, even though the necessity to provide reasons offers

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<sup>113</sup> Article 14 ICCPR

<sup>114</sup> M. Scheinin, *Report of the Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms while Countering Terrorism*, (6 August 2010). UN Doc. A/65/258, at 18 para 56

<sup>115</sup> *Her Majesty's Treasury (Respondent) v. Mohammed Jabar Ahmed and others* (FC), 2010, UKSC 2, para 78; ECJ, Joined Cases C-584/10P, C-593/10 P and C-595/10P, *European Commission and the Council of the European Union v. Yassin Abdullah Kadi*, 18 July 2013, (hereafter *Kadi II*), para 133

<sup>116</sup> T. Biersteker, S. Eckert, Watson Institute, *Addressing Challenges to Targeted Sanctions: An Update of the "Watson Report"*, October 2009, at 31, accessible at: [http://www.watsoninstitute.org/pub/2009\\_10\\_targeted\\_sanctions.pdf](http://www.watsoninstitute.org/pub/2009_10_targeted_sanctions.pdf)

<sup>117</sup> J. M. Farrall, *supra* n36, at 40

<sup>118</sup> *World Summit Outcome*, *supra* n61, para 109 – emphasis added

<sup>119</sup> UNSC Res 1904 (2009) Preamble, para 3

<sup>120</sup> J. Farrall, *The World Summit Process and UN Sanctions Reform: Between Rhetoric and Force*, in P. G. Danchin, H. Fischer, *United Nations Reform and the New Collective Security*, CUP, 2010, at 247

guidelines of minimum evidentiary requirement.<sup>121</sup> As established throughout this Chapter, the reforms undertaken by the Council remain inadequate to respect human rights standards. It has been considered that the UNSC must strive to discharge its principal duty to maintain or restore international peace and security, while respecting human rights of targeted individuals to the greatest possible extent.<sup>122</sup> Nevertheless, it neither appears that establishing an Ombudsperson is appropriate, nor that it presents the most significant measure the Council could have adopted. Indeed, several scholars have provided alternatives to the Ombudsperson for the Council to respect the right to judicial review and due process.<sup>123</sup> Others have also considered that since the 1267 Committee functioned in a similar way as the UNSC, a reform to guarantee such rights was simply impossible to implement.<sup>124</sup>

However, the current paradigm within the international community valorises human rights to an increasing extent. Indeed, national and regional Courts, such as the ECJ and the ECtHR, have unambiguously challenged the legality of targeted sanctions with human rights standards, generally deciding on the prevalence of the latter.<sup>125</sup> Moreover, the ECJ has considered that the establishment of the Ombudsperson did not amount to an effective remedy, nor did the procedure of the 1267 Committee as a whole respects human rights standards. As such, it therefore decided to legally review the listing of an individual or an entity as long as the UN system did not provide for such mechanism.<sup>126</sup>

Thus, there is an evident paradox for European member states that:

May risk having to choose between the option of satisfying obligations imposed by the Charter, or acting in conformity with decisions of their parliaments or courts upholding human rights. The Council could still remedy this problem if it introduced the necessary changes. If it does not, there is a risk of uneven application of United Nations sanctions, which would undermine the credibility and efficiency of the entire system.<sup>127</sup>

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<sup>121</sup> UNSC Res 1904 (2009) para 11

<sup>122</sup> B. Fassbender, *supra* n19, at 93

<sup>123</sup> A. Ciampi, *supra* n10, at 130; S. Zappalà, *supra* n110, at 187; T. J. Biersteker, *supra* n20 at 117; G. Sullivan, B. Hayes, *Blacklisted: Targeted Sanctions, Pre-Emptive Security and Fundamental Rights*, *European Centre for Constitutional and Human Rights*, 2010, at 110 et seq, J.M. Farrall, *supra* n36, at 231 et seq.

<sup>124</sup> S. Zappalà, *supra* n110, at 188

<sup>125</sup> ECJ, *Kadi I*, *supra* n108

<sup>126</sup> ECJ, *Kadi II*, *supra* n115, para 133-134

<sup>127</sup> Representative of Switzerland at the UN, UN Doc, S/PV.6217, 13 November 2009, at 28

It is therefore expected that if the Security Council does not react to the pressure exercised on it by courts and states, the effective implementation of targeted sanctions will not be guaranteed anymore.<sup>128</sup> Indeed, as targeted sanctions are not self-implementing, the Council needs the active involvement of UN member states for the sanctions to be operative.<sup>129</sup> Another important point is that the international responsibility of the UNSC cannot yet be invoked in international law, which forces individuals and entities wrongfully targeted to have recourse to their national and regional fora to hold the states implementing the sanctions responsible. Such *status quo* is manifestly undesirable for states. Consequently, it appears that the Council is increasingly bound by the policy undertakings of its member states. Thus, the insufficient recognition of human rights before the 1267 is likely to backfire on the Council from an internal political standpoint. It can therefore be considered that even if the Council does not suffer from legal accountability, it is likely to suffer from political accountability as a result of its nonchalance in reforming the procedure of the 1267 Committee.<sup>130</sup>

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<sup>128</sup> D. Shraga, *The Security Council and Human Rights: From Discretion to Promote to Obligation to Protect*, in B. Fassbender, *supra* n10, at 34

<sup>129</sup> J. M. Farrall, *supra* n36, at 18

<sup>130</sup> V. Gowlland-Debbas, *supra* n40, at 70

## **Part II: The emergence of core standards of judicial protection in Europe: a ‘bottom-up’ pressure toward reform at the Security Council**

### **Chapter 1: The European approach to normative conflicts: favouring human rights over Security Council obligations**

From 2001 onwards, the European Courts have been solicited by individuals under their respective Conventions to stand on the application of the 1267 targeted sanctions regime. While the jurisprudence of the ECJ and the ECtHR is supposedly harmonious, it can only be affirmed that the judges of Strasbourg and Luxembourg diverged on the path to follow concerning the implementation of targeted sanctions in Europe. Firstly, the landmark *Kadi* case of the ECJ will be analysed and its consequences on the international sphere determined (1). Secondly, emphasis will be provided on the *Nada* case of the ECtHR and its significance in international law (2).

#### **1. The ECJ approach in the Kadi cases: judicial review as a fundamental human right leading to the indirect illegality of 1267 Sanctions**

##### **i) The Kadi jurisprudence as the major contestation of targeted sanctions legality: the crescendo threshold for judicial review from 2005 to 2013**

Mr Kadi, a Swedish national, was listed on the 1267 Consolidated List in October 2001 and so was his company, the Al-Barakaat Foundation. Consequently, he tried to challenge his nomination before European Courts by challenging the European Regulation that listed him and his company. He and his Foundation were removed from the 1267 list in 2012.<sup>131</sup>

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<sup>131</sup> UN Doc SC/10785, 12 October 2012, accessible at: <http://www.un.org/News/Press/docs/2012/sc10785.doc.htm>

The Kadi saga started in 2005, when the General Court (GC) of the EU considered that it was not competent to review the disputed Regulation, as it was drafted to implement UNSC Resolution 1267, which was expressly taken under Chapter VII powers.<sup>132</sup> Kadi appealed that judgment. In 2008, the ECJ considered that the Regulation listing him was indeed illegal as it breached his fundamental rights that are constitutional principles binding the EU.<sup>133</sup> In the aftermath of the annulment of the Regulation as far as Kadi was concerned, the European Commission however re-listed him and provided him with the reasons that led to his listing. Kadi thus appeared again before the GC in 2010 so as to contest the legality of this new Regulation. The GC upheld the view advanced in 2008 that “Courts of the EU must ensure the review, *in principle the full review*, of the lawfulness of all European Union acts in the light of fundamental rights, including where such acts are designed to implement Security Council resolutions”.<sup>134</sup> Thus, the GC considered, *inter alia*, that it was competent to fully review the contested Regulation,<sup>135</sup> that the Regulation was breaching the right to judicial review as Kadi did not possess any effective opportunity to challenge its listing<sup>136</sup> and that the Regulation was thus illegal in application of EU law.<sup>137</sup>

The GC judgment was appealed before the ECJ again. In 2013, the Court firstly recalled that the rights of the defence - including the right to be heard and the right to have access to its file - as well as the right to effective judicial review are protected by the Charter of Fundamental Rights of the EU.<sup>138</sup> The Court also acknowledged that such principles could be limited by a necessary and proportionate measure that genuinely meets objectives of general interest recognized by the EU,<sup>139</sup> but that it did not apply here.<sup>140</sup> Secondly, the ECJ considered that security reasons could in fact preclude the disclosure of information, but that it is the task of the Court *only* to apply a proportionate review between the sensitivity of information and the guarantees of fundamental rights.<sup>141</sup> Most importantly, the Court established a rather stringent threshold of judicial review, as it considered it indispensable to ensure a fair balance between the maintenance of international peace and security and the

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<sup>132</sup> *Kadi GC I*, supra n64, para 219 et seq.

<sup>133</sup> *Kadi I*, supra n108, para 285

<sup>134</sup> *ibid*, para 326-327 – emphasis added

<sup>135</sup> General Court of the EU, Case T-85/09 *Kadi v Commission*, Case No ECR II-5177, Judgment, 30 September 2010, (hereafter *Kadi GC II*), para 142

<sup>136</sup> *ibid*, para 179

<sup>137</sup> *ibid*, para 195

<sup>138</sup> Articles 41(2) and 47 CFREU, *Kadi II*, supra n115, para 98-101

<sup>139</sup> *Kadi II*, *ibid*, para 101

<sup>140</sup> *ibid*, para 106 et seq.

<sup>141</sup> *ibid*, para 125-128 – emphasis added

protection of fundamental rights and freedoms.<sup>142</sup> Indeed, it considered that despite the improvements of the 1267 regime, the Ombudsperson still does not satisfy guarantees of effective judicial protection.<sup>143</sup> The Court thus went on by providing a definition of what it considers to form the concept of judicial protection:

Effective judicial protection must be that it should enable the person concerned to obtain a declaration from a court, *by means of a judgment ordering annulment whereby the contested measure is retroactively erased from the legal order and is deemed never to have existed*, that the listing of his name, or the continued listing of his name, on the list concerned was vitiated by illegality, *the recognition of which may re-establish the reputation of that person or constitute for him a form of reparation for the non-material harm he has suffered.*<sup>144</sup>

The ECJ thus admitted its competence to examine “carefully and impartially” whether the reasons alleged are well founded, in the light of the necessary observations presented by the individual and any exculpatory evidence.<sup>145</sup> Moreover, it is important to stress that the ECJ reversed the burden of proof concerning the de-listing. Indeed, it considered that it was for the relevant European Institutions to provide that the reasons that led to the listing are well founded and not for the individuals to prove their insufficient legal and factual bases.<sup>146</sup> This reasoning is noteworthy as it provides for a further obligation on the European Institutions, but clearly intends to control the legitimacy of the 1267 Committee while listing individuals.

## **ii) The mixed consequences of Kadi II: political pressure on the Security Council while holding EU member states between contradicting obligations**

While *Kadi II* can only be welcomed from a human rights perspective, it appears quite daring from the Luxembourg judges to have decided in such fashion. Indeed, the prevalence of human rights over targeted sanctions is laudable, but the consequences to be retained from the 2013 case could be bitter for member states. The ECJ clearly upheld that it would review the legality of the listing of individuals *as long as* an UN mechanism will be inexistent, as it

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<sup>142</sup> *ibid*, para 130

<sup>143</sup> *ibid*, para 133

<sup>144</sup> *ibid*, para 134 – emphasis added

<sup>145</sup> *ibid*, para 135

<sup>146</sup> *ibid*, para 121

considers the Ombudsperson to not constitute a mean for effective judicial review.<sup>147</sup> Such a threat may appear legitimate as it grants individuals targeted by the 1267 Committee an opportunity to be heard and to legally challenge their nomination within the EU framework. Moreover, the *so lange* approach held by the German Bundesverfassungsgericht in the 1970s effectively pressured the EU to adopt a higher threshold of protection for fundamental rights.<sup>148</sup> However, it remains to be seen if the *Kadi II* approach will trigger the same response from the Council. Taking into account that France and the United Kingdom are permanent members of the UNSC and the 1267 Committee, the fact that they are now encroached in conflicting obligations may pressure an internal reform toward effective judicial review at the Sanctions Committee. Thus, the right to an effective judicial review remains a fundamental challenge to the 1267 sanctions regime, as it is highly probable that this judicial tendency will remain *as long as* the UNSC does not fully satisfy the requirements of due process or “fair and clear procedures”.<sup>149</sup> The *so lange* argument thus appears to be a justification for the ECJ to disobey the UNSC, while constituting a very dualistic approach of international law.

*Kadi II* has been welcomed by mixed reactions from scholars that praised the overriding impact of human rights over the targeted sanctions regime<sup>150</sup> while remaining concerned about the international implications of the case.<sup>151</sup> Particularly, a rightful analysis of the case would be to consider that the ECJ disregards the actual discretion of the EU institutions in that case, and puts EU member states in a very difficult position.<sup>152</sup> Indeed, member states can either disregard their obligation under the UN Charter, or disregard their human rights obligations under EU law.<sup>153</sup> Thus, they incur international responsibility under either the one or the other regime. This appears clearly unsatisfactory, as the ECJ simply stated that EU states would be responsible under EU law when applying the 1267 Sanctions. Moreover, it is important to recall that the ECJ judgment does not affect the de-listing procedure, as even if the EU Regulation targeting individuals is annulled, the individual remains listed on the 1267 Sanctions list.

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<sup>147</sup> *ibid*, para 96

<sup>148</sup> *See*, German Handelsgesellschaft case, *supra* n23

<sup>149</sup> K. T. Huber, A. Rodiles, *An Ombudsperson in the UNSC: a paradigm shift?* Anuario Mexicano de Derecho Internacional, 2012, at 139

<sup>150</sup> A. Tzanakopoulos, *Kadi Showdown: Substantive Review of (UN) Sanctions by the ECJ*, 19 July 2013, EJIL Talk!, accessible at <http://www.ejiltalk.org/kadi-showdown/>

<sup>151</sup> E. De Wet, *From Kadi to Nada: Judicial Techniques Favouring Human Rights over United Nations Security Council Sanctions*, Chinese Journal of International Law, Vol 12, 2013; G. De Burca, *The European Court of Justice and the International Legal Order After Kadi*, Harvard International Law Journal, Vol 51 No 1, 2010, at 4 et seq.

<sup>152</sup> E. De Wet, *ibid*, at 798

<sup>153</sup> Representative of Switzerland at the UN, *supra* n127; A. Tzanakopoulos, *supra* n5, at 36, 51

Thus, it has been argued that the ECJ performed a simulacrum of judicial review, as eventually it cannot review the decision of the 1267 Committee anyway.<sup>154</sup> Likewise, it has been argued that the ECJ in *Kadi II* was contributing to the devaluation of human rights as it only bases its judgment on EU protected human rights,<sup>155</sup> which leaves unanswered the question related to the binding status of human rights over the UNSC. It could be claimed that *Kadi II* was necessary in order not to lower the threshold of the EU protection of human rights,<sup>156</sup> as well as not to damage the relationship between national and international law.<sup>157</sup> Undoubtedly, the ECJ intended to affirm its independence and autonomy *vis-à-vis* the international community,<sup>158</sup> but it actually contributed to isolate the EU.

Indeed, legal certainty is jeopardised with regard to *Kadi II*, as the implementation of targeted sanctions in Europe is clearly under threat. Thus, while making human rights considerations prevail, the ECJ contributed to the fragmentation of international law by clearly refusing to propose an alternative to the existing normative conflict. The ECJ's outcome led some commentators to consider that *Kadi* "killed" article 103 of the UN Charter.<sup>159</sup> However, *Kadi II* appears in contradiction with articles 30(1) of the VCLT and article 351 of the TFEU when disrespecting article 103, as it does not insure the primacy of the UN Charter. Thus, the outcome of *Kadi II* is raising more contradictions than it actually solves, as it forces EU member states to disobey their obligations under international law.

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<sup>154</sup> A. Tzanakopoulos, *supra* n5, at 44

<sup>155</sup> E. De Wet, *supra* n151, at 799

<sup>156</sup> J. Kokott, C. Sobotta, *The Kadi Case – Constitutional Core Values of International Law – Finding The Balance?* EJIL, Vol 23 No 4, 2012, at 1018

<sup>157</sup> J. Van Rossem, *Interaction between EU Law and International Law in the Light of Intertanko and Kadi: the Dilemma of Norms Binding the Member States but not the Community*, Netherlands Yearbook of International Law, Vol 40, 2009, at 197

<sup>158</sup> G. De Burca, *supra* n151, at 2

<sup>159</sup> J. Crawford, *Mr Kadi and Article 103 (A Poem)*, EJIL Talk! 29 July 2013, accessible at <http://www.ejiltalk.org/mr-kadi-and-article-103-by-james-crawford-a-poem/>

## 2. The ECtHR approach to targeted sanctions: between responsibility of the implementing state and latent responsibility of the Security Council

### i) The *Nada* case: harmonious interpretation of conflicting obligations and lack of primacy for the ECHR

In a similar fashion to *Kadi*, Mr Nada and its business were included on the 1267 list in October 2001. Nada was therefore subject to travel bans, which forced him to remain in the Italian enclave of Campione in Switzerland. In 2007, the Swiss Bundesgericht followed the approach taken by the General Court of the EU in *Kadi I*, as it considered that it was strictly bound to afford primacy to international obligations stemming from a Chapter VII Resolution by application of article 103 of the UN Charter.<sup>160</sup> The Bundesgericht only accepted to control the Resolution with *jus cogens* norms, but did not consider the right of fair trial to be included.<sup>161</sup> However, the Court strongly criticized the violation of due process rights as conferred by the ECHR and the ICCPR.<sup>162</sup> Subsequently, the Swiss Parliament adopted reforms regarding the implementation of the 1267 Sanctions, which allowed Swiss authorities to opt out of the regime in specific cases.<sup>163</sup> In 2009, Nada was de-listed.<sup>164</sup>

Nada, however, had filed a complaint against Switzerland before the ECtHR, claiming a violation, *inter alia*, of his right of private and family life as well as the right to a remedy, enshrined in articles 8(1) and 13(1) of the ECHR respectively.<sup>165</sup> Firstly, the Court established its jurisdiction by finding that Nada's listing was attributable to the 1267 Committee and thus to the UN, but that the implementation measure could only be attributable to Switzerland.<sup>166</sup> Thus, the Court had jurisdiction *rationae personae*. Secondly, regarding the apparent normative conflict between the ECHR and the UNSC Resolution, the Court recalled that it must be presumed "that the UNSC does not intend to impose any obligation on Member States to breach fundamental principles of human rights".<sup>167</sup>

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<sup>160</sup> *Nada v SECO*, supra n64, paras 8.1-8.2

<sup>161</sup> *ibid*, para 7

<sup>162</sup> *ibid*, para 8.3

<sup>163</sup> See, [http://www.parlament.ch/afs/data/f/bericht/2009/f\\_bericht\\_n\\_k4\\_0\\_20093719\\_0\\_20100301.htm](http://www.parlament.ch/afs/data/f/bericht/2009/f_bericht_n_k4_0_20093719_0_20100301.htm)

<sup>164</sup> UN Doc SC/9744, accessible at <http://www.un.org/News/Press/docs/2009/sc9744.doc.htm>

<sup>165</sup> ECtHR, *Nada v Switzerland*, Grand Chamber, Case No 10593/08, 12 September 2012, para 3

<sup>166</sup> *ibid*, paras 121-122

<sup>167</sup> ECtHR, *Al-Jedda v. United Kingdom*, Case No. 27021/087, 7 July 2011, para 102

However, the Court found that the wording of the UNSC Resolution was explicit enough to actually require such a breach.<sup>168</sup> Thus, the Court attempted to harmonize conflicting obligations resulting from the UNSC Resolution and the ECHR obligations.<sup>169</sup> Accordingly, it recalled the principle of mitigation when interpreting conflicting obligations.<sup>170</sup> The Court nevertheless considered that UN member states benefit of a “free choice” concerning the measure taken to transpose UN obligations and are only bound by “an obligation of result”.<sup>171</sup> In the Court’s view, “Switzerland enjoyed some latitude, *which was admittedly limited but nevertheless real*” in implementing the 1267 Sanctions.<sup>172</sup> As such, the measure is considered to be disproportionate and Switzerland is found to have violated the ECHR.<sup>173</sup> Finally, the Court upholds *Kadi I* in the sense that Switzerland breached the right to an effective remedy as it could have introduced a mechanism to respect such a right,<sup>174</sup> but does not apply a *so lange* caveat.<sup>175</sup>

Nonetheless, it appears quite dubious to hold such a rationale, as Switzerland clearly had a very restricted, if any, latitude in implementing Resolution 1390 (2003).<sup>176</sup> By affirming Switzerland’s responsibility, the ECtHR expressly refuses to pronounce itself on the hierarchy of norms in the international legal order by declining to adopt a similar position than the ECJ in *Kadi*. Therefore, it considers that a harmonious interpretation does not require resorting to article 103 to ‘solve’ the norm-conflict.<sup>177</sup> Such an approach prevents states from having to choose between the UN legal order and the ECHR,<sup>178</sup> but amounts to an apparent distortion of the clear language employed in the UNSC Resolution.<sup>179</sup> The judgment of the ECtHR can be considered as more pragmatic than the view raised by the ECJ in *Kadi II*, as it sustains the responsibility of the implementing state for not respecting the right of effective judicial review, while taking into account other norms of international law.<sup>180</sup>

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<sup>168</sup> *Nada*, supra n165, para 172

<sup>169</sup> *ibid*, para 169

<sup>170</sup> *ibid*, para 81 and 175; *see also*: Human Rights Committee, Communication No. 1472/2006, 22 October 2008, *Sayadi & Vinck v Belgium*, Individual opinion of Committee member Sir Nigel Rodley (concurring), at 36-37

<sup>171</sup> *Nada*, supra n165, para 176

<sup>172</sup> *ibid*, para 180

<sup>173</sup> *ibid*, para 198 and 212

<sup>174</sup> *ibid*, para 212

<sup>175</sup> J. Kokott, C. Sobotta, supra n156, at 1018

<sup>176</sup> *Nada*, supra n165, Concurring Opinion of Judge Malinverni, paras 8-10

<sup>177</sup> M. Milanovic, *European Court Decides Nada v Switzerland*, *EJIL Talk!* 14 September 2012, accessible at <http://www.ejiltalk.org/european-court-decides-nada-v-switzerland>

<sup>178</sup> *Nada*, supra n165, para 197

<sup>179</sup> E. De Wet, supra n151, at 806

<sup>180</sup> R. Wolfrum, *Judicial Control of Security Council Decisions*, Yearbook of the Institute of International Law, Tokyo Session, Draft Works, 2013 at 63

## ii) The significance of the *Nada* reasoning in light of the ECtHR's jurisprudence

The ECtHR's interpretation in *Nada* has been considered to be tantamount to assume that judicial review is possible unless explicitly excluded, which cannot be sustained for the 1267 Sanctions Regime.<sup>181</sup> However, this technique of systemic integration has the advantage that it finds a solution for apparently non-reconcilable normative conflicts.<sup>182</sup> The ECtHR decided a similar case as *Nada* in November 2013.<sup>183</sup> In that instance, the applicant was listed on the Iraqi targeted sanctions regime,<sup>184</sup> and claimed the violation of his right to a fair trial provided by article 6(1) ECHR. The case before the ECtHR thus resembled *Nada*, and the Court first attempted to harmonize conflicting obligations as well.<sup>185</sup> However, it went on to find that the UNSC Resolution did not allow any leeway concerning its implementation, as well as that it did not offer equivalent protection to the ECHR.<sup>186</sup> Finally, the Court found that the restriction of the right to a fair trial was disproportionate if balanced with security requirements and that Switzerland was thus responsible for a breach of the ECHR.<sup>187</sup>

Consequently, it appears quite debatable for the ECtHR to have decided in such fashion as well, as Switzerland did not have any possibility of interpreting the Sanctions resolutions so as to give application to the ECHR, neither in *Nada* nor in *Al-Dulimi*. In fact, the harmonious interpretation technique used by the ECtHR was indeed clearly hampered in *Al-Dulimi*.<sup>188</sup> However, instead of pronouncing itself on the hierarchy between the ECHR and the UN Charter to make the Convention prevail and hold Switzerland responsible – as in the *Kadi* reasoning<sup>189</sup> - the Court attributed the wrongful act to Switzerland, despite the recognition of their lack of *pouvoir d'appréciation* in the implementation process.<sup>190</sup>

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<sup>181</sup> *ibid*, at 804

<sup>182</sup> K. Istrefi, *The Application of Article 103 of the United Nations Charter in the European Courts: the Quest for Regime Compatibility on Fundamental Rights*, European Journal of Legal Studies, 2012, Vol 5 No 2, at 90

<sup>183</sup> ECtHR, *Al-Dulimi and Montana Management Inc. v. Switzerland*, Case No. 5809/08, 26 November 2013

<sup>184</sup> UNSC Res 1483 (2003)

<sup>185</sup> *Al Dulimi*, *supra* n183, para 111-112

<sup>186</sup> *ibid*, para 117-119; ECtHR, *Bosphorus*, *supra* n24, para 153

<sup>187</sup> *Al-Dulimi*, *ibid*, para 141

<sup>188</sup> K. Istrefi, *supra* n182, at 91

<sup>189</sup> *Kadi II*, *supra* n115, para 67

<sup>190</sup> A. Peters, *Targeted Sanctions After Affaire Al-Dulimi c Suisse, is There a Way Out of the Catch-22 for UN Members?* EJIL Talk! 4 December 2013, accessible at <http://www.ejiltalk.org/targeted-sanctions-after-affaire-al-dulimi-et-montana-management-inc-c-suisse-is-there-a-way-out-of-the-catch-22-for-un-members/>

Thus, the responsibility of Swiss authorities both in *Nada* and *Al-Dulimi* wrongfully implies that it possessed “latitude” when implementing targeted sanctions so as to render them in accordance with the requirements of the ECHR. The Court also considered that it would review UN decisions for *as long as* there is no effective and independent judicial review at the UN for “any measure adopted pursuant to a sanctions regime”.<sup>191</sup> While this rationale brings unity between the jurisprudence of the ECJ and the ECtHR, it appears to hold states virtually responsible for implementing Sanctions regimes. Indeed, the normative conflict between targeted sanctions and human rights does not find any satisfying answer in the light of the *Nada* and *Al-Dulimi* jurisprudence, although individuals and entities can seek redress for human rights violations in the European framework as a whole.

The Court could be considered to have deviated from international law when it attributed the wrongful act to Switzerland instead of attributing it to the UNSC.<sup>192</sup> It had previously assumed that it did not have jurisdiction *rationae personae* when UN member states were merely applying their obligations resulting from a UNSC Resolution.<sup>193</sup> It is therefore quite surprising to attribute the ECHR violation to member states when they do not possess any margin of appreciation regarding the implementation of the Resolution. The human rights violation clearly stems from the UNSC Resolutions and not from the implementation stage. Thus, it appears that the UNSC’s wrongful conducts are attributable to UN member states for implementing UNSC Resolutions, as they acted as ‘agents’ of the UN when implementing the Resolutions.<sup>194</sup> Nevertheless, it can also be considered that such decisions by the ECtHR pressure states to seek for a reform of Sanctions Committees in a similar vein than in *Kadi*, as the *so lange* approach applied here seems to suggest. Thus, it appears that the normative conflict opposing human rights standards as protected in Europe and UNSC resolutions remains to be solved.

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<sup>191</sup> *Al-Dulimi*, supra n183, para 134

<sup>192</sup> *ibid*, Dissenting Opinion Judge Sajó, at 65

<sup>193</sup> ECtHR, *Behrami v. France/Saramati v. France, Germany and Norway* (Admissibility), Case No 71412/01 and 78166/01, 2 May 2007, paras 141-157; R. Wolfrum, supra n180, at 56

<sup>194</sup> *Abdelrazik v Canada*, supra n29, at 147-148, A. Tzanakopoulos, supra n5, at 36: making a parallel with the responsibility of EU organs in *Kadi I*.

## **Chapter 2: Judicial and political impetuses pressuring the UNSC to abide to human rights standards**

As established through the analysis of both the *Kadi* and *Nada* cases, European courts are progressively challenging the primacy of UNSC decisions by indirectly reviewing them through the lenses of their own constitutive instruments. As such, the review neither directly affects the legality of the 1267 regime nor the de-listing process before it. However, it consists in a political pressure put on the member states of both the EU and the CoE to seek for a reform at the UNSC toward respect of human rights standards. Thus, the paradigm seems to have shifted from subordination to the UNSC to contestation of its primacy. The consequences of such alteration will firstly be analysed through further domestic jurisprudence and through the ‘constitutionalisation’ of the international legal order (1). Secondly, a critical analysis of the motives for such pressure will be performed to assess whether it can be characterized as an illustration of the efficiency of external political mechanisms or as internal pressure of UN member states (2).

### **1. Assessment of the legal mechanisms pressuring the Security Council to reform the 1267 Sanctions Regime**

#### **i) Domestic jurisprudences oscillating between act of state and judicial review of the implementing measure**

Domestic and regional jurisdictions are generally reluctant to control the legality of a UNSC Resolution, as successfully challenging the legality of UNSC resolutions appears to be largely precluded by the laws on immunity for international organizations (IOs) and general rules governing international adjudication.<sup>195</sup> Indeed, the UN and the UNSC are immune from adjudication before domestic Courts unless they waive their immunity.<sup>196</sup> Moreover, national courts appear to have placed absolute immunity on the UN as a requirement of customary

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<sup>195</sup> A. Reinisch, *The Privileges and Immunities of International Organizations in Domestic Courts*, International Law in Domestic Legal Orders, OUP, 2013, at 4 et seq.

<sup>196</sup> Article 105 UN Charter, Convention on Privileges and Immunities of the United Nations, New York, 1946, Article II, Section 2.

international law.<sup>197</sup> Thus, the ECtHR has considered that when states establish IOs and accord them immunities, “there may be implications for fundamental human rights”.<sup>198</sup> This is quite a euphemism, as this Court considered that immunities of IOs could limit the right to a Court under the ECHR<sup>199</sup> but also overrides the prohibition of torture and thus *jus cogens* norms.<sup>200</sup> Accordingly, it may appear that the laws on immunity prevent any findings of responsibility regarding the UNSC when infringing the right of access to a Court and judicial review standards.<sup>201</sup> Thus, national or regional courts cannot lawfully challenge the legality of a UNSC Resolution.

Consequently, targeted individuals or entities can only seek for the annulment of the implementing measure that led to their listing, as UNSC Resolutions are not self-implementing.<sup>202</sup> However, it appears that Courts generally discard their competence to review the impugned decision as human rights are trumped when in conflict with UNSC resolutions in application of article 103 of the Charter.<sup>203</sup> This deferential approach to the UNSC has been illustrated in numerous cases challenging the lawfulness of measures implementing asset-freezes or travel bans.<sup>204</sup> Nevertheless, judicial review guarantees are increasingly affirmed by domestic Courts that admit their competence to force their government to request the de-listing of a petitioner had a fair procedure for the listing not been ensured.<sup>205</sup> Some domestic cases have also sustained the possibility that if a designating state had unlawfully listed an individual, de-listing requests by that same state should be honoured by the 1267 Committee.<sup>206</sup> However, in the joint appeals of these cases, the UK Supreme Court (UKSC) considered that obligations under article 25 of the Charter were, by virtue of the primacy clause enshrined in article 103, to prevail over any other international agreement including guarantees provided by the ECHR.<sup>207</sup>

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<sup>197</sup> A. Reinisch, U. Weber, *In the Shadow of Waite and Kennedy*, International Organizations Law Review, Vol 1, 2004, at 61-62.

<sup>198</sup> ECtHR, *Waite and Kennedy v. Germany*, Judgment, Case No 26083/94, 18 February 1999, para 67

<sup>199</sup> *ibid*, paras 73-74

<sup>200</sup> ECtHR, *Stichting Mothers of Srebrenica and Others v The Netherlands*, Application No. 65542/12, Decision, Third Section, 27 June 2013, para 67 et seq.

<sup>201</sup> A. Reinisch, U. Weber, *supra* n197, at 64

<sup>202</sup> J. M. Farrall, *supra* n36, at 18

<sup>203</sup> K. Istefi, *supra* n182, at 83

<sup>204</sup> *see Kadi GC I, Al Jeddah v Secretary of State, Nada v SECO*, *supra* n64

<sup>205</sup> Court of Appeal, *A, K, M, Q & G v Her Majesty's Treasury*, Case EWHC 869, 2008, paras 113-120

<sup>206</sup> *Hay v Her Majesty's Treasury and Secretary of State for Foreign and Commonwealth Affairs*, Case EWHC 1677, 2009, para 28 ; A. Tzanakopoulos, *supra* n5, at 196

<sup>207</sup> *Al-Jeddah v Secretary of State*, *supra* n64, upheld by Lord Hope in the joint appeals of *A, K, M, Q and G and Hay (Ahmed case)*, 27 January 2010, para 71

The UKSC thus circumvented the consequences of *Kadi I* by considering that the ECJ decided in such fashion as it was not itself a member state of the UN.<sup>208</sup> Likewise, in the *Sayadi* decision,<sup>209</sup> Belgium was found in breach of the ICCPR for having submitted names to the Sanctions Committee that resulted in preventing the plaintiffs from their liberty of movement. However, the Human Rights Committee could not review the legality of Resolution 1267 that induced Belgium to submit the names.<sup>210</sup> Additionally, the Federal Court of Canada clearly took the view that the 1267 regime was incompatible with the right to a judicial remedy in the *Abdelrazik* case.<sup>211</sup> The Canadian Court thus overruled the governmental measure implementing the 1267 travel ban.<sup>212</sup> Thus, this concise overview of domestic, regional and monitoring bodies' jurisprudence clearly diverges, flowing from subordination (UKSC in *Al-Jedda*) to detachment from the UN system as illustrated by the *Kadi* cases. However, the challenging of the UNSC primacy in *Kadi* does neither affect its immune character under international law, nor does it legally affect the listing and de-listing procedure of the 1267 Committee.

#### **i) The 'constitutionalisation from below' argument clarifying the endeavour to favour human rights over UNSC Resolutions**

It has been considered that international law has little or no means to resolve serious normative conflicts.<sup>213</sup> However, the UN Charter enjoys a presumption of priority over other norms of international law - as established by articles 103 of the Charter and 30 of the VCLT – which would seem to resolve potential conflicts in favour of the Charter. Such priority can be explained by the function pursued by the UN and the UNSC.<sup>214</sup> Moreover, some scholars consider the UN Charter to form the Constitution of the international legal order.<sup>215</sup> Nevertheless, and as explained above, *Kadi II* discarded the primacy of the UN Charter, as the ECJ defined away the normative conflict by simply ignoring the UN context.<sup>216</sup>

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<sup>208</sup> *ibid*, Lord Mance, para 244

<sup>209</sup> *Sayadi & Vinck v Belgium*, supra n170

<sup>210</sup> The HRC does not even mention the possibility of doing so

<sup>211</sup> *Abdelrazik v Canada*, supra n29, para 157 et seq

<sup>212</sup> R. Wolfrum, supra n180, at 56

<sup>213</sup> J. Klabbers, S. Trommer, *Peaceful Coexistence: Normative Pluralism in International Law*, in J. Klabbers, T. Piiparinen, *Normative Pluralism and International Law: Exploring Global Governance*, CUP, 2013, at 68

<sup>214</sup> *ibid*, at 79

<sup>215</sup> A. Tzanakopoulos, supra n5, at 162; N. J. Schrijver, supra n54, at 34

<sup>216</sup> J. Klabbers, S. Trommer, supra n213 at 76; G. De Burca, supra n151, at 5

It has thus been advanced that the UNSC is increasingly bound to human rights guarantees as a result of the ‘constitutionalisation’ of the international legal order.<sup>217</sup> Thus, if the UN Charter is the Constitution, operating a constitutional review of UNSC Resolutions would appear legitimate.<sup>218</sup> Such a constitutionalisation could be defined as referring to the interaction between national, regional and functional regimes through which the fundamental values of the international legal order contain limits for the exercise of public powers.<sup>219</sup> This would imply that human rights norms could have acquired a special hierarchical standing compared with other international norms.<sup>220</sup> Consequently, human rights would offer guidance in resolving normative conflicts arising from UNSC resolutions. Such a phenomenon would occur through the practice of national and regional courts that would make human rights norms prevail over UNSC obligations by admitting the former norms to overrule the latter, as in *Kadi II* through the adoption of a *so lange* approach. However, given the autonomy of the EU, it appears that the ‘constitutionalisation’ operated in *Kadi* unfortunately referred to EU treaties only.<sup>221</sup> Thus, the ECJ left unresolved the question on whether the Council is bound to universal human rights norms.<sup>222</sup>

National courts have also compelled their government not to comply with a UNSC Resolution if it breaches due process guarantees.<sup>223</sup> Thus, it could be sustained that the phenomenon where courts of UN member states expressly challenge the legality of a UNSC Resolution amounts to a constitutionalisation from ‘below’ given the horizontal character of the international community.<sup>224</sup> However, constitutionalisation wrongfully implies that a constitution exists in the international legal order, where human rights considerations would prevail in case of normative conflicts. However, this does not appear to be the case, as even if it is undeniable that such ‘bottom-up’ pressure influences the Security Council in modifying the structure and proceedings before the 1267 Committee,<sup>225</sup> it cannot consist in the sole reason explaining such reform.

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<sup>217</sup> E. De Wet, *The Role of European Courts in the Development of a Hierarchy of Norms within International Law: Evidence of Constitutionalisation?* European Constitutional Law Review, Vol 5 No 2, 2009, at 285 et seq

<sup>218</sup> A. Tzanakopoulos, supra n5, at 157-163

<sup>219</sup> G. De Burca, supra n151, at 34 et seq; J. G. Van Mulligen, *Global Constitutionalism and the Objective Purport of the International Legal Order*, LJIL, Vol 24 No 2, 2011, at 278-279

<sup>220</sup> P. M. Dupuy, *Some Reflections on Contemporary International Law and the Appeal to Universal Values: A Response to Martti Koskenniemi*, EJIL, Vol 16 No 1, 2005, at 133

<sup>221</sup> I. Johnstone, supra n49, at 298

<sup>222</sup> E. De Wet, supra n217, at 305

<sup>223</sup> Abdelrazik, supra n29; A. Tzanakopoulos, supra n5, at 133-135

<sup>224</sup> J. A. Vos, *The Function of Public International Law*, Asser Press, Springer, 2013, at 8

<sup>225</sup> K. T. Huber, A. Rodiles, supra n149, at 141-142

## 2. Motivations underpinning the pressure exercised on the UNSC: combination of external standpoints and political considerations forwarded by UN member states

### i) The assessment and significance of external pressure mechanisms at the UNSC

The *shaming* process for IOs can be defined as referring to actors exposing and/or making scandalous the negative implications of IOs policies.<sup>226</sup> Concerning the 1267 Regime, it is undeniable that such process occurred from the early 2000s as various types of actors pressured the UNSC to ensure due process guarantees to individuals and entities in the listing process. Indeed, UN bodies and NGOs considered that the procedures for managing the blacklists were neither fair nor clear.<sup>227</sup> Others even qualified the sanctions to be “unworthy” of the UNSC.<sup>228</sup>

Likewise, the *litigation* mechanism leads to Court judgments influencing the IO in such a way that a failure to comply could be costly for states.<sup>229</sup> As established through the review of the relevant jurisprudence above, it can be considered that this mechanism had a real impact in pressuring the Council to modify its policies relating to the 1267 sanctions regime.<sup>230</sup> Most importantly, it was the pressure through *defiance* or *disobedience* that appears to have triggered reforms at the UNSC. Such a mechanism refers to states disobeying the UNSC or refusing to cooperate with it and hence undermining the effectiveness of sanctions.<sup>231</sup> As an example, it appeared that states in the mid 2000s refrained from submitting names to the 1267 Committee as they were concerned with the lack of due process and procedural flaws in the sanctions regime.<sup>232</sup>

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<sup>226</sup> M. Heupel, *With Power Comes Responsibility: Human Rights protection in United Nations Sanctions Policy*, European Journal of International Relations, Vol 19 No 4, 2013 at 776 – emphasis added

<sup>227</sup> Human Rights Watch, Press release, 3 March 2002, *UN: Sanctions Rules Must Protect Due Process*, available at: <http://hrw.org/english/docs/2002/03/04/global5839.htm>; UNGA *World Summit Outcome*, supra n61, para 107 et seq; I. Johnstone, supra n49, at 297, 307

<sup>228</sup> *Assessing Damage, Urging action: Report of the Eminent Jurists Panel on Terrorism, Counter-terrorism and Human Rights*. International Commission of Jurists, 2009, at 13, Available at: <http://www.un.org/en/sc/ctc/specialmeetings/2011/docs/icj/icj-2009-ejp-execsumm.pdf>

<sup>229</sup> M. Heupel, supra n226, at 776 – emphasis added

<sup>230</sup> A. Posch, *The Kadi Case: Rethinking the relationship between EU law and International law?* Columbia Journal of European Law Online, 2009, Vol 15 No 1, at 5; K. T. Huber, A. Rodiles, supra n149, at 120

<sup>231</sup> M. Heupel, supra n226, at 777 – emphasis added

<sup>232</sup> L. Van den Herik, *The Security Council's Targeted Sanction Regimes: In Need of Better Protection of the Individual*, 2007, LJIL, Vol 20 No 4, at 804

Moreover, civil society groups also fomented disobedience by establishing financing support for listed individuals, as occurred in Sweden<sup>233</sup> and Canada,<sup>234</sup> thus clearly disobeying the UNSC. Moreover, it was submitted to both the UNGA and the UNSC presidents to consider that due process shortcomings of the 1267 Committee undermined both the legitimacy and effectiveness of the 1267 Sanctions.<sup>235</sup> Furthermore, it was also considered that the UN should abide to human rights standards as it is legally required to comply with human rights standards included in customary law.<sup>236</sup> Experts thus thoroughly recommended reforms to be adopted by the UNSC to comply with human rights guarantees, both in terms of human rights law<sup>237</sup> and in terms of political feasibility.<sup>238</sup> Consequently, even if the Security Council is deemed not to have adopted a sufficient amount of these recommendations to respect due process guarantees, it accepted several proposals that have been put before it. Indeed, after *Kadi*, the UNSC critically ameliorated the complaints system before the 1267 Committee in terms of disclosing information to petitioners and through the establishment of the Ombudsperson.<sup>239</sup> Such reforms could be interpreted as illustrating the acknowledgment of the Council that it is bound by a certain set of human rights.<sup>240</sup> Indeed, the Council itself stated that it took note of “challenges, *both legal or otherwise*, to the measures implemented by member states”.<sup>241</sup> Moreover, human rights supporters considered some of its reforms as “successful”.<sup>242</sup> Nevertheless, *Kadi* further pressures the Security Council to adjust its procedures, as the defects in terms of rule setting cannot be resolved at the European level.<sup>243</sup>

<sup>233</sup> M. Heupel, supra n226, at 787

<sup>234</sup> G. Sullivan, B. Hayes, supra n123, at 68

<sup>235</sup> Identical Letters Dated 23 June 2008 from the Permanent Representative of Switzerland to the United Nations Addressed to the President of the General Assembly and the President of the Security Council. *Enclosure: Improving the implementation of sanctions regimes through ensuring ‘fair and clear procedures*, UN Doc A/62/891– S/2008/428. Available at: <http://www.securitycouncilreport.org/atf/cf/%7B65BF9B-6D27-4E9C-8CD3-CF6E4FF96FF9%7D/Terrorism%20%20S%202008%20428.pdf>

<sup>236</sup> M. Bothe, *Security Council’s Targeted Sanctions Against Presumed Terrorists: The Need to Comply With Human Rights Standards*, *Journal of International Criminal Justice*, 2008, Vol 6, at 543; see also Chapter I above.

<sup>237</sup> P. Wallensteen, C. Staibano C and M. Eriksson, *Making Targeted Sanctions Effective: Guidelines for the Implementation of UN Policy Options, Results from the Stockholm Process on the Implementation of Targeted Sanctions*, 2003, Department of Peace and Conflict Research, Uppsala University. Available at: [http://pcr.uu.se/digitalAssets/173/173853\\_3final\\_report\\_complete.pdf](http://pcr.uu.se/digitalAssets/173/173853_3final_report_complete.pdf) at 24 et seq.

<sup>238</sup> T. Biersteker and S. Eckert, *Strengthening Targeted Sanctions Through Fair and Clear Procedures*, 2006, Watson Institute for International Studies, Brown University, at 40 et seq. Available at: [http://watsoninstitute.org/pub/Strengthening\\_Targeted\\_Sanctions.pdf](http://watsoninstitute.org/pub/Strengthening_Targeted_Sanctions.pdf)

<sup>239</sup> *ibid*, at 45

<sup>240</sup> M. Heupel, supra n226, at 789

<sup>241</sup> UNSC Res 1904 (2009) Preamble – emphasis added

<sup>242</sup> Statement by H. E Ambassador Christian Wenaweser, Permanent Representative of the Principality of Liechtenstein to the United Nations, on Behalf of the Group of Like-Minded States on Targeted Sanctions, New York, 10 May 2013, available at [http://www.regierung.li/fileadmin/dateien/botschaften/ny\\_dokumente/2013-5-10\\_Statement\\_Like-Minded\\_Briefing\\_SC\\_Subsiary\\_Bodies\\_final\\_1\\_.pdf](http://www.regierung.li/fileadmin/dateien/botschaften/ny_dokumente/2013-5-10_Statement_Like-Minded_Briefing_SC_Subsiary_Bodies_final_1_.pdf)

<sup>243</sup> A. Nollkaemper, *Inside or Out, Two Types of Legal Pluralism*, in J. Klabbers, T. Piiparinen, supra n213, at

Consequently, it can be considered that legal pressure through the jurisprudence of domestic and regional Courts as well as political pressure resulting from the work of experts and states' policies have contributed to the structural reforms of the 1267 Committee. Despite the fact that these reforms remain unsatisfactory, the Council gave way to procedural restructuring toward enhanced respect for human rights standards. Thus, the targeted sanctions regime illustrates an exceptional paradigm where the Council took note of external output.

## ii) The internal role of UN member states as a trigger for reform in the 1267 Sanctions regime

States in IOs are admitted to play two roles: an external role encompassing compliance to the IO's decisions and to their legal affect, and an internal role referring to the will of member states to cooperate.<sup>244</sup> The concept of *dédoublement fonctionnel* illustrates the present dilemma: on the one hand, the UNSC member states need to act in accordance with the norm produced by the Council;<sup>245</sup> on the other hand, representatives of these states' governments compose the UNSC and are bound by other legal obligations and policies. Thus, it appears that states cannot apply a 'double standard' by enacting norms that would be in contradiction with their national and regional commitments. Nevertheless, it has been considered that instead of listing individuals on national or regional lists that were susceptible of being judicially reviewed, states would submit the names to the 1267 Sanctions Committee in order to circumvent their regional human rights obligations.<sup>246</sup>

Evidently, this cannot be the case anymore as states are strongly encouraged to respect judicial review standards and thus to internally seek for a reform of the 1267 regime. As support for the 1267 regime was eroding,<sup>247</sup> the UNSC reacted by adopting a wide range of institutional reforms for the regime to meet human rights standards.

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<sup>244</sup> H. G. Schermers, N. M. Blokker, *International Institutional Law: Unity within Diversity*, Martinus Nijhoff Publishers, 5th Edition, 2011, at 61 para 66

<sup>245</sup> *ibid*, at 151 para 199

<sup>246</sup> D. Halberstam, E. Stein, *The United Nations, the European Union and the King of Sweden: Economic Sanctions and Individual Rights in a Plural World Order*, Working Paper 134, December 2008, Michigan Law School, at 9. Accessible at <http://ssrn.com/abstract=1312082>

<sup>247</sup> Seventh Report of the Analytical Support and Sanctions Monitoring Team, UN Doc. S/2007/677, Annex I, Summary, para. 2

Consequently, it can be considered that the Council is increasingly bound to respect human rights norms, as cooperation of non-governmental actors in the success of the action undertaken is essential.<sup>248</sup> Indeed, it has been considered that a “public sphere” coalesces around the UNSC decision-making, especially on issues of counter-terrorism, such as the 1267 regime.<sup>249</sup> Thus, the pressure exercised on the Council to respect human rights such as judicial review guarantees not only stems from legal and judicial pressure but also from political considerations. Indeed, UN member states are increasingly considering that the working methods of the UNSC should be reformed in order to enhance accountability and transparency.<sup>250</sup> UN member states have constituted groups of ‘like-minded states’ in order to urge a reform of the UNSC. As an example, the Accountability Coherence and Transparency (ACT) group, recently composed, represents 20 member states seeking transparency at the UNSC.<sup>251</sup> Other groups, such as the Like-Minded States on Targeted Sanctions, have also challenged the status quo at the Security Council to seek for a reform of the 1267 regime.<sup>252</sup> Thus, UN member states generally agree on a reform toward transparent decision-making at the UNSC.<sup>253</sup>

The formation of such groups within the UN testifies that the UNSC should be held accountable as well as suggests recommendations to respect human rights. In turn, accountability and transparency policies effectively trigger a reform of the 1267 Regime. Indeed, since the procedure of ‘reversed’ consensus has been established in 2011, it appears easier to hold the objecting states accountable.<sup>254</sup> Thus, it can be rightfully affirmed that civil society strongly influences states to seek for a reform of the UNSC. Taken in combination with judicial and legal challenges, political considerations by UN member states and NGOs have triggered reforms in the 1267 regime,<sup>255</sup> as members of the 1267 Committee must seek support of other UN member states if they aim at the efficiency of the 1267 regime.<sup>256</sup>

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<sup>248</sup> I. Johnstone, supra n49, at 301.

<sup>249</sup> J. Mitzen, *Reading Habermas in Anarchy: Multilateral Diplomacy and Global Public Spheres*, *The American Political Science Review*, Vol 99 No 3, 2005, at 405

<sup>250</sup> *World Summit Outcome*, supra n61, para 154

<sup>251</sup> V. Lehmann, *Reforming the Working Methods at the UNSC, The Next ACT*, August 2013, FES New York, accessible at: <http://library.fes.de/pdf-files/iez/global/10180.pdf>

<sup>252</sup> Document submitted to the Security Council by Switzerland and the Like-Minded States in April 2011, *Improving fair and clear procedures for a more effective UN sanctions system*, accessible at: <http://www.news.admin.ch/NSBSubscriber/message/attachments/22759.pdf>

<sup>253</sup> Press Release, 21 November 2013, UNGA, UN Doc GA/11458, accessible at: <http://www.un.org/News/Press/docs/2013/ga11458.doc.htm>

<sup>254</sup> UNSC Res 1989 (2011) paras 23, 27

<sup>255</sup> J. E. Alvarez, *Contemporary International Law: An 'Empire of Law' or the 'Law of Empire'*, *American University International Law Review*, Vol 24 No 5, 2009, at 828-830

<sup>256</sup> E. Rosand, *The UN Response to the Evolving Threat of Global Terrorism, Institutional Reform, Rivalry or*

## Conclusion

The 1267 Sanctions regime has thus suffered many reforms since its creation as a subsidiary organ of the UNSC in 1999. Such reforms are mainly due to judicial and legal pressure by European Courts as well as political considerations forwarded by civil society and UN member states. As such, it appears that the lack of transparency in the UNSC's procedure completely backfired with respect to the 1267 regime, as the procedures were made increasingly public with possibilities of obtaining narrative summaries, which were later used in Court to squash implementing measures of the 1267 list.<sup>257</sup>

Such reforms evidently enhance the respect for the rule of law at the UNSC, especially regarding transparency requirements,<sup>258</sup> as it constrains the 1267 Committee to perform thorough and effective investigations when submitting a name to be listed.<sup>259</sup> Thus, political and judicial pressure on the Council have forced it to reform the 1267 regime in order to include evidentiary standards as well as a procedure for de-listing.<sup>260</sup> Moreover, even if the Ombudsperson included in the regime in 2009 does not fully respect the rather stringent criteria established by the ECJ for judicial review and effective remedy, its creation remains unprecedented in the Council's history.<sup>261</sup>

Thus, the contested legitimacy of the 1267 regime has triggered judicial turmoil so as to reform the Committee, especially stemming from European Courts. The results of the *Kadi II* decision by the ECJ remain to be seen, however it appear fair to foresee that the UNSC has no other choice than reforming the 1267 regime another time for EU states to respect their obligations. The rather strict threshold for judicial review will nevertheless be delicate to reach, as it would involve the creation of another body to control the 1267 Committee. Thus, human rights play an increasing role in the decision-making of the UNSC, as it is increasingly coerced by judicial and political considerations to accommodate human rights guarantees with its responsibility to maintain and restore international peace and security.

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*Renewal?* in P. G. Danchin, H. Fisher, supra n120, at 258

<sup>257</sup> See, *Kadi II*, supra n115

<sup>258</sup> A. Tzanakopoulos, *Transparency in the Security Council*, in A. Bianchi, A. Peters (eds), *Transparency in International Law*, CUP, 2013, at 373

<sup>259</sup> ICPO, Interpol General Assembly Resolution, No AG-2005-RES-05, 74th Session, 19-22 September 2005, para 2, realizing that the 1267 Committee included names on the 1267 list without real information on individuals and entities targeted.

<sup>260</sup> Alvarez, supra n255, at 830

<sup>261</sup> T.J. Biersteker, S. Eckert, *Due Process and Targeted Sanctions: an Update of the Watson Report*, December 2012, at 7 and 36, available at: [http://www.watsoninstitute.org/pub/Watson%20Report%20Update%2012\\_12.pdf](http://www.watsoninstitute.org/pub/Watson%20Report%20Update%2012_12.pdf)