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International Organizations and Anti-Terrorist Sanctions: No Accountability for Human Rights Violations?

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Sed quis custodiet ipsos custodes?
(Juvenal, *Satires* 6.347-348)

Introduction

The expanded security agenda of the international community following the terrorist attacks of September 11, 2001 has generated loopholes in the protection of fundamental human rights. One major reason is that the terrorist threat is addressed through intergovernmental mechanisms that are ill-equipped to reconcile security goals with human rights guarantees. Acting under Chapter VII of the UN Charter, the UN Security Council (UNSC) determined that acts of international terrorism constitute a threat to international peace and security, and required the adoption of far-reaching sanctions against specific individuals and corporations suspected of supporting terrorism. In doing so, it replaced the previous horizontal cooperation among States in the field of trans-boundary crime with a vertical collective security response. The risks of this new approach to terrorism stem from the political nature of the UNSC, and the fact that the adoption of sanctions is not surrounded by sufficient guarantees to protect the individual rights at stake. Despite the reform of UN procedures, suspected individuals are not guaranteed the right to defence, nor afforded redress at UN level. This article argues that, while the UNSC is bound by international and UN law to respect human rights, there are no effective mechanisms for accountability in case of violations. Also, with the recent exception of the European Court of Justice (ECJ) in *Kadi*, domestic and regional courts are reluctant to review measures implementing Chapter VII resolutions, and States seem to be exonerated from responsibility for abuses committed in this framework. This article explores these complex responsibility issues raised by the sanctions regime, and prospects for accountability.

UN ‘blacklisting’ of suspected terrorists and the human rights debate

The ‘blacklisting’ of suspected terrorists is an atypical development of the non-military coercive measures the UNSC decides, pursuant to Article 41 of the UN Charter, when it determines the existence of a threat to international peace and security. The UNSC found that international terrorism poses such a threat in Resolution 1368 (2001), in the aftermath of the terrorist attacks on the US, a determination reiterated in Resolution 1373 (2001) and subsequently. At the outset, the UN sanctions process consisted mainly of economic embargoes, and it intensified after the end of the Cold War: during the 1990s, the UNSC imposed sanctions in relation to the situation in South Africa, Iraq/ Kuwait, former Yugoslavia, Somalia, Libya, Liberia, Haiti, Angola, Rwanda, Sudan. Such measures were premised on the assumption that ‘economic pressure on civilians will translate into pressure on the government for change’ (Reinisch 2001, p.851). Economic sanctions were seen as the more humane alternative to military coercive action aimed at ensuring international peace and security; nonetheless, they proved

highly detrimental for the civil populations of the States concerned (Committee on Economic, Social and Cultural Rights, *General Comment No. 8*, 'The Relationship between Economic Sanctions and Respect for Economic, Social and Cultural Rights', 12 December 1997, paras.3-4). Thus, they were largely replaced by 'targeted'/'selective' sanctions, directed against specific individuals, armed rebels, political leaders or regime clique: travel bans, assets freezing (Reinisch 2001, pp.851-852). This practice was inaugurated by Resolution 1127 (1997) imposing travel sanctions on UNITA leaders, followed by Resolutions 1173 and 1176 of 1998 deciding financial measures against UNITA members. Analogous measures were adopted in connection with the situation in Sierra Leone, Liberia, Iraq, Democratic Republic of Congo, Cote d'Ivoire, Sudan. While departing from the general sanctions regime, these sanctions regarded easily identifiable public figures, and the disputes surrounding their adoption were limited to the scope of the relevant political or rebellious circle (Cameron 2003a, p.163).

Individual sanctions became controversial when they no longer targeted leaders only. With the adoption of Resolution 1333 (2000), the freezing of funds decided by Resolution 1267 (1999) against the Taliban regime was extended to any capitals directly or indirectly controlled by Usama bin Laden and persons associated with him. More significantly, Resolution 1390 (2002) imposed measures against Usama bin Laden, members of Al-Qaida and the Taliban and any other individuals, groups, undertakings and entities associated with them, signalling the radical shift towards sanctions against private individuals. Under para.2(a), States are to '[f]reeze without delay the funds and other financial assets or economic resources of these individuals, groups, undertakings and entities, including funds derived from property owned or controlled, directly or indirectly, by them or by persons acting on their behalf or at their direction [...]'. These obligations were reiterated in Resolutions 1452 (2002), 1455 (2003), 1526 (2004), 1617 (2005), 1735 (2006), 1822 (2008).

Resolution 1390 (2002) was an unprecedented one: the threat to the peace no longer concerned a particular political regime or territorial entity (Cameron 2003a, p.164, Ciampi 2007, p.46), nor did it have any temporal or factual (*i.e.* conditional upon a requested behaviour) limitation (Birkhäuser 2005, p.6). The vague criteria to establish association with Al-Qaida creates difficulties in implementation, notwithstanding the adoption by the Al-Qaida and Taliban Sanctions Committee established by Resolution 1267 (1999) of Guidelines including listing criteria.¹ Given the secretive nature of the organization, its members and supporters do not have the visibility of political/ military leaders, and the problem arises of correctly identifying the targets of sanctions (Cameron 2003a, pp.165-170, Cadin 2006). The mechanism of identification of suspects fails to ensure proper guarantees of accuracy: the Sanctions Committee draws a list based on proposals by Member States, and, though a 'statement of reasons' is now required from designating States for their proposals, much intelligence material remains confidential. Prior to the requests in Resolutions 1526 (2004) (para.17) and 1617 (2005) (para.4), further specified by Resolution 1735 (2006) (para.5), the information on which States based their proposals was seldom revealed (Cameron 2006, p.5). The measures decided by the Sanctions Committee are unconditionally enforced by States (and, for EU members, by EU institutions), which automatically endorse the lists.² The Consolidated List currently includes 142 individuals associated with the Taliban, 254 individuals associated with Al-Qaida, and 111 entities associated with Al-Qaida.³

Beyond potential assessment errors, there are inadequate subsequent protections afforded to listed individuals. They are not provided with an opportunity to be heard by the Committee or to challenge the measure before a third-party independent body authorized to re-examine the facts and de-list individuals. According to the original scheme, a designated individual depended on

the discretionary protection of the State of nationality/ residence, which could seek cancellation from the list through bilateral consultations with the designating State or addressing the Sanctions Committee; the de-listing decision was based on consultations and consensus within the Committee, and, if consensus was not reached, the matter could be referred to the Security Council (Cameron 2003a, pp.176-177). The pressure for fair and transparent procedures⁴ led to the admission, pursuant to Resolution 1730 (2006), of direct individual de-listing requests, received by a 'focal point'. However, a State must take the initiative for a request to be placed on the Committee's agenda, the mechanism leading to the cancellation of names is still based on political negotiation within the Committee rather than on independent review, and at no point is the individual a party to the proceedings ('De-listing procedure' annexed to Res. 1730 (2006), paras.5-6). Regarding the second aspect considered, in his Report to the Committee on Legal Affairs and Human Rights of the Parliamentary Assembly of the Council of Europe ('United Nations Security Council and European Union Blacklists') of 16 November 2007, Dick Marty observed: 'the members of the sanctions committees are not 'independent and impartial.' A tribunal cannot meet those qualifications when the members serve multiple functions as both prosecutor and judge' (para.34).

Orders freezing assets have severe consequences, affecting both current funds and future payments (which amounts to an employment ban). Pursuant to Resolution 1452 (2002), States may exceptionally release limited amounts to enable targeted individuals to satisfy basic needs (food, lodging expenses, medical care). Asset freezing is, purportedly, a preventive administrative measure, not a criminal sanction requiring a previous judicial assessment. The Letter dated 2 September 2005 from the Chairman of the 1267 Committee (S/2005/572) thus states: 'The sanctions are intended as a deterrent as well as a set of preventative measures' (para.37); 'the sanctions do not impose a criminal punishment or procedure, [...] but instead apply administrative measures' (para.41). Nevertheless, due to its indefinite duration, the measure is akin to confiscation, and because of its sweeping effects it resembles criminal penalties. Indeed, according to the European Court of Human Rights (ECtHR), the severity of the penalty determines the 'criminal' nature of a charge (de Wet 2004, pp.352-353; Marty Report, paras.29-34). Assuming that no criminal charge is involved, a person is, however, entitled to access to a court for any dispute over civil rights (private life, reputation, enjoyment of property, effective remedy). Also, the public stigmatization and the deprivation of property without a conviction are contrary to the rule of law. UN blacklisting is therefore not consistent with international and regional human rights standards, especially as enshrined in the European Convention on Human Rights (ECHR) (Seibert-Fohr 2004, Bowring 2006). The question thus arises if the UNSC can disregard human rights when acting under Chapter VII of the Charter.

Is the Security Council bound to observe human rights?

The determination of a threat to the peace may be regarded as a non-justiciable political decision (Schweigman 2001, pp.261-267, Farrall 2007, pp.70-71), and the lawfulness of UNSC resolutions directly affecting domestic law may be explained by a modernized interpretation of the Charter and by the acquiescence of States. While important scholarly attempts were made to found a theory of justiciability of Article 39 determinations based on objective criteria (Cadin 2008, pp.362-368), the non-justiciability thesis is authoritatively supported by international jurisprudence: the International Criminal Tribunal for Rwanda (ICTR) established that '[UNSC] discretionary assessments are not justiciable since they involve the consideration of a number of social, political and circumstantial factors which cannot be weighed and balanced objectively'

(*Kanyabashi (Jurisdiction)*, 18 June 1997, para.20). An individual sanctions regime designed to cope with the new threat posed by international terrorism may thus be considered legitimate in principle. Conversely, the concrete sanctions mechanisms can be called into question, because the discretion of the UNSC in adopting coercive means is constrained by statutory limits and general international law (Reinisch 2001, p.856, Schweigman 2001, pp.163-285).

Statutory limits to UNSC's margin of discretion

According to the UN Charter, the UNSC is expected to abide by international human rights standards. The Charter establishes in Article 24.2 that '[i]n discharging [its] duties the Security Council shall act in accordance with the Purposes and Principles of the United Nations', which encompass promotion of respect for human rights, and the creation of conditions under which international law (including human rights) can be observed (Preamble, Articles 1.3, 55). Moreover, the International Court of Justice (ICJ) stressed on several occasions that human rights violations amount to violations of the Charter's principles (Akande 1997, p.323). The human rights references in the Charter are general and vague, but, arguably, the Universal Declaration on Human Rights and the two Covenants on civil and political rights, and on economic, social and cultural rights, are, at least in regard to their core content, authoritative interpretations of these provisions, and therefore bind the UNSC (de Wet 2004, p.199, Cameron 2006, p.21; *contra* Lysén 2003, p.293).

Furthermore, the UN has created the expectation that its organs would respect human rights as promoted by the organization. This view is supported by the 'equitable estoppel' corollary of the good faith principle (de Wet 2004, pp.195-198), a principle that binds '*the Organization* and the States' pursuant to Article 2.2 of the Charter (emphasis added) and to general principles of law.

Additionally, as an organ of an international organization, the UNSC is endowed only with those functional competences attributed by the founding treaty; any prerogatives exercised must therefore be rooted in the Charter. The Charter assigns 'specific powers' to the UNSC 'for the discharge of [its] duties' (Article 24.2),⁵ and empowers it to adopt only those measures 'necessary' for the maintenance of peace and security. Consequently, its action must be appropriate for the goal of removing a threat, and cannot affect other interests to an extent disproportionate to this goal (Angelet 2001, pp.72-74, Martinez 2008, p.349). This limit also derives from a general principle of proportionality.

UNSC and customary international law

Since the UN, as a legal person, is bound by international law, and because UN States, bound by international law, cannot create an entity which is not, the UNSC is also subject to customary human rights obligations. Member States can, conversely, contract out of customary rules *inter se*, by agreeing to empower a body to adopt compulsory acts derogating from custom. The collective security system established by the Charter indeed prevails over general law as *lex specialis*. Nonetheless, the provisions regarding UNSC action must be read within the context of the whole Charter, as required by the rules of treaty interpretation (Art. 31.1 Vienna Convention on the Law of Treaties). Respect for international law is a principle of the UN Charter, therefore it would be incongruous to assert that the UNSC is not expected to act in conformity with international law, unless explicitly authorized otherwise. The powers of the UNSC that derogate from custom are specified and delimited in the Charter, *e.g.* the powers to adopt military

measures (Articles 39, 42 ff.), as an exception from the prohibition on the use of force. This supports the argument that the intention of the drafters was not for the UN to generate behaviour contrary to custom through the UNSC.

The Council is all the more bound by customary law when its action goes beyond express statutory powers and cannot make a legitimate claim to derogate. Admittedly, Charter obligations, including UNSC decisions under Chapter VII, take priority over conflicting treaties pursuant to Article 103, as confirmed by the ICJ in the *Lockerbie* case (*Questions of Interpretation and Application of the 1971 Montreal Convention Arising from the Aerial Incident at Lockerbie, Libya v. UK*, ICJ Reports 1992). UNSC binding resolutions can thus supersede other international agreements of member States, but not custom, for Article 103 is concerned only with the compatibility between Charter obligations and obligations ‘under any other international agreement’ (Bowett 1994, p.92, Orakhelashvili 2005, p.69). The literal interpretation of this provision is supported by the *travaux préparatoires*: the precedent used was Article 20.1 of the Covenant of the League of Nations (‘this Covenant is accepted as abrogating all obligations or understandings *inter se* which are inconsistent with the terms thereof’), and proposals for a text expressing the superiority of Charter-based obligations over ‘any other international obligations’ were rejected (Liivoja 2008, pp.602-605). Liivoja (2008, p.606) points out that this interpretation was confirmed by the 1970 *Declaration on Friendly Relations* (Res. 2625 (XXV)), in which the General Assembly (GA) did not conflate the sources of law when rephrasing the supremacy rule: ‘Where obligations arising under international agreements are in conflict with the obligations [...] under the Charter [...], the obligations under the Charter shall prevail’. The *Lockerbie* case, in which the ICJ famously applied Article 103, regarded conflict with a treaty obligation, and Franck (1992, p.522) suggests that it would be ‘interesting to speculate what might have happened had Libya [...] brought its action ‘under general international law’’ (respect for sovereign rights). In the *Yusuf and Al Barakaat* and *Kadi* (hereinafter ‘*Kadi I*’) decisions of 21 September 2005, while the EU institutions argued that Article 103 ‘makes it possible to disregard any other provision of international law, whether customary or laid down by convention, in order to apply the resolutions of the Security Council’ (*Yusuf*, para.207, *Kadi I*, para.156), the Court of First Instance (CFI) merely observed that Charter obligations ‘prevail over every other obligation of domestic law and of international treaty law’ (*Yusuf*, para.231, *Kadi I*, para.181).

White (2008, pp.235-236) argues that Article 103, intended to facilitate the application of Article 41, can allow suspension of inconsistent contractual obligations, not constitutional obligations. He recalls that the first blacklisting resolution, Resolution 1267 (1999), calls upon States to comply ‘notwithstanding the existence of rights and obligations conferred or imposed by any international agreement or any contract entered into or any license or permit granted prior to the date of coming into force of the measure’ (p.236); the reference to contracts and licenses suggests that the type of international agreement envisaged might be one governing trade or assets rather than human rights.

Lex specialis and peremptory norms

There is little dispute that peremptory norms limit UNSC action (de Wet 2004, pp.187-191). In fact, they are part of general international law, and, more importantly, they cannot be derogated. The binding force of UNSC resolutions derives from the Charter, and no treaty provision can derogate peremptory norms (Liivoja 2008, p.610), therefore UNSC decisions conflicting with *jus cogens* would simply be void.

In the *Genocide* case, Judge Lauterpacht emphasized that the doctrine of the supremacy of UNSC resolutions enunciated in *Lockerbie* would be inapplicable if a resolution were in contrast with the prohibition of genocide, universally accepted as *jus cogens*: ‘The relief which Article 103 of the Charter may give the Security Council in case of conflict between one of its decisions and an operative treaty obligation cannot—as a matter of simple hierarchy of norms—extend to a conflict between a Security Council resolution and *jus cogens*’ (*Application of the Genocide Convention (Provisional Measures)*, ICJ Reports 1993, Separate Opinion of Judge Lauterpacht, para.100). This was also explicitly recognized by the CFI, which defined *jus cogens* as ‘a body of higher rules of public international law binding on all subjects of international law, including the bodies of the United Nations, and from which no derogation is possible’ (*Yusuf*, para.277, *Kadi I*, para.226).

While the precise scope of *jus cogens* remains controversial, basic judicial guarantees, such as the right to defense, are arguably covered by a peremptory norm. The Human Rights Committee thus suggested: ‘As certain elements of the right to a fair trial are explicitly guaranteed under international humanitarian law during armed conflict, the Committee finds no justification for derogation from these guarantees during other emergency situations’ (*General Comment no. 29*, 24 July 2001, para.16).

UNSC practice and estoppel

UNSC practice indicates that human rights and collective security enjoy a privileged relationship. The inclusion of judicial guarantees in the Statutes of the *ad hoc* criminal tribunals (Art. 21 Statute of International Criminal Tribunal for the former Yugoslavia (ICTY), Art. 20 Statute ICTR) proves that they remain crucial even when Chapter VII goals are at stake. The Council authorizes humanitarian interventions, and goes as far as to see gross violations of human rights as threats to international peace (Cadin 2008, pp.101-176). Furthermore, the UNSC has repeatedly exhorted States to respect human rights in fighting terrorism, acknowledging that human rights represent a criterion for UN legality in counter-terrorism. Thus, Resolution 1456 (2003) reads: ‘States must ensure that any measure taken to combat terrorism comply with all their obligations under international law, [...] in particular international human rights, refugee, and humanitarian law’ (para.6; see also Res. 1624 (2005), para.4 and preamble). Good faith demands that the Council acts in a manner consistent with its own recommendations.

Furthermore, UN Charter provisions regarding coercive measures were designed to deal with State actors, not with individuals. Since the UN takes action with direct effect on individuals, assuming ‘governmental’ tasks,⁶ State-like prerogatives should be accompanied by State-like responsibilities *vis-à-vis* human rights. Fassbender (2006, p.7) proposed that ‘[t]he due process rights of individuals recognized as general principles of law are also applicable to international organizations [...] when they exercise ‘governmental’ authority over individuals’. Legitimate UNSC activism would require a secure avenue of appeal against listing decisions and independent re-examination. As Cameron (2006, p.9) argues, ‘the mere fact that the Security Council has branched into an area of activity previously reserved for states should not mean that the dearly won due process safeguards which apply at national law should disappear.’

The lawfulness of the current sanctions regime under the Charter and international law thus appears doubtful. The question now arises whether the UNSC can be held responsible for human rights violations, which amounts to enquiring if its decisions can be submitted to judicial review.

Can UNSC decisions be submitted to judicial review?

Individual sanctions and ICJ review

At the international level, systems for implementing responsibility (in particular compulsory jurisdiction) have been established almost exclusively in relation to States, not international organizations, whereas '[i]t is not tenable to say that a legal system can do without mechanisms of accountability for a large number of the entities which it is supposed to govern' (Crawford 2007, pp.6-7). The ICJ is for most commentators (Dugard 2001, p.86, Andreopoulos 2007, p.35) the appropriate body for the revision of UNSC sanctions, and as the main judicial body of the UN it appears to be the logical choice in a systemic perspective (Reinisch 2001, p.865, Farrall 2007, pp.73-75). Naturally, the Court can determine its own jurisdiction (*compétence de la compétence*), and, absent express prohibitions, it could interpret the Charter liberally in deciding the scope of its powers, as did the UNSC (Dugard 2001, p.85). There is in fact no hierarchy between Council and Court (Akanke 1997, pp.312-314) and, unlike with the GA (Art. 12), the Charter places no restriction on ICJ's engaging the same subject matter, simultaneously, as the UNSC. Judicial review of sanctions cannot be excluded in principle. Indeed the ICTY decided it was competent to examine whether the UNSC had lawfully established the tribunal itself (*Tadic (Jurisdiction)*, 2 October 1995, paras.18-22). The analogy with the exercise of judicial review by domestic courts despite the lack of specific constitutional provisions has also been invoked as a possible argument (Franck 1992; *contra*, Alvarez 1996). Further, the contention that legal challenge would cause irreparable delay in security action (Dugard 2001, p.90) does not apply to terrorist lists, as the Court would exercise *ex post facto* review once assets have been frozen.

However, the legal scholarship on ICJ review has focused on how *States* can obtain a determination that a UNSC decision is inconsistent with the Charter or unduly infringes their rights. Neither individuals nor the UNSC can be a party in contentious cases, therefore complaints cannot be filed against its decisions (or against decisions of subsidiary organs answerable to the Council, like the Sanctions Committee). Actions of a designating/implementing State could be reviewed, and thus UNSC resolutions could be indirectly assessed, though the Council would not be bound by the judgment. Nevertheless, since ICJ jurisdiction is limited to State disputes, blacklisted individuals would depend on a State's willingness to bring an action against another State.

The Court could perhaps exercise advisory jurisdiction on the Charter-compatibility of the blacklisting procedure rather than on a case-by-case basis. The GA or the ECOSOC might ask the Court what legal obligations arise for States from the sanctions resolutions or what legal consequences they have for States. The Court may thus find that States do not infringe their Article 25 obligations if they afford targeted individuals domestic remedies leading to unfreezing assets irrespective of UN de-listing, and exclude liability for non-compliance. It could find that States incur international responsibility if they apply sanctions conflicting with their human-rights obligations, for invalid resolutions do not benefit from the effects of Article 103. Theoretically, the Court may even resolve that the Council exceeded its powers when deciding quasi-criminal measures affecting individuals. The Council would not be bound by the opinion, but a finding of invalidity would probably have enough authority to prompt revision of the mechanism within the Council. However, the precedents suggest that the ICJ is reluctant to interfere with Council's decisions (*Certain Expenses of the United Nations*, ICJ Reports 1962,

Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa), ICJ Reports 1971, *Lockerbie*) and the initiative of a main UN body in the sense described might be unlikely. In the absence of ICJ review, the question to be examined is whether domestic or regional courts can perform any kind of review of particular UNSC decisions.

Review by domestic courts

To date there has been little litigation in domestic courts (26 challenges to UN sanctions, according to the Eighth Report of the Analytical Support and Sanctions Monitoring Team). While legal action against the UN is precluded by its vast immunity (Art. 105 UN Charter, Convention on the Privileges and Immunities of the UN, Article II. 2), filing a lawsuit against the State who materially implemented the decision has also proved rather unsuccessful. Municipal courts appear reluctant to review executive decisions based on UNSC binding resolutions, especially when implemented at EU level. Thus, in a suit filed in January 2003 against the Italian Ministry of Economy and Finance, the company Nasco Business Residence Center SAS claimed that there were no substantial grounds for its inclusion on the list, which violated the EU Treaty, the ECHR (in particular the right to property) and Italian Constitution. The Tribunal of Milan dismissed the complaint for lack of jurisdiction, arguing that EU regulations do not allow national courts to adopt provisions contrary to sanctions imposed at EU level (Second Report of the Monitoring Team, 15 February 2005, S/2005/83).

Similar considerations were made by the Brussels Court of First Instance in February 2005 in a case filed by Nabil Sayadi and Patricia Vinck against the Belgian State. The court established that it had no jurisdiction to interfere with UN decisions, and Belgium could de-list and unfreeze assets only if the UN and the EU did so first. The court decided that it could entertain the claim only because the applicants were not contesting either the UN or EU measure, but were merely demanding that Belgium made a de-listing request. Since the plaintiffs had not been indicted after two and a half years of investigation, the court ruled that Belgium had an obligation to initiate de-listing procedures.

The case-law of domestic tribunals in other sectors of UN mandatory action confirms their unwillingness to challenge national measures applying Chapter VII resolutions. In *Al-Jedda* ([2007] UKHL 58, hereinafter '*Al-Jedda II*'), regarding prolonged confinement without trial by virtue of the power to detain granted by Resolution 1546 (2004), the House of Lords interpreted the effect of the UN obligations so as to limit the individual right to liberty enshrined in Article 5 ECHR.⁷

This line of jurisprudence paralyzes treaty-based human-rights protection mechanisms and ultimately justifies the lack of accountability for violations of individual rights in the name of international security. The problem derives from the fact that resolutions imposing individuals sanctions do not leave sufficient leeway for action consistent with the human-rights obligations of implementing States. UNSC resolutions impose a precise obligation, *i.e.* freeze the assets of named individuals until de-listed by the Sanctions Committee, whereas review by domestic courts could lead to the annulment of the implementation measure, which is tantamount to denying compliance.

Regional/ treaty-based courts

The ECtHR and international organisations

While the Strasbourg-based court has not addressed the legitimacy of UNSC sanctions yet,⁸ its recent case-law tends to exclude the application of the Convention mechanism when actors other than States are involved.

(1) *The 'equivalent protection' doctrine.* In the *Bosphorus Airways v. Ireland* decision of 30 June 2005, the court found that EC regulations endorsing UN Chapter VII decisions cannot be reviewed, insofar as the court lacks jurisdiction to examine national measures merely transposing EC binding law into domestic law. According to the court, States do not violate the Convention if they implement decisions of international organizations, such as the EU, that normally guarantee a level of protection similar to the one secured by the Convention; this presumption can only be superseded in a specific case by the manifestly deficient protection afforded (paras.152-156). The court found that indeed the protection of human rights by Community law is equivalent to that of the ECHR system (paras.159-165). Gearty (2008, p.177) notes: 'here is a disturbingly novel kind of hierarchy, [...] 'really bad and requiring action' breaches and 'not so bad and best ignored' breaches'.

(2) *The theory of 'attribution of control'.* The common decision in *Behrami v France* and *Saramati v France, Germany and Norway* of 2 May 2007 attributed acts performed by States contributing to KFOR and UNMIK to the UN as a distinct entity (paras.150-152). Consequently, the court found it lacked jurisdiction *ratione personae* to entertain the claim, which left human rights violations outside the sphere of control of ECHR organs. The Court also argued that subjecting States' acts covered by Chapter VII Resolutions to judicial scrutiny would interfere with the fulfilment of the UN's mission in this field (para.149). This stance is open to criticism: even if the impugned acts are found to be attributable to the UN, the concurrent responsibility of States cannot be dismissed *ipso facto*.

In the light of these judgments, ECtHR substantial review of blacklisting cases might be hindered either by the equivalent protection doctrine, or by the contention that scrutinizing UN-established counter-terrorism mechanisms impairs international security efforts.

The CFI and the choice of judicial self-restraint

Theoretically, proscribed individuals and entities within the EU might turn to the CFI. Nonetheless, according to its first decisions, UNSC resolutions, but also the EC legislation adopted in order to give effect to the former, cannot be submitted to judicial review. The above-mentioned *Yusuf and Al-Barakaat* and *Kadi I* rulings, reiterated in the *Ayadi* and *Hassan* decisions of 12 July 2006, emphasized that CFI jurisdiction is precluded by the primacy of UN Charter obligations over any other treaty obligations, including obligations stemming from human rights treaties and EU membership (*Yusuf*, para.231; *Kadi I*, para.181; *Ayadi*, para.116; *Hassan*, para.92). By virtue of the combined effect of Articles 103 and 25 of the Charter, this primacy extends to UNSC binding resolutions (*Yusuf*, para.234, *Kadi I*, para.184; *Ayadi*, para.116; *Hassan*, para.92). Therefore, Community institutions, bound by the Treaty to further the international obligations of member States, had no autonomous discretion (*Yusuf*, para.265, *Kadi I*, para.214, *Ayadi*, para.116, *Hassan*, para.92). As a result, 'the resolutions of the Security Council at issue fall, in principle, outside the ambit of the Court's judicial review and [...] the Court has no authority to call in question, even indirectly, their lawfulness in the light of Community law' (*Yusuf*, para.276, *Kadi I*, para.225). The Court only considered itself 'empowered to check, indirectly, the lawfulness of the resolutions of the Security Council in question with regard to *jus cogens*' (*Yusuf*, para.277, *Kadi I*, para.226). Given the narrow scope of *jus cogens*, this effectively denied suspected terrorists access to an EC judge. The legal

argument was supported by political considerations: the Court embraced the claim that judicial review would impair UN efforts to guarantee international peace and security, and concluded that the applications were to be dismissed insofar as the public interest in peace and security prevailed: ‘the applicants’ interest in having a court hear their case on its merits is not enough to outweigh the essential public interest in the maintenance of international peace and security’ (*Yusuf*, para.344).

Nevertheless, in rulings occasioned by financial sanctions adopted by EU institutions autonomously, such as *Organisation des Modjahedines du peuple d'Iran* (‘OMPI’) of 12 December 2006, and *Sison* and *Sichting Al-Aqsa* of 11 July 2007, the CFI stated that respect for the rights of the defence presupposes that suspects be informed of the reasons leading to the measure immediately after its adoption, and be heard if they so request (OMPI, paras.125-126, 137); they must have access to the information in their file and be enabled to express their view on the factual elements contained. It also underlined that judicial review requires the court not only to check whether rights of the defence and the obligation to state reasons have been observed, but also comprises the assessment of facts and evidence; this scrutiny is essential when it is the sole procedural guarantee of a fair balance between individual rights and security demands, therefore States cannot claim confidentiality (OMPI, paras.153-155). The court criticized the absolute secrecy surrounding the motivation for inclusion on the list (*Sison*, para.61), and stressed the dual role of disclosure of motivation: the lack of access to the factual information and reasons for adoption of the measure nullifies the exercise of the defence rights, while the court itself is unable to perform its monitoring task (*Sichting*, para.58; OMPI, para.98). While the legal situation of UN listed individuals is substantially similar, the CFI applied a different pattern of review based on the institutional origin of the list, leaving potential victims of UN sanctions deprived of judicial protection.

The ECJ: the constitutional exception to UN supremacy

The recent ECJ judgment in the joined cases *Kadi and Al Barakaat* of 3 September 2008 (‘*Kadi II*’) casts new light on the possibility for judicial review of measures adopted in compliance with UNSC decisions. Following the Opinion of Advocate General Poiares Maduro, the ECJ set aside the earlier judgment of the CFI and annulled the contested freezing regulation insofar as it related to the applicants. To be sure, the ECJ did not assume the power to review and quash the original UNSC resolutions. However, it found that any EC implementation measures are reviewable, by virtue of general principles of the EC legal order, including rule of law and EC institutional balance (*Kadi II*, paras.278-282). Consequently, UNSC resolutions conflicting with non-derogable EC principles (respect for human rights) cannot be enforced (paras.304-309). Also, while the ECJ did not review the merits of the listing decision (nor was it in a position to do so, since it did not possess the requisite information), it examined whether this task is performed at UN level in an equivalent manner so as to justify the Court’s abstention. Deciding that it is not, the court found that UN mechanisms infringe the procedural rights of suspects (paras.319-325).

The ECJ argument does not imply recognition of human rights obligations binding on the UNSC, nor any possibility to hold the UN accountable. This position is however understandable, insofar as EU courts cannot interpret the UN legal order (Barker *et al.* 2009, p.240). *Kadi II* upholds the paramount status of UN obligations, and merely states that compliance cannot go as far as to compromise EU fundamental principles. Nonetheless, the ruling challenges the acceptance of unlimited UNSC discretion, and supports the idea that the enforcement of UN

decisions cannot impair the constitutional values of the legal orders in which they are expected to be applied.

Since asset freezing is a preventive measure, the human-rights consistent interpretation of the resolutions may require States to freeze funds and then choose autonomously how to address potential claims. Barker *et al.* (2009, p.238) argue that ‘decisions of the Security Council do not have direct effect so that States decide on how to implement these decisions within their domestic legal orders’. Just like the term ‘necessary measures’ used in resolutions authorizing force cannot signify that States are legitimized to disregard humanitarian law, *e.g.* targeting civilians, resolutions imposing individual sanctions should not be interpreted as to allow human rights violations. If the EU invokes the constitutional safeguard to limit the enforcement of UNSC decisions, any domestic court could do the same. This exception to compliance with international obligations derives from a source that cannot be superseded by entering international agreements, namely domestic constitutional law, the very basis of treaty-making power. Cameron (2003a, p.179) maintains that ‘a final answer does not exist to the question of which system – public international law or constitutional law – is ‘supreme’.

Resolutions impairing human rights and State responsibility

The norm preventing States from invoking domestic law to bypass international obligations (Art. 27 of the 1969 Vienna Convention on the Law of Treaties) should be applied circumspectly to binding decisions of international organizations. These are significantly different from express treaty provisions, as the unpredictable expansion of the authority of international bodies based on misused ‘implied powers’ (Arangio-Ruiz 1997, pp.27-28) weakens the principle of consent.⁹ As aptly pointed out (Bowett 1994, p.91), it cannot be argued that UN members ‘hav[e] accepted, in advance, whatever decisions the Council might make, so that such decisions have the very same force as the Charter provisions themselves’, and that they ‘believed they were granting to the Council a blank cheque to modify their legal rights’. States may legitimately refuse to comply with Chapter VII resolutions conflicting with their fundamental law, and domestic courts are best placed to review the constitutionality of such resolutions. There are indeed precedents of ‘disobedience’ motivated by constitutional principles: before humanitarian exemptions were introduced at UN level, Switzerland authorized payments frozen accounts in violation of the Iraq sanctions regime in order to prevent hardship situations (Birkhauser 2005, p.6).

The constitutional exception doctrine might be a useful alternative to the argument based on the specialty of human rights treaties, according to which major human rights treaties enjoy a privileged status and are not subject to the supremacy rule in Article 103. This claim, put forward by the applicant in *Al-Jedda II*, was rejected by the House of Lords, who found that the Article 103 reference to ‘any other international agreement’ left no room for exceptions (para.35).

Non-compliance is also justified if one agrees that *ultra vires* decisions are not binding. Liivoja (2009, p.586) proposed that a UNSC decision is an ‘obligation under the Charter’ and falls within the scope of Article 103 only if it complies with the Charter, *i.e.* if the UNSC exercises powers conferred by the Charter, in accordance with its object and purpose. Indeed, ‘Article 103 cannot make a resolution which is unlawful under the Charter prevail over other legal norms’ (Orakhelashvili 2005, p.69). Therefore, targeted sanctions create overriding obligations only to the extent that they are consistent with respect for human rights (Barker 2009, p.237). Yet, can states unilaterally decide that a resolution is *ultra vires*? If the organization has a judicial organ that can review the decisions of executive bodies, perhaps such a finding can only

be made by that organ. However, given the obstacles to ICJ review discussed, we need to consider the hypothesis of no central and authoritative determination of *ultra vires* action. States should probably retain a minimum of control over the constitutional compatibility of obligations deriving from acts of international organs not specifically authorized by the founding treaty. Indeed, when concluding international agreements, states can enter reservations in order to opt out of clauses incompatible with constitutional provisions; the same possibility should be recognized in relation to acts of organizations not based on explicit statutory competences. Nevertheless, State disobedience might discredit collective action for peace and security, for the UNSC depends on the perception of legitimacy for the successful fulfilment of its Chapter VII mandate. It would also set dangerous precedents, which might lead to bad-faith claims of unlawfulness by States seeking to avoid compliance with a resolution. The preferable solution is the review of the blacklisting mechanism in such a manner as to render it compatible with human rights standards generally upheld by domestic legal orders.

On the other hand, compliance with invalid resolutions entails international responsibility for breach of conflicting human-rights obligations, as Article 103 no longer exonerates States. The presumption is that the reading of asset-freezing resolutions must be adjusted to the extent possible to ensure human-rights consistency. But if such a reading is not possible, and the implementation of UNSC resolutions necessarily infringes human rights, States will bear responsibility. To be sure, most human rights are not absolute and have to be reconciled with security concerns. European States can find criteria for anti-terrorist action consistent with human rights in the jurisprudential interpretation of the ECHR.¹⁰

ECHR guidelines for balancing security and human rights

The ECtHR found that ‘some compromise between the requirements for defending democratic society and individual rights is inherent in the system of the Convention’ (*Klass and others v. Germany*, 6 September 1978, para.59). The very presence of restriction clauses (para.2 of Articles 8 to 11) and specific exceptions (Articles 2.1 and 2.2, 5.1) indicates that the conventional system rests on the ‘accommodation’ between different sets of values. Strasbourg jurisprudence on counter-terrorism provides a series of principles defining the limits of permissible interference with suspects’ rights.

(1) *The wider margin of appreciation afforded to the executive authorities in fighting terrorism is not carte blanche.* The ECtHR, ‘having taken notice of the growth of terrorism in modern society, has [...] recognized the need [...] for a proper balance between the defence of the institutions of democracy in the common interest and the protection of individual rights’ (*Brogan and others v. UK*, 29 November 1988, para.48; see also *Fox, Campbell and Harley v. UK*, 30 August 1990, para.28). When examining the complaints, the Court ‘take[s] into account the special nature of terrorist crime and the exigencies of dealing with it’ (*Fox, Campbell and Harley*, para.28; see also *Murray v. UK*, 28 October 1994, para.47). The legitimate aim of defending the community from terrorism is, however, not sufficient *per se* to justify interference by the authorities with a protected right (*Brogan*, para.62). The wider margin of appreciation exceptionally recognized to the authorities does not mean that they have a blank check to act ‘free from effective control by the domestic courts or by the Convention supervisory institutions’ ‘whenever they choose to assert that terrorism is involved’ (*Murray*, para.58; see also *Filiz and Kalkan v. Turkey*, 20 June 2002, para.24, *Sakik and others v Turkey*, 26 November 1997, para.44).

(2) *More severe restrictions are justified by public interest when there is reasonable*

suspicion of terrorist threat, but they cannot imply disproportionate individual sacrifice. The compelling nature of terrorist threats justifies greater restrictions on fundamental rights, even in the absence of public emergencies (*Brogan*, para.48), and the balancing between individual rights and national security demands can even legitimize individual ‘sacrifice’ (*Ferrari-Bravo v. Italy*, Commission decision, 14 March 1984, para.10). The need to prevent further loss of human lives justifies the adoption of measures based on less strict parameters than for ordinary crimes; the accuracy/ quantity of information relied on by the authorities can be inferior to the regular standards: mere reasonable suspicion is sufficient, and the reasonableness criterion is flexibly considered to be met (*Fox, Campbell and Harley*, para.32; see also *Murray*, para.51). However, the Court examines whether the measure appears excessive under the relevant circumstances, as disproportionate sacrifice is not warranted (*Aksoy v. Turkey*, 18 December 1996, para.84). Consistency with ECHR requirements depends on the test of necessity and proportionality: the measure must respond to an imperative need, and the authorities have to resort to the minimum level of interference required in order to achieve the aim pursued. Thus, lengthy pre-trial detention/ detention with a view to deportation or lengthy judicial proceedings may in principle be justified, so long as the interference remains proportional *vis-à-vis* the aim pursued (*Ferrari-Bravo*, 18). The Court found, for instance, that the harsh detention conditions of a convicted terrorist (prolonged solitary confinement) did not amount to a violation of Art. 3, as the prisoners’ rights were balanced against the necessity of anti-terrorist precautions (*Ramirez Sanchez*, para.149). In other cases, the lengthy pre-trial detention of suspected terrorists was found not necessary (*Sakik*, para.45).

(3) *The exceptional interferences must be accompanied by safeguards against arbitrariness, and access to a judge is the most important such safeguard.* Even when the measure is based on a procedure prescribed by law, the State has to demonstrate that ‘there existed sufficient guarantees against arbitrariness’ (*Chahal*, para.119; see also *Brannigan and McBride v. UK*, 25 May 2003, para.48, *Aksoy*, para.83). The most essential guarantee is access to a court. Generally, the interference with a protected right derives from the uncertainty surrounding terrorist activities, the scarcity of evidence, and the need to act promptly. The Court has admitted that investigations into terrorist allegations raise special difficulties that may require a more elastic application of the individual right of access to a judge, but ‘they cannot justify [...] dispensing altogether with «prompt» judicial control’ (*Brogan*, para.61). Even when the Court does consider the measure justified, it still finds the State in breach of its obligations if avenues of appeal were unavailable (*Ramirez Sanchez*, Grand Chamber judgment, 7 July 2006, para.166). Furthermore, where national legislation prevents the judiciary from examining restrictions to individual rights in matters falling within the exclusive competence of the executive (*e.g.* facts leading to the deportation of an individual for public security), the Court will find a violation of the right to an effective remedy (*Chahal*, para.181). ‘The effect of [Article 13] is thus to require the provision of a domestic remedy allowing the competent national authority both to deal with the substance of the relevant Convention complaint and to grant appropriate relief’ (*Chahal*, para.145; see also *Barberá, Messegué and Jabardo v. Spain*, 6 December 1988, para.89).

(4) *While some intelligence sources need to be protected, sufficient information must be disclosed to the suspected individual as to enable him to prepare the judicial defence, and to permit the court to assess the facts.* The ECtHR underlined that the accused has the right to be promptly informed of the nature and grounds of the accusation, so as to be able to challenge its lawfulness in court (*Fox, Campbell and Hartley*, para.40; see also *Barberá, Messegué and Jabardo*, para.78), though it acknowledged the need to protect the sources of information during the proceedings (*Fox, Campbell and Harley*, para.32). While some confidentiality is appropriate

for national security purposes, the executive authorities must be subjected to substantial control by the judiciary. Therefore States breach the Convention where no domestic court could review the confidential material on which a measure (such as deportation of a suspected terrorist) was based (*Chahal*, para.131). States must furnish at least some facts in order for the Court to ‘ascertain whether the essence of the safeguard [...] has been secured’ (*Fox, Campbell and Harley*, para.34).

(5) *Rights restriction must be temporary: compliance with ECHR presupposes promptness of investigation and expeditious review of the case, and removal of the restriction if unjustified.* The timely limitation of a right based on mere suspicion must be counterbalanced by the prompt judicial examination of the case soon after the measure has been enforced. The promptness criterion is measured with respect to the special circumstances, in particular to the complexity of the facts and the difficulties faced by judicial authorities in collecting and assessing evidence (*Chahal*, para.123, *Ferrari-Bravo*, paras.16-17). However, the judicial remedy cannot be only available in theory; the situation of the suspects must be speedily assessed, in order to remove unnecessary restrictions. Thus, the legitimacy of a measure depends on whether the case was examined expeditiously, and whether the authorities acted with due diligence in investigating and offering means of appeal (*Tomasi*, para.84).

The blacklisting mechanism undoubtedly fails the ECHR test. Potentially indefinite sanctions, of particular severity, based on limited information, and adopted by an authority enjoying unsupervised discretion, are not compatible with the standards summarized above. Most critical are the lack of safeguards against arbitrariness, since there is no opportunity for suspects to challenge the decision before an independent review body and to obtain reparation in case of erroneous listing. Moreover, the proportionality of the measures to the aim pursued is questionable, as the drastic effects on potentially innocent individuals do not appear justified by major progress in the fight against terrorism, their efficacy being widely disputed (Monitoring Team reports S/2005/761, para.61, and S/2005/572, para.38; Bianchi 2006, pp.914-915, Cameron 2006, p.18).

For individual financial sanctions to be adopted in a manner consistent with human rights, the targeted person or entity should be informed of the measure and the substantial grounds for it as soon as possible after its adoption, and provided the opportunity to be heard, without unreasonable delay, by an impartial review body capable of reversing the decision and offering redress in case of error. However, the blacklisting mechanism includes no speedy investigations or access to a judge, because ‘at UN level, the freezing measures are *alternatives* to criminal investigations, not adjuncts’ (Cameron 2006, p.8). This lacuna also bars the individuals from the enjoyment of all other rights and liberties at stake. While the right to a judge is not an absolute one, it cannot be completely and indefinitely denied; even in emergency situations, the core of due process rights, on which all other (including non-derogable) rights depend, must be observed. Thus, the Human Rights Committee emphasized: ‘[T]he principles of legality and the rule of law require that fundamental requirements of fair trial must be respected during a state of emergency. [...] In order to protect non-derogable rights, the right to take proceedings before a court [...] must not be diminished by a State party’s decision to derogate’ (*General Comment no. 29*, para.16).

Applicability of ECHR criteria to international counter-terrorism

The ECtHR laid down the criteria for legitimate interference with protected rights when

terrorism threatens national security. Analogous criteria should arguably apply when terrorism constitutes a threat to international security, as authoritatively determined by a UNSC resolution. There is no substantial distinction between the two circumstances, in fact internal situations may constitute a threat to international peace and security irrespective of their spill-over effects (Farrall 2007, pp.92-102, Cadin, 2008, pp.85-100); also, the territorial scope of the threat has a marginal relevance, since terrorism often has a trans-national component. Further, irrespective of the source of determination of the threat (national or multilateral framework), the implementation of measures ultimately remains with the States, who in the case of European States are expected to act in accordance with ECHR obligations. As Bianchi (2006, p.904) suggests, '[r]egardless of whether the commands emanating from the SC are consistent *per se* with international law, states are under an obligation to make sure that their implementation does not violate international law'. In addition, the normative distinction between national and international responses to terrorism tends to fade as the UNSC is increasingly invading traditional sovereign spheres of activity, and undertakes typically domestic courses of action (such as individual quasi-criminal sanctions). It can be argued that, if the UN is to take upon itself global governance tasks and surrogate member States in the fulfilment of certain functions, it cannot disregard the legitimate human rights expectations deriving from municipal standards. This may imply that the legality of Security Council resolutions having a direct domestic impact must also be assessed according to national standards. As Cannizzaro (2005, p.32) argues, '[i]nsofar as [SC] resolutions are aimed at producing effect, directly or indirectly, within the domestic legal orders of the States, they must be subjected to judicial review conducted according to national standards, which can be somewhat relaxed, but should not be completely relinquished out of deference to the SC'.

Nor can the Chapter VII determination of terrorism as a threat to international security be equated to an implicit declaration of a state of emergency within the meaning of Article 15 ECHR: 'In time of war or other public emergency threatening the life of the nation any High Contracting Party may take measures derogating from its obligations under this Convention to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with its other obligations under international law'. According to Cadin (2008, pp.444-455), the international state of emergency proclaimed by the UNSC under Article 39 of the UN Charter should be considered, *de lege ferenda*, as providing legal grounds for States' declarations *ex Art. 15 ECHR*; derogations would remain subject to ECtHR control of the conformity with the limits characterizing the emergency regime. Nevertheless, a virtually never-ending emergency is incompatible with the exceptional character inherent in the notion, and the indefinite duration of sanctions is at odds with the temporary nature of derogations. As Resolution 1822 (2008) shows, the sanctions regime will not reach an end in the foreseeable future: the UNSC '[d]ecides to review the measures [...] with a view to their possible further strengthening' (para.40). Dick Marty argues in his above-mentioned report: 'The "blacklisting" procedure should in principle be limited in time. It is inadmissible that persons remain on the blacklist for years, whilst even the prosecuting authorities, after a long investigation, have not found any evidence against them' (para.5.3). The declaration of a state of emergency implies a specific goal, which, once attained, no longer justifies the derogations regime, whereas the prevention of terrorist attacks is currently as much a continuous objective as the protection of the community from ordinary crime. Even admitting that the terrorist threat may qualify as an emergency, identified as such by States collectively, valid derogations presuppose substantial and procedural limits (formal notification to the treaty-based monitoring bodies of the specific measures adopted, suspension of rights 'to the extent strictly required by the exigencies of the situation', etc.). Therefore the assumption that the implementation of Chapter VII resolutions

compensates for formal derogation has no grounds. In *Al-Jedda* ([2006] EWCA Civ 327), the London Court of Appeal considered that Article 103 of the UN Charter makes lodging a derogation with the monitoring bodies unnecessary (para.71); in appeal the House of Lords considered Article 15 inapplicable as a matter of ‘subsequent practice’ in case of UN authorizations of the use of force (*Al-Jedda II*, para.38). However, it is arguably immaterial if States derogate from human-rights obligations in compliance with UN obligations, the duty to report is an integral part of the notion of derogation, as it ensures external control over the compliance with the substantive requirements and avoids arbitrariness. Besides, unlike the enforcement of specific rights, the duty to report derogations is not in contrast with the Charter obligations deriving from the sanctions regime, so Article 103 does not have the effect to exclude it. Also, implicit derogations are not consistent with the principle of legal certainty: States need to specify the rights suspended, the extent to which they may be restricted, and the relevant timeframe. Cameron (2006, p.21) stresses that ‘a totally unsupervised power to derogate is contrary to human rights treaties. The SC cannot both have the power to take measures to deal with a public emergency and have the final word on whether these measures are strictly required’. According to Bianchi (2006, pp.891-892), ‘Chapter VII powers are themselves an exception. [...] To allow the SC to enlarge its powers for specific types of threats would be tantamount to creating an exception to an already existing exception’.

While it is true that international organizations as such are not bound by human rights instruments, States cannot elude their conventional obligations when they establish inter-governmental organizations and rely on their obligations to comply with binding acts of those organizations’ organs. Article 28.1 of the Draft articles provisionally adopted by the International Law Commission on the Responsibility of International Organizations provides that ‘[a] State member of an international organization incurs international responsibility if it circumvents one of its international obligations by providing the organization with competence in relation to that obligation, and the organization commits an act that, if committed by that State, would have constituted a breach of that obligation’.

With particular reference to the ECHR, the Strasbourg Court found that States cannot circumvent their obligations under the Convention by transferring powers to an international organization: ‘The Convention does not exclude the transfer of competences to international organizations provided that Convention rights continue to be ‘secured’’ (*Mathews v UK*, 18 February 1999, para.32). Regarding the judicial protection of ECHR rights, when domestic tribunals are barred from performing their function, States still have to ensure there are independent judicial mechanisms capable of affording redress. If domestic courts cannot entertain a claim due to the immunity of an international organization from jurisdiction, there must be reasonable alternative means to protect the rights within the organization, otherwise the State’s conduct will be found in breach of the Convention (*Waite and Kennedy v Germany*, 18 February 1999, paras.67 ff.) Therefore, unless the UN sanctions regime is amended to guarantee an avenue of appeal and means for redress, the responsibility for human rights violations remains with the States implementing it. Dick Marty’s Report suggests: ‘*Bosphorus* and [...] *Behrami* [...] show that the ECtHR is willing to examine whether states are responsible for fundamental human rights violations under the ECHR in cases where only ‘manifestly deficient’ protection was afforded. Targeted sanctions fit into this category perfectly, given that the sanctions regimes provide almost no protection of fundamental human rights’ (para.82).

Conclusions: reinstating rights and filling the accountability gap

The intensification of international activity in multilateral frameworks means that '[i]ncreasingly, major tasks are undertaken, and it may be that major wrongs are committed, collectively' (Crawford 2007, p.2). For that reason, the UNSC should not act free from scrutiny, especially when its action has a direct bearing on individual rights. The blacklisting procedures and the general deference of courts to the UNSC perpetuate a mechanism lacking guarantees and placing victims in a legal limbo. The result is that the development of international quasi-governance is not matched by the acknowledgment of an international constitutional order, centred on rule of law and human rights. Municipal and regional case-law tends to treat international law as rigidly hierarchical, following Article 103, with the UNSC able to act in an unrestrained manner in the name of international peace and security. This phenomenon encourages anomalies such as the suspension of the judicial rights of suspected terrorists.

On the other hand, the *Kadi II* solution is probably not the best response to the accountability gap. Certainly, the ECJ judgment was ground-breaking insofar as it was the first time a court affirmed that respect for human rights is a condition for the lawfulness of domestic measures implementing obligations under the UN Charter. However, this dualist approach weakens the logic of collective security, undermining the certainty and the uniformity of the sanctions regime, and at the same time leaves unsettled the question of the international responsibility of States for breach of the Charter. More importantly, *Kadi II* does not say that UN resolutions can be reviewed, and it invokes the European public order, whereas human rights should also be acknowledged as a fundamental part of the international public order.

Consequently, further reform of UN blacklisting procedures remains critical, not least because the perceived legitimacy of UN counter-terrorism depends on its consistency with human-rights standards.¹¹ The creation of an *ad hoc* UN body entrusted with the review of listing decisions is, admittedly, the most adequate solution for the human rights concerns raised by individual sanctions. Yet, according to the Eighth Report of the Monitoring Team, a review panel would appear 'to erode [UNSC] absolute authority to take action on matters affecting international peace and security (para.41). The same report stresses that sharing confidential information with such panel would be seen as problematic. Nonetheless, UN bodies cannot be endowed with binding executive powers in areas completely 'immune' from judicial oversight. Since counter-terrorism has moved onto the international plane, and what were traditionally domestic tasks are now increasingly performed at UN level, it is necessary to develop accountability mechanisms matching the new ambitions of the Security Council.

Notes:

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¹ Guidelines of the Committee for the Conduct of Its Work (Adopted on 7 November 2002, and amended on 10 April 2003, 21 December 2005, 29 November 2006, and 12 February 2007), para.6 d). Available from http://www.un.org/sc/committees/1267/pdf/1267_guidelines.pdf.

² To give effect to UN resolutions, the EU Council adopted Common Positions 2001/930/CFSP and 2001/931/CFSP on specific sanctions to combat terrorism, implemented through EC regulations. Council Regulation (EC) 2580/2001 on specific restrictive measures directed against certain persons and entities with a view to combating terrorism also empowered the EU Council to maintain its own list of individuals and entities to whom sanctions apply. Several common positions and regulations have updated both UN and EU lists. See Cameron (2003b) on EU blacklisting.

³ <http://www.un.org/sc/committees/1267/consolist.shtml>. Last updated on 24 March 2009.

⁴ See World Summit Outcome Document, 2005 [online]. Available from http://www.un.org/ga/59/hlpm_rev.2.pdf, para.89.

⁵ Other commentators, such as Delbrück (1994, p.403), challenge, however, the restrictive interpretation.

⁶ Cameron (2006, p.8) argues: '[i]n 'legislating by list', the Security Council acts as legislature, judiciary and executive'.

⁷ The Chamber of Appeal had also maintained that national tribunals cannot question the validity of UNSC binding resolutions, but merely verify their effects in the concrete case.

⁸ As indicated in *SEGI and others*, 23 May 2002, individuals have to exhaust remedies available at EC level.

⁹ Pastor Ridruejo (2007, pp.172, 175) distinguishes between 'conventional'/ 'treaty-based' law (treaty norms) and 'institutional law' (binding decisions of international organizations).

¹⁰ ECHR standards are also applicable to the EU as such: according to Art. 6 EU Treaty and Art. 52.3 Charter on Human Rights and Fundamental Freedoms, the ECHR is a source of law for the EU as far as the scope of human rights and fundamental liberties is concerned (see also the *Nold* decision, 14 May 1974, para.13). The 'European Counter-Terrorism Strategy' adopted by the European Council on 30 November 2005 expressed the commitment of the EU 'to combat terrorism globally while respecting human rights'.

¹¹ If no UN remedies are made available, and domestic decisions are seen as impairing UN measures, the current procedures should be replaced by a de-centralized sanctions regime, entrusting States with the nominal designation, on the basis of detailed uniform criteria laid down by the Sanctions Committee, and maintaining the Committee for coordination. Designating governments would disclose information to the States having jurisdiction over suspects in such a way as to allow the tribunals of the latter to perform their task.

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