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# SECURITY COUNCIL LISTING PROCEDURES AND HUMAN RIGHTS.

# MEDIDAS CONTRA EL TERRORISMO Y DERECHOS HUMANOS EN EL CONSEJO DE SEGURIDAD.

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**ABSTRACT.** In the context of international efforts to curtail terrorism, the present paper analyses the powers of the Security Council to institute targeted sanctions against individuals and their compatibility with human rights in international and EU law. It will address the response of the European judiciary in the landmark *Kadi* cases to illustrate how these measures have been interpreted and applied at the municipal level. It is shown that judges use different criteria to balance compliance with international obligations on the one hand, and human rights principles on the other. The Security Council has progressively become more transparent by offering certain room for review within listing mechanisms and by creating a procedure to remove individuals from its consolidated lists. However, the paper highlights the tensions in domestic and regional human rights regimes stemming from the Security Council's quasi-legislative and quasi-judicial roles.

**Keywords:** Targeted sanctions, United Nations, Security Council, human rights, domestic courts, European Union, *Kadi*.

**RESUMEN.** En el marco de la cooperación internacional para erradicar el terrorismo, el presente trabajo analiza las bases legales que autorizan al Consejo de Seguridad la imposición de sanciones contra individuos y la compatibilidad de dichas autorizaciones con las obligaciones internacionales y comunitarias en materia de derechos humanos de los Estados-Miembro de la Unión Europea. El estudio evalúa las sanciones del Consejo de Seguridad y las medidas que ha tomado el sistema judicial Europeo en respuesta a

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dichas normas internacionales. Se toman como referencia los casos *Kadi* para ilustrar la aplicación e interpretación de las sanciones internacionales a nivel doméstico. Se exponen los distintos criterios que los órganos judiciales adoptan para implementar obligaciones internacionales derivadas del Consejo, por un lado, y respetar los derechos humanos de los individuos sancionados, por el otro. En respuesta, el Consejo de Seguridad ha introducido ciertas medidas para asegurar la transparencia y revisión independiente de sus decisiones, incluyendo un procedimiento para la remoción de listas-sanción. Sin embargo, subrayamos las tensiones entre sistemas de derechos humanos domésticos y los poderes cuasi-legislativos y cuasi-judiciales del Consejo de Seguridad.
**Palabras clave:** Sanciones, Naciones Unidas, Consejo de Seguridad, derechos humanos, tribunales nacionales, Unión Europea, Kadi.

## I. Introduction.

As terrorism has gained an international dimension, so have the measures curtailing it. In recent years, terrorist groups and organizations have acquired a large capacity to establish international networks, through which they exchange information, obtain financing and perpetuate their goals. The attacks of 11 September 2001 in the United States were a painful reminder of this regrettable state of affairs, and the steps taken by the international community to fight against terrorism were largely due to the aftermath of America's traumatic experience. However, many other countries have also suffered in the hands of extremists, and attacks requiring a high degree of complexity and organization have taken place in the United Kingdom, Spain and India, to name a few.

The international community and world leaders have since taken it upon themselves to rid the world of terrorism, and in doing so have not hesitated in making use of international law, its institutions and values to fulfill this purpose.[1] One controversial way in which States have responded to the security threat has been through the listing of individuals under the Chapter VII framework of the Security Council ('SC'), thus obliging States to incorporate the content of these lists into domestic law and enforce their applicability by freezing individual's assets, implementing travel bans and in some instances, forbidding any transaction, cooperation or association with listed entities. However, these measures are at odds with certain fundamental rights afforded to persons under domestic constitutional

[1] See generally, A. Bianchi (ed), *Enforcing International Law Norms against Terrorism*, Hart Publishing, Oxford and Portland (2004).

provisions, and international law alike. These may include substantive rights such as property, free movement and free association, as well as procedural guarantees such as the right to a judicial hearing. The paucity of review in the SC further encroaches upon these rights and complicates the prospect of remedies which those affected are entitled to by law. This has led to the establishment of the Office of the Ombudsperson of the Security Council's 1267 Committee in December 2009.

This paper addresses the measures of the Security Council designed to counter terrorism and their compatibility with international human rights. To illustrate how these measures have been interpreted and applied at a regional level, I will discuss the response of the European judiciary in the landmark *Kadi* cases. Finally, the role and mandate of the Ombudsperson will be presented.

It is argued that the response to the Security Council's listing procedures in domestic judicial systems has been divergent, as judges use different criteria to balance compliance with international obligations deriving from Chapter VII of the United Nations ('UN') Charter on the one hand, and human rights on the other, which are enshrined in instruments such as the European Convention on Human Rights or the International Covenant on Civil and Political Rights. However, in some instances the courts have been bold, which has slowly obliged the SC to act in a more accountable manner by granting certain room for review of its listing mechanisms and by creating procedures to remove individuals from its consolidated lists. This highlights the difficulties arising for domestic and regional human rights regimes from the SC's quasi-legislative and quasi-judicial roles adopted to stem terrorism.

It should be noted that the challenges to SC listing procedures have not only taken place in European courts, but have also been carried out in other jurisdictions.[2] However, emphasis is made in Europe for the purposes of the present paper because of the abundance of jurisprudence generated, as well as the richness of the ensuing debate.

## II. The Security Council's Listing Regime.

The recent SC practice concerning the listing of individual entities is very different from the previous sanctions regimes it has adopted. Sanctions have been usually classified into

[2] Litigation has also been brought forward in Pakistan, Turkey, and the United States, to name a few. See 'Litigation by or relating to individuals on the Consolidated List', Annex to UN Doc. S/2006/154, Fourth report of the Analytical Support and Sanctions Monitoring Team appointed pursuant to Security Council resolutions 1526 (2004) and 1617 (2005) concerning Al-Qaida and the Taliban and associated individuals and entities.

three categories: comprehensive sanctions, arms trade sanctions and combined sanctions. Comprehensive sanctions took a predominant role in the aftermath of Iraq's invasion and annexation of Kuwait in 1990 through full trade and financial sanctions against Iraq which are best exemplified by SC Resolution 687, which called for a ceasefire and declared measures to be imposed, including Iraq's obligation to make reparations for damage caused.[3] To their discredit, comprehensive sanctions do not distinguish between the different sections of the population. In contrast, arms trade sanctions sought to prevent the supply and allocation of weapons for parties to armed conflicts. Examples are the arms embargoes imposed against ex-Yugoslavia, Somalia, Liberia and Rwanda.[4] Combined sanctions mix arms sanctions or comprehensive sanctions with a targeted element. Examples are diplomatic sanctions on elites, the freezing of governmental assets and air link bans, as was done against Libya when it refused to extradite suspected terrorists.[5]

In light of implementation problems relating to humanitarian and population concerns, officials and academics reconsidered the impact of SC sanctions. This evaluation culminated in the end of the 1990's with the Interlaken Process.

### 2.1 The Interlaken Process.

The SC listing procedures targeting individuals were initially conceived to curtail the Taliban regime in Afghanistan and were the consequence of the Interlaken Process of smart sanctions,[6] convened by the Swiss Government in March 1998 and again in March 1999. The Process explored ways in which targeted sanctions could be more effective. This responded to the need of avoiding prejudice caused to innocent populations which ensued from placing general embargoes and blockades through SC action, thus also depriving persons from the flow of humanitarian aid and essential goods. Consideration was also made in Interlaken of collateral damage to neighboring states, which assume most of the economic costs of implementing sanctions against reticent states.[7]

It was concluded during the Interlaken talks that targeting elites and individuals could render the process more effective and diminish collateral damage. It was observed that

[3] UN Doc. S/RES/687 (1991), para. 18

[4] See UN Doc. S/RES/713 (1991), UN Doc. S/RES/733 (1992), UN Doc. S/RES/788 (1992) and UN Doc. S/RES/914 (1994), respectively.

[5] See UN Doc. S/RES/748 (1992) and UN Doc. S/RES/883 (1992).

[6] See Report on the *Expert Seminar on Targeting UN Financial Sanctions* (1998) and *Report on the 2nd Interlaken Seminar on Targeting UN Financial Sanctions* (1999) available at: http://www.seco.admin.ch/themen/00513/00620/00639/00641/index.html?lang=en. Last accessed on June 7, 2013.

[7] *Expert Seminar on Targeting UN Financial Sanctions*, *ibid* p. 15.

'[t]argeted financial sanctions would include measures such as the freeze of foreign assets of specially designated individuals, companies or governments that particularly contribute to the threat of peace and security. Only an elite group, determined by an official list, would fall within the scope of the measure.'[8] It went on to recall a 1994 precedent where the SC urged member States to freeze funds of Haitian elites.[9] Here, the targeted individuals had been involved in the 1991 *coup d'état* and were designated by a list managed by the Sanctions Committee for Haiti. Although identification of groups and individuals could prove difficult, these difficulties were not insurmountable.[10] Finally, '[t]here was general agreement that states depend on lists containing the names of the targets in order to be in a position to implement targeted sanctions. Whenever possible, such lists should emanate from the UN Security Council.'[11]

Concerning the implementation of sanctions against individuals, companies and groups, it was observed in Interlaken that lists of targets and of the target-group was a precondition for equal international enforcement and that lists must emanate from the SC to be perceived as legitimate. In addition, an appeals mechanism at the Sanctions Committee level was needed to remove entities from the list in order to avoid multiple judicial procedures at the national level. Finally, domestic legislation must recognize the legitimacy of the UN lists.[12]

## 2.2 The Security Council's Listing Framework.

The listing of individuals in the SC derives from measures adopted to prevent the commission of terrorist attacks and punish those responsible for said attacks, including the regimes that support or sponsor them. The listing of individuals was not envisaged in the initial SC response to terrorism, but these measures progressively gained complexity overtime to include individuals. As will be described below, the SC began by listing terrorist organizations before expressly targeting individuals in its resolutions, who were incorporated into the lists overtime. It is thus important to consider the evolution of these listings and to identify the authority and legal basis upon which the SC has carried them out.

[8] *Ibid*, p. 11.
[9] UN Doc. S/RES/917 (1994), para. 4.
[10] *Expert Seminar on Targeting UN Financial Sanctions* (1998), *supra* note 7 at p. 26.
[11] *Ibid*, at p. 30.
[12] *Ibid*, at p. 43.

### 2.2.1 The Measures against the Taliban.

In Resolution 1267 (1999) the SC established a Committee in accordance with Rule 28 of its provisional Rules of Procedure. The Committee was integrated by all the Council's members and sought the Taliban's compliance with previous SC resolutions calling for its cooperation in bringing Al-Quaida operatives to justice, including Usama bin Laden, now deceased. The Committee created by this Resolution enjoyed power to designate and freeze property owned or controlled directly or indirectly by the Taliban. There was still no mention of individuals' listings in Resolution 1267.

Adopted under Chapter VII of the UN Charter, Resolution 1267 determined that the Taliban's failure to stop providing sanctuary to international terrorists and their organizations, and the failure of all Afghan factions to cooperate with efforts to bring indicted terrorists to justice as demanded in SC Resolution 1214 (1998),[13] constituted a threat to international peace and security.[14] While taking note of the indictment of Usama bin Laden and his associates by the United States for the 7 August 1998 bombings of the United States embassies in Nairobi and Dar es Salaam, Resolution 1267 demanded that the Taliban turn over bin Laden 'without further delay to appropriate authorities.'[15] To enforce these measures, it imposed obligations upon states such as the creation of the Committee to which governments were to make periodic reports regarding their implementation of measures against the Taliban. The relevant sections of Resolution 1267 decided that states should:

> '4 (b) Freeze funds and other financial resources, including funds derived or generated from property owned or controlled directly or indirectly by the Taliban, or by any undertaking owned or controlled by the Taliban, as designated by the Committee established by paragraph 6 below, and ensure that neither they nor any other funds or financial resources so designated are made available, by their nationals or by any persons within their territory, to or for the benefit of the Taliban or any undertaking owned or controlled, directly or indirectly, by the Taliban, except as may be authorized by the Committee on a case-by-case basis on the grounds of humanitarian need;
>
> …

[13] UN Doc. S/RES/1214 (1998), para. 13.
[14] UN Doc. S/RES/1267 (1999), preamble.
[15] *Ibid*, para. 2.

> 6. Decides to establish, in accordance with rule 28 of its provisional rules of procedure, a Committee of the Security Council consisting of all the members of the Council to undertake the following tasks and to report on its work to the Council with its observations and recommendations:
>
> (a) To seek from all States further information regarding the action taken by them with a view to effectively implementing the measures imposed by paragraph 4 above;
>
> (b) To consider information brought to its attention by States concerning violations of the measures imposed by paragraph 4 above and to recommend appropriate measures in response thereto;
>
> (d) To make periodic reports to the Council on information submitted to it regarding alleged violations of the measures imposed by paragraph 4 above, identifying where possible persons or entities reported to be engaged in such violations'[16]

In addition, the Resolution called upon states to act in accordance with these provisions, notwithstanding the existence of 'rights and obligations conferred or imposed by any international agreement'[17] concluded prior to the date of entry into force of the financial sanctions imposed against the Taliban. Here, the SC was establishing a normative hierarchy, probably on the basis of Article 103 of the UN Charter, which establishes the prevalence of Charter obligations over other international engagements.[18] Moreover, it called upon States to bring proceedings against persons and entities violating measures imposed against the Taliban, and to cooperate fully with the Committee established by the resolution (hereinafter '1267 Committee'),[19] including transfer of information required for the pursuance of the resolution.[20]

Bearing these considerations in mind, Resolution 1267 imposed on states the obligation to cooperate with the 1267 Committee. Most importantly, there is no mention of individuals' listing, but the 1267 Committee enjoys the power to designate property to be frozen that is owned or controlled directly or indirectly by the Taliban. This can be interpreted as tantamount to listing individuals and collective entities by encroaching upon their property rights without due process. The 1267 Committee regime has been subject to harsh criticism. As pointed out by I. Johnstone, its scope is very wide and almost half of

[16] *Ibid*, paras. 4 and 6.
[17] *Ibid*, para. 7.
[18] Charter of the United Nations, 892 *UNTS* 119, Article 103.
[19] But also referred to as the 'Taliban Committee' among some commentators.
[20] UN Doc. S/RES/1267 (1999), paras. 8 and 9.

individual and collective entities currently listed are under that regime.[21] Secondly, it is trained towards non-state actors, which do not have the same resources as states to contest the allegations against them. In this sense, an inequality of arms between the affected parties and the 1267 Committee is painfully manifest. Thirdly and most importantly, these measures are largely of a preventive character, and impose 'restraints on people and corporations not for what they have done in the past, but for what they may do in the future.'[22] Clearly, a lack of due process can be observed in the SC procedure, and this poses further difficulties in domestic legal orders which have to implement these measures. Moreover, even though this is not the first time that the SC characterizes the actions of individuals as threats to the peace,[23] A. Bianchi observes that 'the peculiarity lies, rather, in the fact that the threat in question is neither situation-specific nor time-limited. International terrorism remains fairly indeterminate, given the controversy surrounding its definition, or at least, the scope of application of current definitions, particularly at times of armed conflict.'[24]

In addition, the listings manifestly infringe the privacy of personal data, as they contain sensitive information such as passport numbers, addresses and national identification numbers.[25]

### 2.2.2 Expansion of the Targeted Sanctions Regime.

The Resolution 1267 regime encroached upon certain rights with very little transparency and accountability, but ensuing resolutions expanded the SC's role to that of a truly legislative body by broadening its law-making powers, leaving those affected with little room to contest the Council's acts. Resolution 1333 (2000),[26] likewise adopted under Chapter VII of the UN Charter, further requested States to freeze the financial funds and assets belonging to Usama bin Laden and individuals associated with him designated by the 1267 Committee. It also requested states and the 1267 Committee, 'to maintain an updated list, based on information provided by States and regional organizations, of the individuals and entities designated as being associated with Usama bin Laden, including

[21] I. Johnstone, 'The UN Security Council, Counterterrorism and Human Rights' in A. Bianchi, A. Keller (eds), *Counterterrorism: Democracy's Challenge*, Hart (2008) 335-53 at 342.
[22] *Ibid.*
[23] UN Doc. S/RES/733 (1992), UN Doc. S/RES/794 (1992), UN Doc. S/RES/788 (1992), UN Doc. S/RES/1132 (1997).
[24] A. Bianchi, 'Assessing the Effectiveness of the UN Security Council's Anti-terrorism Measures: The Quest for Legitimacy and Cohesion' 17 *European Journal of International Law* (2006) 881-919 at 890.
[25] This information is made public in potential contravention to the right to privacy.
[26] UN Doc. S/RES/1333 (2000).

those in the Al-Qaida organization.'[27] Careful attention to the language employed by the resolution shows that there is a clear distinction between 'designation' and 'listing'. Thus, designation by the 1267 Committee is a precondition of listing, and listing entails the freezing of financial assets. The purpose of Resolution 1333 was to create updated lists of entities based on the previous designations made by the 1267 Committee. Moreover, this was the first time that individuals are expressly considered as being eligible for incorporation into the lists. Resolution 1333 separately imposed on states and on the 1267 Committee the obligation to create lists, thus creating two tracks of listings: persons could be listed under the 1267 regime and under domestic jurisdictions alternatively or cumulatively. Thus, legal consequences of being listed in a domestic jurisdiction could be different from those deriving from a 1267 Committee listing.

The next step taken by the SC to strengthen its listing regime was Resolution 1373 (2001)[28] adopted shortly after the 11 September 2001 attacks. This Resolution has been considered by many as a truly legislative act.[29] Acting under Chapter VII of the Charter, the Council decided that states shall criminalize the willful provision or collection of funds by their nationals or in their territories with the intention that the funds should be used to carry out terrorist acts.[30] It further decided that terrorist acts were to be 'established as serious criminal offences in domestic laws and regulations and that the punishment duly reflects the seriousness of such terrorist acts',[31] while calling upon states to ensure that any person participating in the financing, planning, preparation or perpetration of terrorist acts was brought to justice.[32]

The legislative aspect of this resolution is evidenced in the obligation according to which states must criminalize terrorist acts and their financing in their domestic legal systems. This posed great problems in various countries, as certain individuals were listed under two or more regimes as a consequence of domestic implementation of the SC dispositions through multiple acts, statutes and regulations. For example, Canada enacted the United Nations Suppression of Terrorism Regulations pursuant to SC Resolution 1373 which contained two tracks of listings: one controlled by the Canadian Government, and a

[27] *Ibid*, paras. 8 (c) and 16 (b).
[28] UN Doc. S/RES/1373 (2001).
[29] *See* I. Johnstone, *supra* note 22 at 336. *See also* P. Szasz, 'The Security Council Starts Legislating', 96 *American Journal of International Law*, (2002), 901-4 and J. Alvarez, 'Hegemonic International Law Revisited', 97 *American Journal of International Law* (2003), 873-87.
[30] UN Doc. S/RES/1373 (2001), para. 1(a).
[31] *Ibid*, para. 2(e).
[32] *Ibid*.

second controlled directly by the SC. Thus, since being listed *per se* does not constitute a crime, some individuals who were listed on both tracks were charged with the criminal offence of having financial dealings with themselves or their companies, namely, knowingly providing or collecting funds for use by a listed person and providing financial services to a listed person.[33] This situation arose from the domestic implementation of anti-terrorism measures through legislation, which means that 'they cannot be easily removed once the threat has been properly countered, if this is ever the case.'[34]

Finally, in Resolution 1390 (2002)[35] the SC decided to continue the measures imposed in Resolution 1333, calling for the maintenance of an updated list by the Committee with individuals and entities associated with Usama bin Laden or Al-Quaida. Moreover, it decided that States should take the following action against bin Laden, members of Al-Quaida and the Taliban "and other individuals, groups, undertakings and entities associated with them",[36] who were listed by the Committee pursuant to resolutions 1267 and 1333: to freeze their funds and other financial assets without delay, including property owned or controlled directly or indirectly, by them or by persons acting on their behalf, and to prevent their entry into or transit through their territories.[37] Moreover, resolution 1390, urged all States to incorporate legislation enforcing the aforementioned measures, and punishing individuals who violate them or prevent their application.

However, States have found themselves with great difficulties in harmonizing the application of anti-terrorist measures in their domestic legal orders, partly because the listing procedures do not provide the minimum guarantees afforded in domestic jurisdictions to persons suspected of having committed a crime.

## III. Assessing the Security Council's Listing Authority.

This section will consider the SC's legal authority under the UN Charter to list individuals in order to restrict their personal liberties. Moreover, it will deal with whether the listing procedures are at odds with international human rights standards, and if so, on what grounds. Several preliminary observations concerning the listing methodology are in order.

[33] D. Dyzenhaus, 'The Rule of (Administrative) Law in International Law', 68 *Law and Contemporary Problems* (2005) 127-66 at pp. 142-5 describes a Canadian court case of an individual challenging an extradition claim by the United States based on Canada's United Nations Suppression on Terrorism Regulations.
[34] A. Bianchi, 'Assessing the Effectiveness of the UN Security Council's Anti-terrorism Measures', *supra* note 24, p. 892.
[35] UN Doc. S/RES/1390 (2002).
[36] *Ibid*, para. 2.
[37] *Ibid*, paras. 2(a), 2(b).

First, when a listing request is supplied by a State, it need not contain *prima facie* evidence that a crime has been committed. The threshold of supporting evidence required to list individuals is much lower than that needed in any criminal law system to indict a person for a crime. This goes against the presumption of innocence, since persons are being listed as a preventive measure and not for a crime they have committed. Secondly, due to the lack of an international consensus concerning the definition of terrorism, each State applies its domestic provisions to determine whether an entity deserves to be listed or not. Thus, as legislation and administrative law concerning terrorism vary from country to country, each State is 'essentially free as to how to identify the persons it wishes to have included'.[38] In this regard, the Committee offers no guidance, and simply demands a motivation accompanying the listing request, which is in no way equivalent to an official criminal indictment, much less a judicial pronouncement establishing a person's criminal responsibility, which would be indispensable to freeze a person's assets or restrain their personal liberty in a domestic jurisdiction. Thirdly, the de-listing of an entity may only take place if the Committee so decides by consensus, provided that the entity or individual has approached the Committee through a sponsoring State or the Focal Point. Given that the Committee makes its decisions based on consensus, diverging criteria of its Members concerning the designation of terrorists and the definition of terrorism can be an obstacle difficult to surmount.[39] Finally, if lack of consensus on de-listing compels the SC to consider the matter in plenary, the veto of a single permanent Member will suffice to overwhelm the voice of the petitioner, even if he or she is supported by a prevailing majority.

### 3.1 The Security Council's Powers to List Entities (Or Lack Thereof).

To ascertain their legality, one needs to frame these measures within the powers of the Security Council conferred to it by the UN Charter. Indeed, the Council was called into existence to maintain international peace and security, and to that end, was given special attributions through Chapter VII of the Charter. In determining a threat to the peace, a breach of the peace or an act of aggression, the SC enjoys a wide discretion.[40] This

[38] L. G. Radicati di Brozolo and M. Megaliani, 'Freezing the Assets of International Terrorist Organizations' in A. Bianchi (ed), *Enforcing International Law Norms against Terrorism*, *supra* note 2, 377-413 at p. 398.
[39] *Ibid*, at 399.
[40] J.A. Frowein, 'Introduction to Chapter VII', in B. Simma (ed), *The Charter of the United Nations*, Oxford, Oxford University Press (2002) p. 719.

prerogative derives from Article 39 of the UN Charter. However, Chapter VII of the Security Council spells out measures of constraint, not measures of responsibility or attribution. Articles 41 and 42 of the Charter provide for forcible action through non-judicial political and military channels aimed at terminating a situation threatening international peace and security. They do not intend to punish, much less attribute State or individual responsibility, even if the breach is flagrant and obvious, as nowhere is it contemplated in the Charter that the SC will determine the lawfulness or unlawfulness of a certain act. The Council is not a judicial body and its mandate is limited to the preservation of peace and security. Indeed, in *Zollmann* v *United Kingdom*, the European Court of Human Rights stated that 'the UN Sanctions Committee is a monitoring and investigative but not judicial body'.[41]

If being listed by the 1267 Committee does not imply the judicial attribution of responsibility for the commission of a wrongful act, the measures adopted against listed entities are tantamount to such an attribution, when considering the consequences of domestic implementation.

One could argue that the fight against terrorism calls for a state of emergency, and therefore, the derogation of certain rights could be in order. Whereas the fight against terrorism is no doubt a matter of urgency, the lack of temporary limitations to listing measures encroaches upon the well-established practice among States that derogations of individual rights must have a temporary limit, as noted by Article 4(1) of the International Covenant on Civil and Political Rights.[42] Additionally, Chapter VII measures are already an exception to the rule, and allowing the SC 'to enlarge its powers for specific types of threats would be tantamount to creating an exception to an already existing exception. Besides, the difficulty of conceiving a proper legal basis for such an expansion of powers expressly conferred to the SC by the Charter, the policy implications of such a choice would be dire.'[43] Therefore, whether the Security Council enjoys explicit powers deriving from the UN Charter to list individuals is doubtful at best.

These considerations will be relevant when analyzing States' international obligations deriving from the listing regime, which stand in contrast with international human rights, such as the right to a fair trial, the *nullum crimen sine lege* principle, the right to property and the right to a remedy. But before broaching these issues, it is pertinent to consider the Security Council's own attempts to protect human rights in light of the listing regime, and

[41] *Zollmann v United Kingdom*, European Court of Human Rights, decision on admissibility of 27 November 2003, p. 11
[42] See CCPR/CO/76/EGY (2002), para. 6; CCPR/CO/71/SYR (2001), para. 6; CCPR/C/79/Add.93 (1998), para. 11.
[43] A. Bianchi, 'Assessing the Effectiveness of the UN Security Council's Anti-terrorism Measures', *supra* note 25, 891-2.

whether the protections afforded are in accordance with the applicable minimum standards of international law.

### 3.2 Human Rights Protection within the Council's Listing Regime.

It is important to highlight that the SC has been compelled to address human rights concerns, due to the far-reaching implications of the obligations it imposes upon States and the way they affect private entities. In resolution 1456 (2003), which was adopted at the level of ministers of foreign affairs, the SC noted that 'States must ensure that any measure taken to combat terrorism comply with all their obligations under international law, and should adopt such measures in accordance with international law, in particular international human rights, refugee, and humanitarian law.'[44] This section will assess the nature and effectiveness of these measures, but it is submitted that the lack of direct involvement of the SC to ensure the respect for human rights in pursuing its undertakings shows the inappropriateness of the measures applied despite the positive steps already taken.

In order to supervise the implementation of resolution 1373 (2001), the SC established the Counter-Terrorism Committee (hereinafter CTC), a subsidiary organ of the SC under Article 29 of the UN Charter.[45] In the preamble of that resolution, it affirmed the need to combat terrorist threats to international peace and security 'in accordance with the Charter of the United Nations'.[46] In turn, Article 24(2) of the Charter establishes that in discharging its duties for the maintenance of international peace and security, the Security Council shall act in accordance with the Purposes and Principles of the United Nations. For their part, the Purposes and Principles of the UN Charter seek '[t]o achieve international co-operation…in promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language or religion'.[47] It has been argued that all States nowadays universally accept the UN Charter and that its dispositions apply to all nations.[48] In resolution 1452 (2002), the Council determined that the financial

[44] UN Doc. S/RES/1456 (2003), para. 6.
[45] UN Doc. S/RES/1373 (2001), para. 6: '*Decides* to establish, in accordance with rule 28 of its provisional rules of procedure, a Committee of the Security Council, consisting of all the members of the Council, to monitor implementation of this resolution, with the assistance of appropriate expertise'.
[46] UN Doc. S/RES/1373 (2001), preamble.
[47] *United Nations Charter*, Article 1(3).
[48] See 'Conclusions of the work of the Study Group on the Fragmentation of International Law: Difficulties arising from the Diversification and Expansion of International Law', *ILC Yearbook* (2006), Vol. II Part Two. Hereinafter *Koskenniemi Report*.

freezes would not be applicable to funds covering basic expenses, such as 'payments for foodstuffs, rent or mortgage, medicines and medical treatment, taxes, insurance premiums, and public utility charges, or exclusively for payment of reasonable professional fees and reimbursement of incurred expenses associated with the provision of legal services'.[49] The consequences of not having such a disposition would logically be to leave those listed as indigent and are clearly addressing the right to property, which is enshrined in several constitutional provisions.[50]

Pursuant to resolution 1535 (2004), the Counter-Terrorism Executive Directorate (CTED) was created to give policy guidance to the CTC.[51] Pursuant to its mandate, the CTED included a human rights expert in its staff and concluded an agreement with the High Commissioner for Human Rights.[52] However, in a subsequent report, the Special Rapporteur on human rights and counterterrorism stated that the CTC, 'in its dialogues with States has been routinely asking questions about a long list of crime investigation techniques that manifestly constitute interferences with the right to privacy and family life…Against this background, it is problematic that the CTC seems to be recommending that the potential range of investigative techniques…should be maximized.'[53] It furthermore adds that 'Unless the applicable human rights standards are referred to in this type of question, States may get the impression that they are requested to expand the investigative powers of their law enforcement authorities at any cost to human rights.'[54] This shows that the CTC's reluctance to address human rights directly. Moreover, in October 2009, the High Commissioner for Human Rights, Navanethem Pillay stated during a briefing to the CTC that:

> '[s]ince the adoption of Security Council resolution 1373 in 2001, numerous States have put in place and applied provisions that derogate from binding international human rights instruments. Others have used the fight against terrorism to act outside existing law or judicial control. In this respect, Security

[49] UN Doc. S/RES/1452 (2002) para. 1(a).
[50] *See* Art. 14 of the Mexican Constitution and Art. 26 of the Federal Constitution of Switzerland.
[51] UN Doc. S/RES/1535 (2004) para. 2.
[52] UN Doc. S/2004/124, Proposal for the Revitalization of the Counter Terrorism Committee.
[53] UN Doc. E/CN.4/2006/98, Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, para. 60.
[54] *Ibid.*

> Council resolution 1373, vital as its objectives undeniably are, in some cases has had a very serious negative impact on human rights.'[55]

As illustrated, the desirable standards are far from being reached. The High Commissioner went on to describe specific rights which have been infringed, among which four will be considered below: the right to a fair trial, the *nullum crimen sine lege* principle, the right to a remedy and the right to property.

An important development to curtail conflict with human rights obligations of states is the establishment of the Office of the Ombudsperson created by Security Council Resolution 1904 (2009) to deal with the Al-Quaida Sanctions List.[56] The process for consideration of a request consists of a three-tiered process of information gathering, dialogue between the delisting petitioner and the relevant states mediated by the Ombudsperson, and a discussion and decision emanating from the Sanctions Committee.

## IV. Specific Human Rights Violations through Listing.

### 4.1 *Nullum Crimen Sine Lege.*

The *nullum crimen* principle states that offences prosecuted are to be clearly defined by law. Whereas the domestic criminalization of the support and financing of terrorism pursuant to resolution 1373 may fulfill the requirements of *nullum crimen* through legislative or administrative dispositions, the freezing measures of resolution 1267 don't live up to the same standard. All Member States directly apply them upon listing an individual. Motives for listing may vary from country to country. Considerations are mainly based on security standards, but policy reasons are inevitably influential. After all, the SC is a political body. In addition, some States may not have enacted legislation concerning terrorism, and those that have might find it painstakingly hard to frame the listed entity's conduct within its counter-terrorism legislation. According to the European Court of Human Rights (ECHR), '[i]t is not however apparent to the Court that a resolution of the Security Council is sufficient in itself to create an "international offence" that is prosecutable'.[57]

The fact that the SC conducts listing procedures, and gives States a large margin of interpretation to submit candidates for listing, creates great uncertainty, and runs contrary to the *nullum crimen* principle.

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[55] Address of the UN High Commissioner for Human Rights to the Counter-Terrorism Committee of the Security Council, New York, 29 October 2009, p. 6. On file with the author.
[56] The mandate was recently extended by SC Resolutions 1989 (2011) and 2083 (2012).
[57] *Zollmann v United Kingdom*, *supra* note 42 at p. 11.

### 4.2 The Right to a Fair Trial.

Article 6 of the European Convention on Human Rights (ECHR) guarantees the right to a fair trial. Moreover, General Comment No. 29 of the Human Rights Committee has held that 'the principles of legality and the rule of law require that fundamental requirements of fair trial must be respected during a state of emergency'[58] regardless of the absence of a specific provision guaranteeing the right to a fair trial in Article 4 of the International Covenant on Civil and Political Rights. Even though the SC listing measures described above do not amount to a trial or the attribution of criminal responsibility, the obligation of States to freeze assets and impose travel bans can be categorized as measures tantamount to administrative or criminal punishment, pursuant to which there has been no process or trial, and which are a *fait accompli* as soon as the entity is listed without a right of reply, a right to be heard, or a right to confront or contest the evidence is presented against him or her. In this sense, the presumption of innocence is also violated.

Even by taking the CTC's stand, which affirms that the Consolidated List is not a criminal one, the ECHR has stated that a criminal charge may 'in some instances take the form of other measures which carry the implication of such an allegation and which likewise substantially affect the situation of the suspect'.[59] Following this analysis, the SC lists could be squarely defined as a criminal charge, and could therefore be validly contested in the European judicial system of human rights protection as not guaranteeing the right to a fair trial.

### 4.3 The Right to a Remedy.

The right to a judicial remedy is guaranteed by Article 2 of the International Covenant on Civil and Political Rights and Article 13 of the European Convention of Human Rights. There is no judicial remedy available to persons listed by the 1267 Committee. The procedures through which individuals can contest their presence on the consolidated lists are not judicial in nature. As previously described, there are three ways to request de-listing: the first is to convince a State to bring the cause forward in the 1267 Committee, the second is to address the Focal Point for De-listing and the third necessitates the intercession of the Ombudsperson. Neither of these options guarantees that the matter will

[58] UN Doc. CCPR/C/21/Rev.1/Add.11, General Comment No. 29 on States of Emergency (Article 4) of 31 August 2001, para. 16.
[59] *Eckle* v *Germany*, European Court of Human Rights, 1982, Series A, No. 51 5 EHRR, 1983, para. 73.

be considered except for the procedure recently established by the Ombudsperson as described above. Since States are not obligated to take up these causes, they may decline to bring the issue forward if they have policy or other concerns. For its part, the Focal Point can decline the request if one of the Member States of the 1267 Committee manifests its will thereto, and the applicant will be so notified without motivating the decision. For their part, the recommendations of the Ombudsperson are subject to the consensus of the Sanctions Committee. If no consensus emerges from the Ombudsperson's recommendation, the decision to delist rests on the Council as a whole. This mechanism, although a commendable and valuable one which attempts to take all relevant circumstances into account, cannot be said to amount to a fully adversarial judicial process where the individual has equality of arms to defend their cause.

### 4.4 The Right to Property.

The freezing of assets has direct consequences on the right to property, which has been recognized by the European Court of First Instance as a *jus cogens* principle in the *Kadi* case pursuant to Article 1 of the First Protocol to the ECHR.[60] In this respect, the Court said that 'it is only an arbitrary depravation of that right that might…be regarded as *jus cogens*.'[61] The right to property is also recognized in Article 21 of the American Convention on Human Rights and in Article 17(1) of the Universal Declaration of Human Rights of 1948. Even though the SC has adopted measures to avoid that the financial freezes are not applicable to expenses addressing basic needs, as it did in resolution 1452 (2002), the right is still encroached if persons do not have the ability to freely dispose of their property. Interestingly in the *Kadi* case, the Court of First Instance considered the freezing of funds of the applicant as a 'temporary precautionary measure',[62] which, as opposed to confiscation, does not affect the substance of the right to property and, according to the Court of First Instance, was not arbitrary in nature. This criteria was reversed in Mr. Kadi's appeal to the European Court of Justice, as will be described below.

## V. The European Union's Judicial Response to Listing Procedures.

[60] *Yassin Abdullah Kadi* v *Council and Commission*, Court of First Instance of the European Communities, Judgment of 21 September 2005, Case T-315/01.
[61] *Ibid*, para. 242.
[62] *Ibid*, para. 248.

Domestic implementation has been one of the most controversial aspects of the SC listing regime, since each State will have its own way of complying with the obligations deriving from the SC sanctions regimes. Indeed, '[d]omestic legal systems not only have their constitutional or statutory rules for incorporation, but also their own criminal law and procedure as well as administrative law and practices, which may be inspired by different legal traditions'.[63] This matter gains complexity within a self-contained regime of institutional law, such as that of the European Union (hereinafter EU). As EU Member States have acted in compliance with SC resolutions calling for listing, those affected have seized the communitarian courts to assert the provided by the European Convention on Human Rights. The judicial outcomes that have ensued and the arguments used to support them are a very useful yardstick to measure the effectiveness of SC listing measures, their legitimacy, legality and, most importantly, compatibility with EU human rights law. Finally, they draw interesting conclusions concerning the relationship between the EU's human rights regime, and the legal regime governing international peace and security. The relevance of the judicial decisions analyzed below find basis on the fact that they have strongly influenced judicial bodies in other jurisdictions concerning the application of the SC listing regime.

### 5.1 The *Kadi* Case in the European Court of First Instance.

The European Union is bound by the effect of SC resolutions through its legal order, particularly through Articles 297 and 307 of the European Community Treaty. Mr. Kadi is a Saudi national who was listed by the 1267 Committee on 19 October 2001. His assets were frozen pursuant to EU Regulations enforcing the dispositions of the SC.[64] When contesting these regulations in the Court of First Instance of the European Communities, he demanded the annulment of the Regulations, alleging breaches of his fundamental rights. Firstly, he alleged the breach of the right to be heard, secondly, the right to property and of the principle of proportionality, and thirdly, the right to effective judicial review. In considering his pleas, the Court of First Instance (hereinafter CFI) considered the general relationship between the international legal order under the aegis of the UN, particularly the regime of international peace and security, and the Communitarian legal order. It also

[63] A. Bianchi, 'Assessing the Effectiveness of the UN Security Council's Anti-terrorism Measures', *supra* note 25, 893.
[64] Particularly Regulation No. 467/2001 and Regulation No. 2062/2001.

considered the extent to which the Community and its Member States are bound by resolutions of the SC adopted under Chapter VII of the Charter.

When examining the relationship between the UN and Communitarian legal orders, the CFI ruled that from the standpoint of international law, Member States are bound to respect the principle of primacy of their obligations under the UN Charter enshrined in Article 103, which means that the obligation established in Article 25 of the Charter to carry out decisions of the SC prevails over any other obligation they may have entered into under international agreements.[65] The CFI went on to say that the obligation to respect the principle of primacy of obligations undertaken by the UN Charter is not affected by the EC Treaty,[66] since it was an obligation that arose before the Treaty, and falling within the temporal scope of Article 307 EC which reads in its relevant part: 'The rights and obligations arising from agreements concluded before 1 January 1958 or, for acceding States, before the date of their accession, between one or more Member States on the one hand, and one or more third countries on the other, shall not be affected by the provisions of this Treaty'.

The CFI stated that the mandatory nature of the SC resolutions did not bind the Community, since the Charter of the UN does not bind it directly because it is not a member of the Organization, nor is it the successor of the rights and obligations of EU Member States. Nevertheless, it concluded that mandatory force of UN obligations binds the Community by virtue of Community law.[67] Following this logic, the Community may not infringe the obligations imposed on its Member States by the UN Charter or impede their performance, and furthermore, it should adopt all the measures necessary to enable its Member States to fulfill those obligations.

Concerning its power to consider the human rights breaches raised by Mr. Kadi, the CFI makes one of the most sweeping statements of the judgment: 'the resolutions of the Security Council at issue fall, in principle, outside the ambit of the Court's judicial review…the Court has no authority to call in question, even indirectly, their lawfulness in the light of Community law. On the contrary, the Court is bound, so far as possible, to interpret and apply that law in a manner compatible with the obligations of Member States

[65] *Yassin Abdullah Kadi* v *Council and Commission*, Court of First Instance of the European Communities, Judgment of 21 September 2005, Case T-315/01, paras. 181 to 184.
[66] *Ibid*, paras. 185 to 188.
[67] *Ibid*, para. 193.

under the Charter of the United Nations.'[68] However, it declared itself competent to indirectly consider the lawfulness of SC resolutions using *jus cogens* as a standard which is binding on all subjects of international law. It is under this light that Mr. Kadi's human rights submissions were considered.

As to the right to property, the CFI decided that there had been no such violation, since the freezing of funds did not constitute an arbitrary, inappropriate or disproportionate measure.[69] As regards his right to be heard before the Community's authorities before the contested regulations were adopted, the CFI decided that the Council was not obligated to hear the applicant before a regulation was applied.[70] With regard to his right to be heard by the Sanctions Committee, the CFI simply pointed out that no such process exists and that the SC resolutions do not provide any right of audience, but noted the procedure established by the Focal Point on de-listing although the Ombudsperson mechanism was not yet in place.[71] Lastly, regarding the right to judicial review, the CFI underlined that its own full judicial review of the contested Regulation's lawfulness, and the indirect review of the Security Council's resolutions demonstrated that this right had not been violated.[72]

After this judgment, several jurisdictions followed the same path, such as Swiss Federal Supreme Court in the *Nada* case.[73] Here, the applicant had made a request for de-listing, given that the criminal proceedings against him had been terminated domestically. By following the same path as the CFI, the Swiss Federal Supreme Court invoked Article 103 of the UN Charter. Moreover, it emulated the *jus cogens* policy followed by the CFI in *Kadi*, but in a slightly different way: while determining that the only limits to the implementation of SC resolutions were *jus cogens* norms, it decided that the fundamental rights and procedural guarantees invoked by Nada did not belong to *jus cogens*.[74] Finally, it conceded that whereas the de-listing procedure available to individuals was not in accordance with the standards of judicial control granted by the Swiss Constitution, it was not in a position to correct that situation, which must be remedied by an international mechanism within the UN framework.[75] This shows the dangers of using such a high

[68] *Ibid*, para. 225.
[69] *Ibid*, paras. 243 to 251.
[70] *Ibid*, para. 259.
[71] *Ibid*, paras. 261 and 262.
[72] *Ibid*, para. 283.
[73] *Youssef Nada* v *State Secretariat for Economic Affairs and Federal Department of Economic Affairs*, Administrative appeal judgment, Case No 1A 45/2007; ILDC 461 (CH 2007)
[74] *Ibid*, para. 7(4).
[75] *Ibid*, para. 8(3).

principle as a yardstick to measure human rights. The policy followed by these two tribunals must be criticized, because they did not distinguish between the regime of *jus cogens* norms and the regime of human rights. They remain distinct, and each has their own attributes and values.

### 5.2 The *Kadi* Case in the European Court of Justice.

The European Court of Justice (ECJ) overturned the CFI's judgment on *Kadi* in September 2008.[76] In this judgment the ECJ adopted a completely different view regarding the applicable law. Instead of engaging in a systematic overview of EU law and its relationship with the UN regime of peace and security, it limited itself to analyzing its own legal system and its own human rights regime. It concluded that 'it is not a consequence of the principles governing the international legal order under the UN that any judicial review of the internal legal lawfulness of the contested regulation in the light of fundamental freedoms is excluded by virtue of the fact that the measure is intended to give effect to a resolution of the Security Council adopted under Chapter VII of the United nations.'[77] In this sense, it concluded that the Community judicature must, in accordance with the EC Treaty powers it has been conferred, ensure the full review of the lawfulness of all Community acts in light of general principles of Community law, 'including review of Community measures which, like the contested regulation, are designed to give effect to the resolutions of the Security Council under Chapter VII of the United Nations.'[78] Thus, the ECJ effectuates its review within Community law, and not within international law, as the CFI did before.

The ECJ went on to analyze the human rights violations invoked by Mr. Kadi concerning his listing and the measures applied against him. In balancing these human rights interests with the regime of international security, it stated that it is the work of the Community judicature to apply "in the course of judicial review it carries out, techniques which accommodate, on the one hand, legitimate security concerns about the nature and sources of information…and, on the other, the need to accord the individual a sufficient measure of procedural justice."[79] Concerning the right to a remedy, the ECJ determined that it had not been observed given the failure to inform the applicant of the evidence

[76] *Yassin Abdullah Kadi v. Council and Commission,* ECJ, Judgment of 3 September 2008.
[77] *Ibid* para. 298.
[78] *Ibid* para. 326.
[79] *Ibid* para. 344.

adduced against him, and the fact that the infringement had not been remedied in the course of the actions of the CFI.[80] It was therefore held that the contested Regulation was adopted without any guarantee being given as to the communication of inculpatory evidence, or as to the right of being heard in that connection, and that the principle of effective judicial protection had been violated.[81]

Concerning the right to property, the ECJ found that the contested Regulation was adopted without furnishing any guarantee enabling Mr. Kadi to 'put his case to the competent authorities, in a situation in which the restriction of his property rights must be regarded as significant, having regard to the general application and actual continuation of the freezing measures affecting him'.[82] This constituted an unjustified restriction of Mr. Kadi's right to property.

In the end, the ECJ set aside the Court of First Instance judgment and annulled the Council Regulations imposing financial freezing measures insofar as they concerned Mr. Kadi.

The judicial policy that the ECJ followed was framed in the European human rights regime, and did not rely on a hierarchy of norms between the UN system and the European one. This approach is far better than the one taken by the CFI, since it leaves it to States individually to establish measures which will implement the sanctions regimes of the SC, while ensuring respect of regional and international human rights instruments.

## VI. Conclusion.

The listing procedures continue taking place in the SC. Member States continue to comply with the provisions of the resolutions imposing sanctions and asset freezes upon individuals and collective entities. However, important judicial precedents, such as *Kadi* in the ECJ have made the SC more reluctant to further develop this questionable sanctions regime. Indeed, the establishment of an Ombudsperson has undoubtedly been a step in the right direction, as the office strives to guarantee the procedural rights of petitioners.

It has also been demonstrated that the SC's far-reaching attempts to curtail terrorism with measures such as listing procedures can be counterproductive in the fight against terrorism, as it has clearly produced more conflicts of law than was initially thought. In the first place, it stands in sharp contrast with minimum human rights that are recognized in

[80] *Ibid* para. 350.
[81] *Ibid* para. 352.
[82] *Ibid* para. 369.

the majority of States. Secondly, they are at odds with domestic procedures which seek to curtail terrorism, or which already have similar procedures in order to deter international and transnational crime.

It would be desirable that the SC satisfied its commitment to the maintenance of international peace and security without entering the realm of quasi-judicial determinations and quasi-legislative measures applicable to all States. Firstly, its legal authority to act in this manner is doubtful after close scrutiny of the UN Charter. Secondly, it does not enjoy the means, expertise and bodies to ensure the protection of human rights when discharging its duties, the obvious reason being because its primary function concerns peace and security. But one must not lose sight of the ultimate purpose: 'We the Peoples.'

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