Counter-terrorism policies of the United Nations
Security versus Human rights

Written by: Kristóf Horváth
International Relations Program
Tutor: Dr. Békési László
2014
Table of contents

Introduction ................................................................................................................................. 1
Choice of subject ....................................................................................................................... 1
Methodology and summary of chapters ................................................................................ 4
Chapter One ............................................................................................................................... 6
  1.1. Defining Terrorism ........................................................................................................ 6
  1.2. Resolution 1267 .......................................................................................................... 9
  1.3. Amendments ............................................................................................................... 13
Chapter Two ............................................................................................................................ 15
  2.1. Human rights .............................................................................................................. 15
  2.2. Resolution 1373 ....................................................................................................... 21
  2.3. The listing procedure ............................................................................................... 24
  2.4. The Monitoring Group ........................................................................................... 29
  2.5. The de-listing procedure ......................................................................................... 33
  2.6. The Focal Point and the Ombudsperson .................................................................. 35
Chapter Three .......................................................................................................................... 41
  3.1. The Kadi cases .......................................................................................................... 41
  3.2. Security versus Justice ............................................................................................ 47
Conclusion ................................................................................................................................ 55
Epilogue ..................................................................................................................................... 59
References ................................................................................................................................. 60
  Primary References ............................................................................................................ 60
  Secondary References ....................................................................................................... 63
  Bibliography ....................................................................................................................... 65
Introduction

Choice of subject

„Terrorism hurts all nations – large and small, rich and poor. It takes its toll on human beings of every age and income, culture and religion. It strikes against everything the United Nations stands for. The fight against terrorism is our common mission.”¹

Ban Ki-Moon

While governments and intelligence agencies throughout the world are fighting terrorism mostly individually with some level of cooperation, there is an organization, which is trying to beat the track and to encompass States to work tighter together, to have a coordinated legal background. This organization is the United Nations, whose main commitments are maintaining international peace and security, developing friendly relations among nations and promoting social progress, better living standards and human rights. Thanks to its unique character, the United Nations has special powers vested in its founding Charter, which allows the Organization to call upon States for taking action. With 193 Member States, the United Nations is one of the broadest co-operations of today’s world order, an organization which has the power to create a safer world.

As the Second World War brought such a destruction to the peoples and nations of the world what it hasn’t seen before, civilized people came up with the idea of a world order where peace, security, equal human rights, healthy development are a standard and not an exception. While the so-called ancestor, the League of Nations wasn’t successful in many aspects, the United Nations, with all the received criticism, is a prospering intergovernmental organization, which makes the world a more livable place for millions of people since 1945.

Environment protection, human rights protection, peacekeeping operations, social and economic development, humanitarian aid programs are all part of the objectives of the United Nations. As the Organization tries to tackle great obstacles,

¹ Ban Ki-Moon, 16 February 2007, Statement to the General Assembly.
terrorism, as the 21st century’s greatest antipode in terms of world peace is on the agenda at all times.

Being a Member State comes with responsibility. By joining the fleet of nations, from which only three States\(^2\) of Earth are missing today, one must accept the terms, the legal authority, and all responsibilities and obligations which comes with it. In this case it is simple. Everyone must comprehend and follow the objectives and norms of the Charter.

There are situations though, when states question the rightness of the decisions of the United Nations and there are cases when even the organization itself questions some of its own actions. What happens if the United Nations takes decisions contrary to the Charter it should follow and defend? Although this is not usual, there are occasions where the Security Council or other bodies indirectly violated the foundational treaty, the document on what peace and security depends.

In the history of the United Nations some Members have breached the Charter, and thus they had to face punishment, sanctions and other measurements decided by the Organization. In the case if the United Nations itself goes against the rights and obligation what it imposes on others – of course by indirect measures - multiple concerns arise. In aspect of the sanctions regimes, the main concerns appear in context with fundamental human rights. In the 1990s the United Nations shifted its sanctions policies from general to targeted sanctions, exactly to reduce the humanitarian impact on innocent civilians by the economic or other sanctions. The shift meant that much more concentrated sanctions can be imposed what caused the Security Council to establish a very strict approach and at some point – although it wasn’t the purpose – even violating fundamental human rights. The most infamous case is of Mr. Yasin Abdullah Ezzedine al-Qadi (also spelled Yasin Abdullah Ezzedine al-Kadi or Yasin A. Kahdi), who challenged his listing on the Al-Qaeda and Taliban Sanctions List, and created landmarks of public international law with his cases.

Several questions arise related to the sanctions regime, and more of them are challenging fundamental declarations of human rights, therefore the opportunity showed itself to present the concerns of the international community towards the sanctions regimes, and especially the 1267 Committee. The goal of this work is to arrive to a

\(^2\) The Holy See, Taiwan, Kosovo.
conclusion where a certain level of recommendation on how to challenge the problems can be given.

Article 1 of Chapter 1 of the UN Charter claims that “maintaining international peace and security”\(^3\) is one of the purposes of the existence of the United Nations. Article 3, of the very same chapter emphasizes that “promoting and encouraging respect for human rights and for fundamental freedoms for all”\(^4\) are the purposes as well. Needless to say, the United Nations have adopted the declaration called ‘Universal Declaration of Human Rights’ back in 1948, and acted upon it ever since.

Where is the borderline? What is more important: International peace and security or protection of Human Rights? Is there an interrelating circle where both can be achieved without harming the other’s circle of rule?

The present work intends to analyze the United Nations’ approach to terrorism, their work towards this global problem and find answers to the above stated questions by examining legal cases where individuals have fought against the decision of the United Nations.

---

\(^3\) United Nations Charter, 1945, Chapter 1, Article 1.
\(^4\) United Nations Charter, 1945, Chapter 1, Article 3.
Methodology and summary of chapters

“Terrorism strikes at the very heart of everything the United Nations stands for. It is a global threat to democracy, the rule of law, human rights and stability, and therefore requires a global response.”

Secretary-General Kofi Annan

Chapter One contains a very brief history of terrorism and introduces the reader into the United Nations fight against it by presenting the 1267 Committee and its amendments.

The first subsection of Chapter One summarizes the most important events which happened related to terrorism in the 20th century, and tries to find an answer for a question which apparently seems simple, but at the same time, is highly complex and widely debated, namely: what is terrorism. Once the international community, nations of the world, coins the term, they have a better chance at fighting at terrorism. The importance of the definition of the term is crucial in fighting it, because of the legal documents, on which our peace and security depends. Since the world is regulated through law, the precisely defined terms are playing a very important factor in the regulations, resolutions and other legal documents. The subsequent subsection tries to place the United Nations on the map of fight against terrorism. What have the organization did to prevent the spread, to combat one of the deadliest and evilest phenomena of the 21st century? As it may not be obvious, the United Nations possesses legal instruments, supranational authority which it can use to set binding obligations for its Member States. What are these instruments, and do they stand a chance against terrorists? What power can the United Nations project, and how do states co-operate with the measures set by the organization? This and the next subsection are solely to establish the framework for the coming controversies, problems, disputed legal cases, and most importantly to introduce the reader into the world of counter-terrorism from the aspect of the United Nations. Resolutions, declarations, counter-actions of the Security Council to certain events are presented in this chapter.

The first subsection of Chapter Two concentrates on the human rights related to the installed sanctions regimes, paying close attention to all the relevant declarations and conventions. It constitutes an essential part, because legal disputes and complaints against the sanctions regime are based on these instruments. The procedures of listing and de-listing, the countries’ implementation’s control mechanism conducted by groups and the possible courses for applying for de-listing are composing the chapter. While human rights have not, the processes of listing and the practices to apply for de-listing have been altered multiple times during the existence of the regime. Most of these modifications stemmed from the objections of states or individuals, therefore always trying to satisfy the actual demonstrated shortcomings of the regimes. The examination of the work of the Focal Point and the Office of the Ombudsperson reveals how the United Nations tackled the shortcomings and addressed the negative comments.

The chapter also introduces the reader briefly to another sanctions regime of the United Nations against terrorism, namely the 1373 Committee, revealing the differences between the two and thus the necessity of other regimes.

The cases of Mr. Kadi are presented in the first subsection of Chapter Three. Mr. Kadi is probably the most well-known individual opposing the sanctions regime of the 1267 Committee and his cases are landmarks of public international law. His struggles gave an inspiration to analyze the relation of security and justice, which is the second subsection of the chapter offering different scenarios in order to understand how the 1267 Committee bended its methods to comply with norms and obligations depriving from quintessential documents of humanity.

The work relies mostly on primary sources, such as United Nations documents, resolutions or Declarations and Conventions. Secondary sources include a broad variety of articles, books written about terrorism, especially focusing on the 1267 Committee and its work.
Chapter One

1.1. Defining Terrorism

“The purpose of terrorism lies not just in the violent act itself. It is in producing terror. It sets out to inflame, to divide, to produce consequences which they then use to justify further terror.”

Tony Blair

Several answers can be found in trying to date the birth of terrorism. We can argue whether the first terrorist group was the Sicarii Zealots in the 1st century or it was only acts of violence or whether the Sons of Liberty is the first group, who carried out the Boston Tea Party which was an attack on British property, or as others claim it, a political protest. Gavrilo Princip, the assassin of Archduke Franz Ferdinand is often referred to as a terrorist, being the member of the Black Hand, an extremist group who fought for uniting all territories with majority South Slavic population. In any case, strategies of terrorists, way of conducting their operations have transformed during the decades and we can say that present day terrorism is the most violent form since its birth. Of course, responding to these threats has also gone through a tremendous change, and it appears that sometimes it even carries things too far.

During the 20th century, several terrorist attacks have been carried out on a wide scale concerning the measures. Date and place are as well changing on an extended rate, there is at least one attack in every decade, and unfortunately every continent’s habitants have experienced such terrible events.

While in criminal law, and thus in a legal environment, terrorism hasn’t been defined yet, there are numerous statements, and commonly accepted ideas about what falls under the term. Sir Jeremy Greenstock, a former British Ambassador for one example once stated that “what looks, smells and kills like terrorism, is terrorism.” It is clear that states, leaders or experts have no doubts when a terrorist attack happens that it is a terrorist attack, the hard part is to encase an every aspect and every time usable term which covers the wide range of actions which we can call a terrorist act. Since terrorism

6 TONY BLAIR, 18 March 2003, Speech in Great Britain’s House of Commons.
7 SIR JEREMY GREENSTOCK, 1 October 2001, General Assembly Debate on Terrorism.
has tools ranging from using suicide bombers to propaganda speeches, it is hard to cover every aspect.

Of course there is a great need for a legal definition because until today, terrorism referred to in legal documents, can cause abuse of law, and in case of terrorism, it can be decisive in lives of people.

Terrorism as such covers a wide area of actions. One of the broadest interpretations is that terrorism is a form of illegitimate political violence. This is true in a variety of aspects but is far from covering all actions. The other immediate problem is that there exists some political violence which causes fear and is regarded legally legitimate. For example, under the laws of war killing is legal. But besides of the linguistics, questions of morality, politics and ideology about the legitimacy of use of violence is at stake. While political violence is technically illegal, there are numerous occasions, when it can be seen as legitimate. Rebelling against an authoritarian government or assassinating a dictator may be considered morally and politically legitimate.

As we can see there are various problems defining the term. The main reason though is that states cannot draw a definite line between conflicts over national liberation and self-determination, and terrorism. Since terrorist groups are fighting governments, and ideologies and freedom fighters do the same, the precise borderline is hard to establish. There is no generally accepted term, but several nations and agencies defined the term for themselves.

The lack of a globally accepted term caused problems on concluding a comprehensive convention on international terrorism. The United Nations, facing such difficulties, applied a rather interesting, but working method. They condemned the different sectors of criminal offenses, thus covering terrorist activities.

The United Nations’ very first indirect action against terrorism was the 1963 Tokyo Convention, which is focusing on Offences and Certain other Acts Committed on Board Aircraft. The Convention is applicable to offences against penal law and “acts which, whether or not they are offences, may or do jeopardize the safety of the aircraft or of persons or property therein which jeopardize good order and discipline on

---


9 Ibid.
The Convention has entered into force on 4th of December 1969, and as of today 185 parties has ratified it.

Throughout the following years, the United Nations have forged several other Conventions, which one can consider as the part of the fight against terrorism, and which little by little helped scholars and researchers to coin the term terrorism.

Decades and several conventions after the Tokyo Convention, in 1995, the General Assembly defined terrorism in a resolution, which reads like this: “Criminal acts intended or calculated to provoke a state of terror in the general public, a group of persons or particular persons for political purposes are in any circumstance unjustifiable, whatever the considerations of a political, philosophical, ideological, racial, ethnic, religious or any other nature that may be invoked to justify them.” This action opened the opportunity to adopt resolutions targeted on terrorism, which is the only possible way for the United Nations to tackle this phenomenon.

After the Tokyo Convention numerous resolutions have been adopted concerning terrorism, both by the General Assembly and the Security Council. Most of them recalled Resolution 49/60 and other resolutions which were meant to eliminate international terrorism.

The United Nations’ counter-terrorism policies are usually associated with the most well-known resolutions: Resolution 1267, 1373 and 1540, although each one of them have been expanded and refined by further resolutions. The most significant difference between past and present policies to counter terrorism is that while earlier resolutions aimed at targeting states for supporting or sponsoring terrorism, the new resolutions are targeting non-state actors not tied to any geographical location or even time. The new and substantially improved resolutions are open ended and targeting abstract threats. This new approach demonstrates how the Security Council and thus the United Nations could conform to the modern threats, the transnational, cross-border criminal networks.

---

10 Convention on Offences and Certain Other Acts Committed on Board Aircraft, Chapter 1, Article 1. (b).
1.2. Resolution 1267

“Terrorism can never be accepted. We must fight it together, with methods that do not compromise our respect for the rule of law and human rights, or are used as an excuse for others to do so.”

Anna Lindh

On the eight anniversary of the arrival of American forces in Saudi Arabia, on the 7th of August 1998, hundreds of people were killed by truck bomb explosions at the American embassies of Dar-es-Salaam, Tanzania and Nairobi, Kenya. As it turned out, the attacks were planned and partially carried out by the Al-Qaida terrorist network, with Osama bin Laden being one of the masterminds.

As a response the Security Council adopted Resolution 1189, condemning the attacks, expressing sorrow and condolences, and calling upon States and international institutions to provide support and assistance to Kenya and Tanzania.

President Bill Clinton ordered to carry out series of missile strikes against Sudan and Afghanistan, where possible cells of terrorists, their camps and facilities were supposedly located.

The Security Council adopted Resolution 1193 a week after the strikes, in which their concerns were concentrated on Afghanistan, the Taliban, and the civil casualties of the civil war in the Central Asian country. The body adopted Resolution 1214 three months later, in which it expressed its great concern about the continued conflicts in Afghanistan and among many other measures, were deeply disturbed by the continuing use of Afghan territory, especially the Taliban-controlled territories, for sheltering and training terrorists.

Before the 1990s the Security Council had imposed sanctions only twice: an economic blockade of South Rhodesia (1966-1979) and an arms embargo against South Africa (1977-1994). The 1990s thus can be called “The Sanctions Decade”, as

14 Anna Lindh, 4 December 2002, Helsinki Conference.
David Cortright and George A. Lopez named it\textsuperscript{20}. More than a dozens of States were sanctioned for differing actions, but more interestingly, these were targeted sanctions. The very first of its kind enforced by the United Nations was against the UNITA\textsuperscript{21} (National Union for the Total Independence of Angola). Today, there are only targeted sanctions in existence, which can be collected into three categories: sanctions targeted at individuals, sanctions targeted at specific commodities and sanctions targeted at particular regions in a country. Sanctions can resolve or take control of situations where a diplomatic notification is not enough, but military response would be inappropriate or impossible\textsuperscript{22}. If we remember the recent Crimean crisis, we can see a great example of the imposition of such targeted sanctions. The United States introduced visa restriction on Russian officials who “threaten its (Ukraine’s) peace, security, stability, sovereignty, and territorial integrity; and contribute to the misappropriation of its assets, constitute an unusual and extraordinary threat to the national security and foreign policy of the United States”.\textsuperscript{23} Along with the travel ban – that is deduced from the United Nations Charter (“In light of the firm commitment of the United States to the preservation of international peace and security and our obligations under the United Nations Charter to carry out the decisions of the United Nations Security Council imposed under Chapter VII”)\textsuperscript{24} – the United States froze assets of individuals as well\textsuperscript{25}. In the meanwhile the European Union acted partially similarly, it froze assets “of Ukraine’s ousted Russia-backed leader Viktor Yanukovych and 17 other officials suspected of violations of human rights and misuse of state funds”\textsuperscript{26}.

But the switch from sanctioning states to sanctioning individuals and non-state entities has generated new issues, in particular the status and rights of parties that might be listed wrongly.

\textsuperscript{22} SIMON CHESTERMAN & BEATRICE POULIGNY, 2003, Are sanctions meant to work? The politics of creating and implementing sanctions through the UN, Global Governance, Vol. 9, pp. 503-518.
\textsuperscript{25} Executive Order 13660, 6 March 2014, Section 1, See at: http://www.treasury.gov/resource-center/sanctions/Programs/Documents/ukraine_eo.pdf.
As there has been a shift towards targeted sanctions instead of general economic sanctions, the question arises: why? The answer is that probably general sanctions were not so effective and because it definitely caused disproportionate harm to the population on which it was imposed. Targeted sanctions are aimed directly at individuals, entities and are designed to limit their humanitarian impact. Most typically, effectively implemented targeted sanctions are the same as preventive measures or incentives to change behaviour. “This development is comparable with the emergence of modern or vertical international criminal law in the 1990s, in that leading individuals are targeted directly rather than through abstract state entities.” Nevertheless, international criminal law and sanctions policy differ, because the former is a body of law that is by nature applied by a court operating on the basis of clear procedural rules, while sanctions are imposed by the Security Council operating on the basis of political decision-making. Important to state that sanctions are more of an administrative and political process than legal one, without the “same standards of evidence, burdens of proof, and access to remedies of legal processes, but at the same time they are governed to some degree by administrative law procedures.” This would already imply that the targeted entities should be guaranteed the “right to good administration” as it is defined in Article 41 of the European Union Charter.

In general, sanctions are designed to bring a threat to an end. As the Article 39 of the United Nations Charter states it, the purpose of sanctions is to maintain or restore international peace and security.

On 15 October 1999, the Security Council unanimously adopted Resolution 1267 which is a milestone in fighting terrorism, since it is adopted under Chapter VII of the United Nations Charter and thus it’s binding on all Member States. This is possible thanks to Article 25 of the Charter, which reads as: “The Members of the United Nations agree to accept and carry out the decisions of the Security Council in accordance with the present Charter.” Article 48 further states: “The action required to

---

27 Simon Chesterman & Beatrice Poulligny, 2003, Are sanctions meant to work? The politics of creating and implementing sanctions through the UN, Global Governance, Vol. 9, pp. 503-518.
carry out the decisions of the Security Council for the maintenance of international peace and security shall be taken by all the Members of the United Nations”33.

The Resolution imposed serious sanctions on the Taliban, who held most of the territories of Afghanistan at the time. The Security Council’s decision called upon the Taliban to take effective measures in the cause of the termination of terrorist training camps and installations on the territories of which it holds under control and to cooperate with the efforts to bring the terrorists to justice. The Council demanded that the Taliban turn over Osama bin Laden without any further delay. As the Resolution reads, the Taliban has one month to comply with the above stated, otherwise, on the 14th of November 1999, it shall impose the measures against them. These measures called upon all Member States to ”deny permission for any aircraft to take off from or land in their territory if it is owned, leased or operated by or on behalf of the Taliban”34, and to freeze funds and other financial resources that could benefit the Taliban35.

Another very important action of the Resolution was to establish a ‘committee of the whole’, meaning that its membership is identical to the Security Council. The committee’s tasks according to the Resolution are, inter alia, to seek further information from states about the implementation of the measures, to make periodic reports on the impacts of the measures, and to examine the reports which are prepared by the Member States. Mainly, the Committee helped organizations and states on the globe to combat terrorism by different methods. In some instances the adoption of new laws or improving existing legislation, in others, calling on ratification of counter-terrorism treaties, or development and implementation of counter-terrorism action plans.

The Resolution calls upon States to act strictly in accordance with the provisions and to bring proceedings against persons and entities within their jurisdiction that violate the above stated measures.

As the Taliban did not fulfill the request of the Security Council, all the above sanctions were imposed on them. The newly created 1267 Committee or Al-Qaida and Taliban Sanctions Committee as it is titled since 2nd of September 200336, has established the Al-Qaida and Taliban Sanctions List. The Consolidated List includes individuals and entities that are associated with the terrorists.

1.3. Amendments

“Global terrorism is extreme both in its lack of realistic goals and in its cynical exploitation of the vulnerability of complex systems.”

Jürgen Habermas

Since its establishment, the Committee’s work has been modified over the years to perfect the fight against such global threat. The first amendment was on the 19th of December 2000, by Security Council Resolution 1333, which recalled the measures taken by Resolution 1267 and imposed further sanctions such as the prohibition of arms deals with the territories under Taliban rule, and to stop dealing with and eliminate the illicit cultivation of the opium poppy. Alongside with the arms and air embargo, all Member States were told to freeze the assets of Osama bin Laden. Resolution 1333 was only the first in the line of many coming amendments, which specified the work of the Committee and imposed further sanctions on the Taliban and Al-Qaeda. All the introduced measures, given old or new, despite working effectively have been associated with certain problems, such as absence of justification for listing, information on how to appeal a designation or prompt notification.

Therefore the 1267 Committee by Resolution 1363 of 30 July 2001 established a Monitoring Group comprised of five experts who supervise the implementation of the measures imposed by past resolutions, who offer assistance to states to increase their capacity in favor of implementing the measures and who report to the Committee regularly. The main reason for the Group’s creation was to have a team of experts who can offer independent recommendations. The Committee has been established in accordance with Article 29 of the UN Charter and has the responsibilities of the sanctions regime under control. As it was a subsidiary organ of the Council, the Committee was the administrator of the Consolidated List of terrorist suspects, and it

39 Ibid. 1333 Paragraph 5. (a).
40 Ibid. 1333 Paragraph 9.
41 Ibid. 1333 Paragraph 8. (c).
had the deciding power to list or de-list individuals or entities.\textsuperscript{44} The Group had its chairman and two vice-chairmen, who were appointed by the Council.\textsuperscript{45} As to assist the Monitoring Group, a Sanctions Enforcement Support Team, has been planned with fifteen members who are experts in the fields of customs, border-security and counter-terrorism,\textsuperscript{46} however it was never established.\textsuperscript{47} On the other hand, the Monitoring Group had made significant research on the field throughout its visits to several countries and reported dutifully to the Committee, but has met harsh complaints from some visited countries. All above stated are in past tense, because today a newly established Monitoring Team took over the tasks of the Group.


\textsuperscript{45} Ibid.


Chapter Two

2.1. Human rights

“There is no trade-off to be made between human rights and terrorism. Upholding human rights is not at odds with battling terrorism, on the contrary – the moral vision of human rights is among our most powerful weapons against it.”

Kofi Annan

The development from general economic sanctions to targeted ones demanded recommendations for the Council to adopt operative resolutions. The Interlaken process, concerning financial sanctions, the Bonn-Berlin process pertaining travel bans and the Stockholm process regarding the implementation of targeted sanctions all acknowledged the need to respect human rights and international humanitarian law.

During the years after the introduction of targeted sanctions several sources, doubted the imposed measures to be fair and suggested that “the absence of review or appeal for those listed raise serious accountability issues and possibly violate fundamental human rights norms and conventions.” As a consequence the General Assembly has called on the Security Council “to ensure that fair and clear procedures exist for placing individuals and entities on sanctions lists and removing them, as well as for granting humanitarian exceptions.” Targeted sanctions in general has met contrary opinions thanks to the human rights dimension, but terrorism, as a special matter of these measures even met more, since the reluctance to assert the primacy of human rights concerns in these cases is not clear. Is this the case of choosing between security and justice? Scholars argue that it doesn’t have to be, rather the two should mutually reinforce each other: “Strengthening procedural fairness can strengthen security and vice versa. Improving fairness and clarity in the application of targeted

sanctions will reinforce the global effort to use and implement targeted sanctions to counter acts of terrorism.”

One other crucial question is if regional or national court judgements can challenge decisions of the Security Council, because if so, these decisions may undermine the effective implementation of United Nations sanctions and are threatening collective security in whole. A closely related matter is to examine whether Article 103 of the Charter is challenged in such a case along with Article 25.

The first step to unfold and resolve these controversies is to analyse the framework of human rights law agreed upon and implemented by the United Nations and in addition, the regional human rights instruments. The Universal Declaration of Human Rights adopted in 1948, and the International Covenants on Economic, Social and Cultural Rights and on Civil and Political Rights and numerous further treaties, such as those on racial discrimination, women’s rights, torture, children’s rights and migrant workers are the main and stable framework of human rights in the United Nations. Probably the most important feature of the 1993 Vienna World Conference on Human Rights, what was implemented by the United Nations, is that human rights are both universal and indivisible.

Furthermore, regional human rights instruments have been adopted, such as the European Convention for the Protection of Human Rights (1950) what established the European Court of Human Rights (ECtHR), the Charter of Fundamental Rights of the European Union (2000), the American Convention on Human Rights (1969) and its Additional Protocol in the Area of Economics, Social and Cultural Rights (1988), and the African Charter on Human and People’s Rights (1981).

---

53 “In the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail.” United Nations Charter, 1945, Article 103.
57 Ibid.
60 United Nations General Assembly Resolution, 10 December 1984, 39/46.
There exist various occasions where targeted sanctions can infringe human rights. Financial sanctions affect property rights along with a probable impact on a person’s privacy, reputation and family rights and travel bans inevitably interfere with freedom of movement. The list of potential violations of human rights does not end here, since if “sanctions are wrongly imposed on listed individuals without granting these individuals the possibility of being heard or of challenging the measures taken against them, there may also be a violation of the right of access to court, the right to a fair trial and the right to an effective remedy. In some extreme situations, the right to life can be violated, for example in cases, where targeted individuals may seek medical treatment in another country than their residence, but the travel ban prevents them from doing so. A similar breach of rights occurs on the assumption that financial sanctions hinder the targeted individual to acquire basic goods, such as food. However, the United Nations sanctions regimes include the possibility to grant exemptions. Banning travel may conflict with freedom of religion – especially if one’s religion requires pilgrimages – and the right to seek asylum.

The most addressed concern in the middle of the 2000s was the barrier for the individual to challenge the sanctions taken against him. Several legal challenges were presented in front of national and regional courts. In most cases rights to effective remedy and a fair trial were the subject of the debate. The Universal Declaration of Human Rights (UDHR), the International Covenant on Civil and Political Rights (ICCPR) and the European Convention on Human Rights (ECHR) all contain clauses on these matters.

Fair trial as a fundamental right appears in Article 10 of the UDHR: “Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge.

---

73 Universal Declaration of Human Rights, 1949, Article 14.
against him.”

Effective remedy is also acknowledged, Article 8 covers the topic: “Everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law.” In the ICCPR, the right to fair trial is recorded in Article 14(1): “… In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law…” Article 6 of the ECHR follows the ICCPR by saying that “the right to a fair and public hearing by a competent, independent and impartial tribunal established by law” applies to cases where “criminal charges” are presented or where “rights and obligations in a suit at law” are at stake. The Human Rights Committee in its General Comment on Article 14 of 1984, did not define the concepts in detail, which “led scholar Manfred Nowak to plead in favor of an autonomous interpretation of these concepts under the ICCPR, regardless of national classifications, thereby limiting the possibility for state parties to circumvent the Covenant.” While the concept of “criminal charge” should be autonomously interpreted, the essence of case law of the European Court of Human Rights (ECtHR) on Article 6 of the ECHR applies equally in the context of Article 14 of the ICCPR, because the same words are in both provisions. Interestingly Article 14 of the ICCPR and Article 6 of the ECHR use differing expressions “rights and obligations in a suit at law” and “civil rights and obligations,” however this difference misses from the French version of the texts, where phrasing is the same. Related to this discrepancy between languages, the Human Rights Committee decided that a case-by-case judgement is the applicable method. On the grounds that there is “diverse and open-ended case law it is uncertain whether the committee would find that UN sanctions can

74 Universal Declaration of Human Rights, 1949, Article 10.
75 Universal Declaration of Human Rights, 1949, Article 8.
76 International Covenant on Civil and Political Rights, 1954, Article 14(1).
79 Ibid.
be characterized as obligations in a suit at law and thus it is not entirely certain that Article 14 of the ICCPR is applicable.”

Regarding the effective remedy, what is determined by Article 2(3) of the ICCPR, it is only applicable if another right of the Covenant is involved. The UDHR in its Article 8 on the other hand provides a right to an effective remedy “for acts violating a wide range of fundamental rights if they are granted by constitution or by law.” Closely looking at the articles, we can see that while the ICCPR speaks of competent judicial, administrative, or legislative authorities. These allow a wider range for nonjudicial remedies than the relating UDHR Article, what requires a remedy by a competent national tribunal.

Examining the ECHR’s regulation about fair trial, namely Article 6, we can see how high standards it sets: “In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law.” Since this clearly states that these standards must be met in the event of criminal or civil law cases, the task is to decide if listing and the imposition of sanctions such as asset freeze are qualified as either criminal or civil, that is if they fall under Article 6 or whether they are administrative in nature or measures of a sui generis character that remain outside the scope of Article 6. The concept of ‘civil rights and obligations’ must be dealt with on a case-by-case basis, because although it is independent of national qualifications the ECtHR has no general guidelines in deciding what falls precisely under the term. Many have argued that the sanctions bear a criminal connotation, but the Monitoring Team established by Resolution 1526 – the quasi successor of the Monitoring Group – has stated that “the List is not a criminal list.” Furthermore it also stated that “the sanctions do not impose a criminal punishment or procedure, such as detention, arrest or extradition, but instead apply administrative measures such as freezing assets, prohibiting international travel and precluding arms sales.” Therefore we can say that even if a criminal law connotation appears, the sanctions don’t have to be characterized as criminal sanctions.

84 Ibid.
86 European Court of Human Rights, König vs. Germany, judgement, 28 June 1978, paragraphs. 88-89.
88 Ibid., paragraph 41.
The importance of deciding whether sanctions are criminal charges or civil obligations lies at the distinction between the required evidence to be listed. The former has to meet the standard of ‘beyond reasonable doubt’ while the latter has no such condition, meaning that its evidentiary burden for listing is lower. Additionally, the determination plays a decisive role in the review mechanism, because if Article 6 is applicable, then the review mechanism must be judicial in nature, but if isn’t, then the right to an effective remedy (Article 13 of the ECHR) may still apply, but this provision sets a lower standard since the remedy need not necessarily be judicial, but a “national authority” is to take care of the case.

If effective remedy is the applicable standard, the qualification of ‘effective’ and the explanation on ‘remedy’ must be installed. In 2006, the United Nations Office of Legal Affairs commissioned a study in which standards of effective remedy are explained. ‘Remedy’ bears a wide range of interpretation, since it allows the Security Council to choose from different options as to what body should be addressed with the concern such as an international tribunal, an inspection panel, a commission of inquiry, an ombudsman office or a committee of experts. The ‘effectiveness’ is depending on considerations such as accessibility, speed and efficiency of the procedure; the power of the reviewing body; the fair opportunity to put forward one’s case; the quality of the decision-making; and the compliance with the decision.

2.2. Resolution 1373

“You're always going to have extremists in every religion. We're never going to be able to get rid of terrorism, because there is always going to be evil in the world.”

King Abdullah II of Jordan

Resolution 1373 is the consequence of the deadliest terrorist attacks that have ever been carried out, namely 9/11. More than three thousand people died, and the World Trade Center has been completely destroyed, when terrorists hijacked four passenger aircrafts and flew them into their targets. As a response, George W. Bush has proclaimed the War on Terror, a global fight to eliminate all terrorists. The United Nations Security Council has condemned the attacks in a resolution the very next day, but significant action was taken only on 28 September. Resolution 1368 is a purely political statement, and has no legal effect of any kind.

Resolution 1373 on the other hand is a landmark in the fight against terrorism, since it established the second - out of three committees of the United Nations in relation with terrorism and had a great impact on the international level. The United States engaged in capital-by-capital diplomacy to build an anti-terrorism coalition, and once the evidence pointed to Al-Qaida and Osama bin Laden, it started to plan a military response, but only after approaching the Security Council for approval. US policymakers were puzzled about which UN body shall act against terrorism since there have never been an effective multilateral offensive: the Sixth Committee or the Security Council? While the Sixth Committee would have the authority and legitimacy, the Security Council’s Chapter VII powers might be expanded to authorize strikes against non-state actors. As the Sixth Committee was not scheduled for several weeks, the decision was to begin with the Security Council. The Council was to make binding rules on all Members, thus its Chapter VII authority and Article 25 of the Charter provided the legal basis.

93 KIng Abdullah II of Jordan, 7 February 2010, Interview.
96 1267 Committee, Counter-Terrorism Committee also known as 1373 Committee, 1540 Committee.
While the Resolution was a unique type itself, the use of Article 25 was unprecedented in its scope and magnitude as well. Some argue that such use of the Charter powers were the first-ever legislative acts of the Security Council. Unique, because the Council consist only of 15 Members, but this resolution was legally binding and enforceable on all Members. Only to describe how much the Members of the Council agreed upon the Resolution: the Council’s 4385th meeting, where the resolution was approved, lasted five minutes.

Resolution 1373 marked out several significant measures to tackle terrorism globally. The prevention and suppression of financing terrorist acts must be halted at any price. All States must ensure that funds and assets of persons or entities related directly or indirectly to any kind of person or entity that is associated with terrorism must be frozen. Taking action for the suppression of financing terrorism plays an important role in the document. Arms deals, prevention of movement of terrorists, calling upon States to anticipate any kind of planning of terrorist acts if possible, are a few steps the Council demanded. Several other measures were requested by the body, such as closer cooperation between States regarding actions and movements of terrorists, which were to be accomplished by concluding bilateral and multilateral arrangements and agreements. As the Council used its power to bind the Member States to carry out its measures, it adjured them to implement anti-terrorism laws into their domestic jurisdiction and to become parties to all relevant international conventions and protocols relating to terrorism as soon as possible.

The Council meant to clarify that Resolution 1373 must be taken seriously, and it is not only a “fleeting, emotional response to a crisis”, therefore as paragraph 6 states it established a Committee “to monitor (the) implementation of this resolution,

102 Ibid. Paragraph 2. (g).
103 Ibid. Paragraph 2. (a), (e).
104 Ibid. Paragraph 2. (g), Paragraph 3. (a).
105 Ibid. Paragraph 3. (d), (e).
106 Ibid. Paragraph 1. (b).
107 Ibid. Paragraph 3. (d).
with the assistance of appropriate expertise, and calls upon all States to report to the Committee.\textsuperscript{109} This committee, the Counter-Terrorism Committee approached the report-writing process in a non-confrontational, collaborative spirit trying to withdraw from the use of its enforcement powers\textsuperscript{110}. Such an attitude differs from the 1267 Committee’s conduct of work, which if necessary, criticizes states and their methods to comply.

As we can see, Resolution 1373 set out similar demands as Resolution 1267. It is though a substantial difference that it is not a sanctions body nor it does maintain any list, it leaves it up to each state to draw up such lists. Its main purpose is to oblige the States to comply with its provisions and to establish the 1373 Committee which can oversee their implementation. While the 1267 Committee is a sanctioning organ, the 1373 Committee’s main task is capacity-building in the Member States in order to be able to conform with the resolution’s measures.

In order to possess better operating skills, a Counter-Terrorism Committee Executive Directorate has been established in 2004\textsuperscript{111}, with a larger budget and more permanent status.

2.3. The listing procedure

“Wars have generally been fought against proper nouns (Germany, say) for the good reason that proper nouns can surrender and promise not to do it again. Wars against common nouns (poverty, crime, drugs) have been less successful. Such opponents never give up. The war against terrorism, unfortunately, falls into the second category.”

Grenville Byford

The Al-Qaida and Taliban Sanctions Committee had clear listing procedures, which over time received numerous complaints about the method’s fairness, thus it has been changed since its establishment. The procedure at the beginning was rather simple and actually its simplicity led to controversies and abuse, therefore to avoid these, the Council changed the listing procedure several times. The latest amendment in order to straighten out the procedure occurred in 2012 by Security Council Resolution 2083 which regulates every detail and specifies every must-do in order to list someone or any entity.

As the United Nations is not capable at the moment to operate any militarized task associated with terrorism or an intelligence agency, it has to rely on the findings of States. The Organization itself is not “well placed to play an active operational role in efforts to suppress terrorist groups, pre-empt specific terrorist strikes, or to develop dedicated intelligence-gathering capacities”. At present day, the Organization lacks the military capacity and has problems to provide sufficient resources to develop any analytical support in order to respond to threats. Another major obstacle that hinders the chance of a smoothly running intelligence gathering and processing body is that the United Nations members may not share sensitive national information with each other. Besides, the differences among members concerning the definition of terrorism and “the inability of the world body to place any guaranteed safeguards on classified

116 Ibid.
information\textsuperscript{117}, frustrate any concerted attempt. The list itself is only operated by the Committee, but it does not nominate anyone, this task remains to be completed by the Members. A double function, one for reflecting the decisions of the Committee and one for being a database for the administrating levels of the European Union and the United Nations Member States characterizes the list. The creation of the list was built on political trust and had no guidelines for states to follow in proposing names\textsuperscript{118}.

According to the previous guidelines, any state could propose persons or entities for listing and the Committee members had 48 hours to place a ‘technical hold’ on it, in case they desired additional information to consider or obtain more information on the submission\textsuperscript{119}. As 48 hours is not such a long time, states often prenotified affected states or close allies to accelerate and smooth out the listing procedure. For example, the United States, which has proposed the most of the names on the list, “typically gives prenotification to its allies on the committee and affected states five working days in advance of formally making such a proposal”\textsuperscript{120}. Updated guidelines define now a time period of 10 full working days of the Committee to consider listing requests\textsuperscript{121}. As it was before, “if no objections are received by the end of the no-objection period, the decision is deemed adopted”\textsuperscript{122}.

As the Committee’s operational functioning has changed or at least transformed during the years, the listing procedure and the Committee’s conduct of work has also gone through alterations. The most debated aspects of the procedure were the fairness for human rights and failure to safeguard due process rights what is thanks to the closed nature of the information provided publicly about the listed individuals and the complex procedure of de-listing. Many added names lacked even the slightest of information on the person and generally didn’t include explanations of the connection between the individual or entity and Osama bin Laden or members of the Al-Qaida or the Taliban\textsuperscript{123}. While secrecy plays an important role, especially in order to protect secret intelligence material, it also raises questions on human rights. Multiple occasions occurred where

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{117} Ibid.
\item \textsuperscript{118} ERIC ROSAND, 2004, The Security Council’s efforts to monitor the implementation of Al-Qaida and Taliban sanctions, The American Journal of International Law Vol. 98, No. 4. pp. 745-763.
\item \textsuperscript{119} Ibid.
\item \textsuperscript{120} Ibid.
\item \textsuperscript{121} United Nations Security Council Document, 15 April 2013, Guidelines of the Committee for the conduct of its work, paragraph 6. (n).
\item \textsuperscript{122} Ibid.
\item \textsuperscript{123} ERIC ROSAND, 2004, The Security Council’s efforts to monitor the implementation of Al-Qaida and Taliban sanctions, The American Journal of International Law Vol. 98, No. 4. pp. 745-763.
\end{itemize}
\end{footnotesize}
innocent people were listed due to misspelling of names or lack of identifying information.\textsuperscript{124} It must be said though, that most of the cases subject to legal challenges were introduced in the months following the terrorist attacks of 11 September 2001 and since then the listing and de-listing procedures have been improved, therefore wrongful listings are rarer.

Many states feared to be stigmatized as anti-Islamic,\textsuperscript{125} therefore withdrew from proposing names, others simply expressed their doubts about the common standards of fairness and impartiality by not proposing.\textsuperscript{126}

It became obvious that the procedure must be transformed to create a much more transparent identification procedure and more accessible review, and to stimulate states for proposing names, and last but not least, to enhance the cooperation of states. The occurrence of failure in modifying the procedures “threatens to undermine the credibility and effectiveness of United Nations sanctions generally”\textsuperscript{127}

Although the Council adopted resolutions so as to clarify the listing procedure, it did not mean that the states’ compliance improved.\textsuperscript{128} The List was established to collect the individuals and entities associated with the Al-Qaida and the Taliban, but the Security Council’s measures against the names on it, the sanctions, were to be carried out by the governments and financial institutions. At first, states did not even had to inform individuals about their presence on the List and designating States did not have to specify the reason for proposing names. Reason and identifying information today is better regulated; the definition of ‘associated with’ and the extended amount of justifying information provide constructive improvements. Unfortunately, few advance consultation with affected Member States of residence or nationality of the listed individual were present, especially if they were not serving on the Security Council. Countries who are members of the Council received automatic statements of case, and are able to review them. Such process also raised serious questions about the transparency of the listing process, with arguments deriving from Member States about

\begin{flushright}
\textsuperscript{124} Ibid. \\
\textsuperscript{125} Ibid. \\
\textsuperscript{126} MONIKA HEUPEL, 2009, Multilateral sanctions against terror suspects and the violation of due process standards, International Affairs Vol. 85, No. 2. pp. 307-321. \\
\textsuperscript{128} ERIC ROSAND, 2004, The Security Council’s efforts to monitor the implementation of Al-Qaida and Taliban sanctions, The American Journal of International Law Vol. 98, No. 4. pp. 745-763.
\end{flushright}
a redacted version with deleted sensitive information of the statement to be made available on a wider level.\textsuperscript{129}

If on the List, governments must order an asset freeze, a travel ban and an arms embargo against the listed. Assets are not frozen immediately of the time of listing, because the Member State as the classical subject of international law has to implement the listing by adopting national law\textsuperscript{130}. For example, the freezing of assets requires a transformation act within the Member States’ territory\textsuperscript{131}. As one can see here, there is no de iure effect on the individual, but it is the Member State who is the addressee of the sanctions regime. However there is yet a de facto effect on the individual, thanks to Article 25 of the United Nations Charter, which says that “The Members of the United Nations agree to accept and carry out the decisions of the Security Council in accordance with the present Charter”\textsuperscript{132}, which makes the “listing decision of the Committee, which is a subsidiary body of the Security Council binding on the Member States”\textsuperscript{133}. Thus the national level becomes the executing assistant of the Committee, it has no discretion in deciding to implement the sanctions or not or to whom to sanction. The sanctions are binding and directly applicable in the European Community’s Member States according to Article 249\textsuperscript{134}, therefore they must be implemented by the competent bodies on the national level. Hence the sanctions regime is carried out within a multi-level structure: “the Security Council and the Sanctions Committee acting on the UN level, the EU Council acting on the European level and various national authorities acting on the national level.”\textsuperscript{135}

Numerous problems have come to light after the introduction of the sanctions regime. One was the unclear definition of ‘associated with’ which was regulated only in 2006, by Security Council Resolution 1617\textsuperscript{136}. Further problems arose quickly after the introduction of the sanctions regime, such as the right to due process, concerning the


\textsuperscript{131} Ibid.

\textsuperscript{132} United Nations Charter, 1945, Article 25.


\textsuperscript{134} Treaty of the European Community, 1957, Article 249 (2).


listing procedure; the lack of provided information on listed individuals; the implementation of sanctions from Member States and their cooperation with the regime and deficiency of willingness to propose names. Further doubts were drawn up concerning the notification of listed individuals. Adequate notification is crucial in reaching the standards of a due process. Listed individuals and entities need to be informed, especially in order to specify the basis and reasons for their inclusion on the list. None of the sanctions regimes of the United Nations, including the 1267 Committee, notifies directly the targets, but they largely rely on Member States to do so\textsuperscript{137}. This kind of method works perfectly with numerous Member States, but in many instances it fails due to the lack of capacity or the will to carry out the Committee’s request for notification.

As all the malfunctions of the listing process started to appear, the Committee, and thus the Council tried to tackle the challenges. After several proposed alterations and carried out amendments, the listing procedure today is regulated through multiple resolutions.

Today, the listing procedure is more stable, for example Member States who propose names for listing need to submit as much justifying information in support of the case as reasonably possible. With the modified procedures, the Committee had found the balance between the methods of ensuring that legitimate targets do not avoid sanctions and minimum evidentiary standards and a transparent listing process to ensure due process and other human rights\textsuperscript{138}, states are much more willing to contribute to and support the Committee in its work.


\textsuperscript{138} \textsc{Eric Rosand}, 2004, \textit{The Security Council's efforts to monitor the implementation of Al-Qaida and Taliban sanctions}, The American Journal of International Law Vol. 98, No. 4. pp. 745-763.
2.4. The Monitoring Group

“In the face of terrorism, a united front is one of the strongest weapons.”

Virginia Foxx

The Monitoring Group established by Resolution 1363 on 30 July 2001, followed by the counsel of experts who were asked to make recommendations regarding the way the sanctions could be best monitored, consisted of five members. The main task of the five experts was to monitor how States implement the measures. Since the Group was born right before the 9/11 attacks, it focused on countries which could help to build up a picture on the al-Qaida network and had reasonable grounds to implement the measures imposed by the Committee. The Group used various approaches to tackle the difficulties of implementation, especially because the different States faced different problems. Among these approaches were visits to border entry points in Europe and in Asia, and the mission to learn as much as possible about al-Qaida in order to understand the environment in which each individual member state has to implement the sanctions. Throughout these exploratory works, the Group sketched a terrorist network what was never seen before, meaning that it does not have any geographical visibility, but it is a coalition of likeminded groups across the globe, a “Terrorisme sans Frontiers” as the Group called it.

It is the Monitoring Group’s merit that the identifying information which had to be provided for listing is extended, because during the visits, most of the countries were complaining about it, generating the first major recommendations for the Group’s report. While some states had no difficulties at all, others claimed that insufficient identifiers or “cultural construction of names may leave implementation of the resolution open to possibilities of non-compliance”.

139 VIRGINIA FOXX, 13 July 2005, Speech in the US Congress.
142 Ibid. paragraph 10.
Multiple key problems, in this case concerning travel ban, were present in the observed countries. Namely, that some states have not included the persons on the Consolidated List in their own state’s watch- or stop list. As an explanation, states referred to the lack of minimum identifiers. In some instances, the admission to state watch- or stop lists was jeopardized because strict judicial requirements had to be fulfilled. Humanitarian reasons were another excuse not to follow the requirements of the Committee, but to tackle the phenomenon, the Council, shortly after the Group’s recommendations, adopted Resolution 1452, and terminated the barriers to not circumvent the demands.

The observations of the Group led to the adoption of Resolution 1455 by the Council what improved Resolution 1390. At the same time the Secretary-General re-appointed the Monitoring Group with some additional tasks, such as “…follow up on relevant leads relating to incomplete implementation of the measures…”

Paragraph 6 of the relevant resolution called upon states to submit a report on the implementation of the measures. After the 90 days of time to submit, the Group was quite exasperated by the results it received, namely that only 26 percent of States fulfilled the instructions of the resolution. Obviously the Committee’s chairman was disappointed by the reluctance of states to cooperate in the global fight against terrorism. By the second report of the Group, on 3rd November 2003, the number of reports has increased to 83, although it was still less than 50 percent of the United Nations membership.

Among several other findings the experts have expressed their concerns that the travel ban is only a political statement if countries won’t take the sanctions seriously, and that the arms embargo is the most difficult component of the sanctions regime to monitor, not only because it is quite impossible to oversee the traders, but because numerous countries have rejected to provide information related to reported or suspected violations of the arms embargo. The Group’s research also highlighted the extensive use of informal banking systems by the terrorists. Al-Qaida moved its financial activities to regions where there is a lack of financial resources, resolve and/or capacity to regulate such activities closely, such as Africa, the Middle-East and Southeast Asia. Another discovery was that, various individuals and groups on the List

---

143 Ibid.
148 Ibid. VI. paragraph 107.
have begun to use front companies, trusts and several other arrangements to hide their assets\textsuperscript{149}. Hawala, a specific kind of transfer system, was one of the techniques to move money, also and especially into other countries. Hawala is basically a transfer of debt, where the person who wants to transfer, hands over the sum to a hawaladar (a hawala broker), who then notifies another hawaladar - positioned in the city of the recipient - and completes the transfer by giving the sum to the recipient. There will be a debt between the two hawaladars, where the first broker owes money to the second\textsuperscript{150}. The transaction is based on an honour system, and that is where its popularity derives from: the lack of any promissory instruments. Charities were also a channel through which funds reached the al-Qaida and its associates\textsuperscript{151}.

The Monitoring Group’s mandate was not renewed by the Secretary-General in January 2004, thus it terminated its work, which was actually subject of much criticism, especially in its last year. Several Member States complained about the Group’s working methods and its failure to be responsive to the committee’s concerns\textsuperscript{152}. There was a lack of coordination with the committee in advance, and the limited scope of travels also led to criticism. Some other States brought up problems regarding the Group’s transparency and sloppiness in its work. For example, Italy, Liechtenstein, and Switzerland were angered by the report of December 2003, wherein the Group claimed that listed individuals lived, travelled and operated multimillion-dollar businesses in their countries, in contravention of the sanctions imposed, without even consulting the relevant offices to verify basic facts in its report\textsuperscript{153}. Lack of sophisticated analysis and too broad interpretation of its mandate are just some of the complaints against the Monitoring Group. The work of the Group of course was not a disaster altogether, because it did contribute “to enhancing the committee’s understanding of the effectiveness of the sanctions and of states’ efforts to implement them, at times spotlighting individual countries for failing to take adequate measures against al-Qaeda”\textsuperscript{154}.

\textsuperscript{149} ERIC ROSAND, 2004, \textit{The Security Council’s efforts to monitor the implementation of Al-Qaida and Taliban sanctions}, The American Journal of International Law Vol. 98, No. 4. pp. 745-763.
\textsuperscript{151} ERIC ROSAND, 2004, \textit{The Security Council’s efforts to monitor the implementation of Al-Qaida and Taliban sanctions}, The American Journal of International Law Vol. 98, No. 4. pp. 745-763.
\textsuperscript{152} Ibid.
\textsuperscript{154} ERIC ROSAND, 2004, \textit{The Security Council’s efforts to monitor the implementation of Al-Qaida and Taliban sanctions}, The American Journal of International Law Vol. 98, No. 4. pp. 745-763. at p. 755.
Naturally, the Committee was well aware of the necessity of a company of experts for the implementation and control of the sanctions regime, and thus, by Resolution 1526 the Security Council established the Analytical Support and Sanctions Monitoring Team155 (Monitoring Team) under the direction of the Committee156. Contrary to the Group, which was created by the Secretary-General and was assigned to support the Committee at the Council’s request, the Monitoring Team was the creation of the Council. As the Group received much criticism, the Council decided to list the responsibilities of the new Team, including, *inter alia*, to notify the committee in advance of its planned activities, including travels, of what it has to consult with the selected States as well.157 Resolution 1526 not only called upon States to submit reports, but to explain in writing reasons for not reporting158, because unfortunately the Committee haven’t received reports from every State, despite the reports’ aim to assess the information on terrorists to then process it and assist states to implement the necessary measures. Mostly, “states had not incorporated the sanctions in their domestic legislation or administrative rules”159, because the legal regime in force seemed to be sufficient for them to address terrorism. Others hadn’t have the capacity, or the political will, some states without Taliban or al-Qaida presence on their territory simply thought that the call for a report is inapplicable in their situation.

156 *Ibid.* Annex
2.5. The de-listing procedure

“I frankly don't think it's going to be a successful war on terrorism until law enforcement agencies like the FBI are willing to share with other law enforcement agencies. If they can't share information, there's no way this war can be won.”

Patty Hearst

“The Al Qaida / Taliban sanctions regime has demonstrated an impressive institutional development over the course of the past ten years. What began as a vaguely crafted resolution imposing financial sanctions against the Taliban and extended to individuals “associated with” al Qaeda, UNSCR 1267 contained no provision for delisting when it was first introduced in 1999. Today, it represents the most procedurally advanced of the sanctions committees with formalized procedures for delisting, a highly professional analytical staff (its Monitoring Team) issuing regular and detailed reports, elaborate and detailed procedures for designations on the basis of standardized statements of case, an ongoing internal review of all listings, routinized procedures for handling exemptions requests, and much greater transparency in its operations.”

As it is mentioned above, several complaints were brought against the fairness and transparency of the sanctions regime. The original de-listing procedure didn’t allow for individuals for direct application against listing, violating fundamental rights. At first, the listed individuals, entities had to initiate the de-listing procedure through their government of residence and/or citizenship by asking them to request a review in the Sanctions Committee. In the meanwhile, it was the petitioner who had the obligation to provide relevant information and justification for de-listing. Subsequently the petitioned government was responsible to approach the originally designating government to seek additional information and to hold consultations on the request. The flow of information between the governments could work vice versa, and they had the opportunity to consult with the Chairman of the Committee as well on.

160 Patty Hearst, 26 January 2002, Interview.


163 Ibid. paragraph 8(c).
the matter. If the petitioned government after examining the information wished to pursue the de-listing, it was to seek to persuade the designating government(s) to submit jointly or separately a request for de-listing to the Committee, but such request was not obligatory. The Committee decided by consensus, and if it wasn’t reached following further consultations, it forwarded the case to the Security Council\textsuperscript{164}. As it is, this mechanism thus not falls under the term of effective remedy, basically because the effectiveness is not set up properly. Although in some cases it could fulfil the term, in some others, for example if the governments refuse to submit a request to the Committee, remedy or more like the opportunity of remedy is completely jeopardized. It should be added though that the 1267 Monitoring Team recommended in its third and fourth reports that even if states are do not agree with a petition, they should forward them for de-listing to the Committee, and to enlarge the number of Member States that may initiate a de-listing procedure, because these actions might serve to address the legal caveat to a certain extent.\textsuperscript{165}

This shortcoming, along with the lack of transparency and due process were the subjects of most of the criticism projected towards the sanctions regime. The Security Council’s endeavour to address these comments resulted in a resolution which established a focal point, to ensure fair and clear procedures. Albeit it significantly enhanced what it was set up for, many have argued that there are still gaps in the complete realization of an entirely righteous procedure of combating listing either because of wrongful listing or even only for applying for exemptions. I will present these concerns along all the legal aspects, but first, I deliver the information on what the establishment of the focal point reached to accomplish.

\textsuperscript{164} Ibid. paragraph 8. (e).
2.6. The Focal Point and the Ombudsperson

“The strength of democratic societies relies on their capacity to know how to stand firm against extremism while respecting justice in the means used to fight terrorism.”¹⁶⁶

Tariq Ramadan

The idea to establish a focal point didn’t come out of the blue; several complaints were presented during the years, and it was mentioned as recommendation in the 2006 Watson report as well. Its installation brought a significant change, especially in how governments and previous doubters looked at the sanctions regime and at the mechanisms of the Committee; and of course it improved the accessibility for those listed. Transparency or at least its strong semblance appeared to silence the critics, even if it didn’t last forever. The establishment came about at the right moment, as regards to the experts seriously questioning the legitimacy and existence of the committee because of lacking peremptory norms.

The Secretary-General was requested to establish the focal point within the Secretariat as a Security Council Subsidiary Organs Branch¹⁶⁷ (which is a division working directly with the sanctions regimes providing substantive support and secretariat services to the subsidiary organs of the Security Council, including the Sanctions Committees). It is named ‘focal’ because it works for all active Sanctions Committees¹⁶⁸. According to its founding document, its main tasks are, inter alia, to receive de-listing requests from petitioners (individual(s), groups, undertakings, and/or entities on the Sanctions Committee’s list¹⁶⁹); to acknowledge receipt of the request, to inform the petitioner of the general procedure for processing that request¹⁷⁰; to forward the request to the designating government(s) and to the government(s) of citizenship

¹⁶⁸ Ibid, paragraph 2.
and residence; and to inform the petitioner about the Committee’s decision to grant the de-listing petition or to dismiss it.

The formation of the focal point did not abolish the opportunity of any petitioner to use the previously adopted de-listing procedure, namely via their government of residence or citizenship. Although the focal point was the initial method for listed entities to approach the Committee as individuals, Security Council Resolution 1904 in 2009, - and its amended version by resolution 1989 in 2011 - modified the procedure by vivifying the Office of the Ombudsperson. Resolution 1989 plays a unique role together with Resolution 1988, because they divided the regime into two. The Council’s decision to split the Al-Qaida and Taliban Sanctions Committee into two separate sanctions regimes was a pure political decision. The reason was to show support of the Afghan government, which had an ongoing political dialogue with the Taliban and consequently a respond to the demanded de-listing raised by Taliban as a precondition for talks. The Ombudsperson is only responsible for the Al-Qaida Sanctions Committee, meaning that the focal point remains to be the organ for requesting de-listing for all other sanction committees under the Security Council. Today the head of the Office is Kimberly Prost who fulfilled her first mandate and has been re-appointed for 30 months on 1 January 2013.

Under the old de-listing procedure and before granting the right to the Ombudsperson, the way to submit requests for de-listing as an individual to the committee was through the focal point. After receiving a de-listing request, the focal point forwarded it to the designating government(s) and to the government(s) of residence or citizenship for their information and possible comments which were encouraged to consult before recommending de-listing. Following the consultation, in case of any of these governments deciding in favour of de-listing, they must have forwarded their recommendation with an explanation either through the focal point or

---

171 Ibid. Tasks of the focal point. No. 5.
172 Ibid. Tasks of the focal point. No. 8.
directly to the Chairman of the Sanctions Committee, who then placed the request on the Committee’s agenda. Committee members were encouraged to share any information relating to the de-listing requests with the designating government(s) and government(s) of residence or citizenship.

As it was before, the Committee decided by consensus and if failing so, further consultations forego another vote on the matter before forwarding it to the Council.

Concerning the Ombudsperson’s tasks, he/she is mandated to gather information and to interact with the petitioner (also personally), relevant states and organizations with regard to a de-listing request. A four-month period - what can be extended with another two - of information gathering from all relevant sources, including the Monitoring Team’s findings and the petitioning state’s government, is available for the Ombudsperson before a two-month period – what can similarly extended once with two months - of engagement time, what is primarily set up for conducting dialogue with the petitioner, before it must submit a Comprehensive Report to the Committee. The Comprehensive Report summarizes all information specifying further their sources; describes the Ombudsperson’s activities with respect to this de-listing request, including the dialogue with the petitioner; and lays out the recommendation of the Ombudsperson what has to state his or her views on the possible course of de-listing.

Fifteen days is the period what the Committee has to review the Comprehensive Report, it is the timeframe while it can pose questions to the Ombudsperson. The Committee has a total of thirty days to present a recommendation either on retaining the listing or considering de-listing. In case the recommendation is promoting the maintenance of listing, the individual will remain on the Consolidated List, unless a Committee member submits a de-listing request which the Committee shall consider under its normal consensus procedures. If the outcome of the recommendation is de-listing, States must withdraw the measures imposed on the individual, group,
undertaking or entity under the sanctions regime within sixty days, unless the Committee decides during this period to maintain the listing. In case of no consensus the Chair shall submit the question of de-listing to the Security Council, which has sixty days to decide. Whatever the final decision is, the Committee must inform the Ombudsperson who then can transmit it to the petitioner. Rejected de-listing request entails a mechanism in which the Ombudsperson interprets the decision towards the petitioner in form of a letter which contains the process and publicly factual information gathered by the Ombudsperson and communicates the decision of the Committee.

Further main tasks of the Ombudsperson are to distribute publicly releasable information about the procedures of the Committee and to write biannual reports summarizing his or her activities to the Security Council.

As we can see, numerous amendments have been issued to reach more fair and transparent procedures, but unfortunately there are still shortcomings of the regime according to the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, Ben Emmerson. In accordance with his report and therefore his views, resolution 1267 and the institutions built around it “has evolved in nature and scope into a permanent tool of the United Nations counter-terrorism apparatus, more closely resembling a system of international law enforcement than a temporary political measure adopted by the Security Council with a view to averting an imminent threat to international peace and security. As a result, the regime has been subject to frequent criticism for its failure to incorporate a mechanism of independent judicial review.” In his report, the Special Rapporteur urged the Council to bring the Al-Qaida sanctions regime into conformity with international human rights norms and he called upon the Council to strengthen the Ombudsperson by making her recommendations binding and public, and by extending the length of her mandate. Main arguments were that the Ombudsperson process failed to satisfy legal standards guaranteeing listed individuals due process especially concerning independence and providing effective remedy, even though she “has gone to very

191 Ibid.
196 Ibid. paragraph 12.
197 Ibid. paragraph 1.
considerable lengths to make her Office as effective as possible,” although these shortcomings mostly stem from the structural setup of the system. The United Nations Human Rights Committee clearly stated that the power of an executive body to control or direct a judicial body “is incompatible with the notion of an independent tribunal.”

Since its establishment, the Ombudsperson’s recommendation has prevailed in every case, meaning that the Committee is satisfied with her work and her decisions. Most criticism - along with all the positive comments - are on how the independence compared to the procedure’s before was widened but in the meantime not sufficient enough and that her recommendations are not binding, therefore she is unable to grant relief. The aspects of independence are appointment and decision-making, and while she is appointed independently, her independence relating to decision-making and the ability to grant relief is contested. Although as it is mentioned above, her recommendations have always prevailed, the possibility of the Security Council to overturn her decision is constantly present. In reality, many have argued that she is able to provide the necessary fair and clear procedures and that her mandate provides strong guarantees of due process. In fact, resolution 1989, which reversed the presumption, is meaning that “an independent reviewer’s recommendation to delist is final unless unanimously overturned by 15 countries – a high bar with strong political and legal disincentives for exercising veto authority,” demonstrates the Ombudsperson’s authorisation.

Clearly the Ombudsperson process is failing to constitute formal judicial review of Security Council decisions: providing evidence to targets is not a requirement (although the Ombudsperson provides information to the petitioner), absence of hearing before definitive decision-makers (though the Ombudsperson process of dialogue, report and presentation before the committee constitutes hearing, and if the committee overturns the recommendation, it must provide reasons), and her recommendations are not binding (but the threshold of unanimous agreement of all 15 Council members is

---

198 Ibid. paragraph 33.
199 Ibid. paragraph 34.
high)\textsuperscript{204}. Despite all critical reviews, the current system appears to come “as close as meeting the calls for an independent and binding review mechanism as seems possible”\textsuperscript{205}.


Chapter Three

3.1. The Kadi cases

“Someone must have been telling lies about Joseph K., for without having done anything wrong he was arrested one fine morning.”

*Franz Kafka, The trial*

The most important and infamous case to challenge decisions of the 1267 Committee is that of Yasin Abdullah Ezzedine al-Qadi (Kadi), a man of Saudi origin. The judgements of his cases established precedents and forced the European courts to review their relation to the United Nations sanctions regimes and to examine the United Nations’ justification in relation with fundamental rights.

As it is presented before, human rights problems arise while introducing sanctions regimes where individuals are targeted instead of states, because initially there were no possibilities of any recourse for individuals to complain about the measures taken against them. Apart of human rights problems, the issue had “institutional connotations and it related directly to questions of checks and balances in the context of a system of collective security”206.

In general, the Kadi case’s importance lay at the decision whether a United Nations Security Council resolution should enjoy primacy over European Union (EU) law. In its judgement the Court did not allow for this primacy.

Kadi first appeared on the United Nations’ Consolidated List on 19 October 2001, after he was already added to the United States’ list of Specially Designated Global Terrorists207. As a direct consequence his assets were frozen in the European Union when as a response to the United Nations’ listing, the European Union added him to its own list within the framework of the Common Foreign and Security Policy (CFSP) and on Regulation 881/2002 (based on EC Articles 60, 301, 308) which

---


provided, *inter alia*, to freeze funds and other economic resources of individuals and entities associated with Osama bin Laden, the Al-Qaida and the Taliban. Kadi challenged his listing applying to the European Court of First Instance (CFI), known today as the General Court (GC) claiming that “the Council was not competent to adopt that regulation and that the regulation breached several of their (Kadi’s and Al Barakaat International Foundation’s) fundamental rights, in particular the right to property and the rights of the defence”\(^{208}\). At the very first instance the Court simply refused to review the EU regulation referring to the fact that it would amount to review the measure of the Security Council. The dismissal included, *inter alia*, that Member States were required to comply with Security Council resolutions according to the Charter of the United Nations, a Treaty which prevails over Community Law\(^{209}\).

Naturally, Kadi appealed against the judgements to the European Court of Justice (ECJ) which reviewed the lawfulness of the EU regulation transposing the regulation. The main argument of the Court was that as Article 6(1) of the Treaty on European Union clearly describes the protection of fundamental rights as a cornerstone of the Union’s legal order, which in this case were infringed. This statement brings to conclusion that therefore all Union measures must be compatible with fundamental rights\(^{210}\). The Court simultaneously reasoned that this does not amount to a review of the lawfulness of the Security Council measures, but it would only apply to the Union act that gives effect to the international agreement at issue and not the latter as such\(^{211}\).

Having established that, the only task was to review for compliance with fundamental rights. Since Mr. Kadi was not informed about the reasons of his inclusion in the list of individuals and entities subject to sanctions, he was unable to seek judicial review of these reasons, consequently his right to be heard and his right to effective judicial review and the right to property had been infringed. The CFI had no authority to review whether Security Council resolutions were consistent with fundamental rights, but in a subsequent move, it “empowered itself to check whether Security Council resolutions were consonant with norms of jus cogens, since the Court said, these rules have a higher status, are non-derogable, and are binding on all subjects of international law, including

\(^{208}\) Court of Justice of the European Union, 3 September 2008, Summary of the judgement C-402/05 P & C-415/05 P.


\(^{210}\) Court of Justice of the European Union, 3 September 2008, Judgement of joint cases C-402/05 P & C-415/05 P, paragraph 281.

\(^{211}\) *Ibid.* paragraph 286.
the organs of the United Nations”. A question if the Security Council should adhere to jus cogens is not new, Judge ad hoc Sir Elihu Lauterpacht in the Application of the Genocide Convention already stated: “jus cogens operates as a concept superior to both customary international law and treaty. 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.” Of course national or regional courts are not the proper place for reviewing Security Council measures, also because as such, a review may undermine the system of collective security. In its final judgement in 2008 the ECJ ruled that the CFI erred in law by holding that the Community judicature was not competent to review the legality of Regulation 881/2002 with regard to jus cogens. Under Article 61 of its Statute, the Court gave its own ruling, that the appellant’s right of defence, especially his right to be heard was not respected. Accordingly it resulted in an infringement of the right of judicial review, because the appellant was unable to defend his rights in satisfactory conditions before the Community judicature. Mr. Kadi’s plea in law relating to the restriction to the right to property - although the Court did accept the viewpoint that such restrictions could be justified in the fight against the threats to international peace and security posed by acts of terrorism – pointed out “that the contested regulation was adopted without furnishing any guarantee enabling Mr. Kadi to put his case to the competent authorities, whereas, having regard to the general application and effective continuation of the fund freezing measures affecting him, such a guarantee is necessary to ensure that his right to property is respected.” The judgement did not invalidate the EU measures immediately, but kept them in effect for another three months, allowing the Commission to remedy the situation from the point of view of protecting fundamental

214 Court of First Instance, 21 September 2005, case T-315/01.
216 Court of Justice of the European Union, 3 September 2008, Judgement of joint cases C-402/05 P & C-415/05 P.
217 Ibid.
rights. During this period of three months, the EU Commission sent a brief summary to Mr. Kadi with the reasons of the United Nations about his listing and giving him opportunity to comment. He replied, but the Commission decided to re-list him\textsuperscript{218}.

As expected, Mr. Kadi challenged the (re-)listing, before the General Court. In the judgement of his case against the European Commission\textsuperscript{219} the Court reviewed Council Regulation No. 881/2002 and Commission Regulation No. 1190/2008 and had to examine the division of competences between the Court of Justice and the General Court. Finally in 2010, the Court decided in favour of him, arguing that the “regulation was adopted without furnishing any real safeguard enabling the applicant 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 duration of the freezing measures to which he is subject”\textsuperscript{220}. Another important matter was that the Security Council still not deemed it appropriate to establish an independent and impartial body responsible for hearing and determining, as matters of law and fact, actions against individual decisions taken by the Sanctions Committee\textsuperscript{221}. The Commission “failed to take due account of the applicant's comments”\textsuperscript{222} and “did not grant him even the most minimal access to the evidence against him”\textsuperscript{223}, consequently the right of judicial review and the right to property were infringed. The Court also decided that the amendment to the Regulation No. 881/2002 “constitutes an unjustified restriction of his right to property”\textsuperscript{224}, also meaning that a breach of the principle of proportionality is also well founded\textsuperscript{225}. The sanctions committees’ measures on listing and as a result on freezing of assets, was meant to be open-ended, and preventive in nature, clearly not reliant upon criminal standards set out under national law\textsuperscript{226}, hence Mr. Kadi’s ten year presence on the list seems controversial. Such length of time, especially in a person’s lifetime questions the classification of the measures as preventive or punitive, protective or confiscatory, civil or criminal\textsuperscript{227}. Not only the

\textsuperscript{219} General Court, 30 September 2008, Judgement of the General Court, Case T-85/09.
\textsuperscript{220} Ibid. paragraph 192.
\textsuperscript{221} The Office of the Ombudsperson was only established in 2011, and as a matter of fact, she is not completely independent, although her presence enhanced the transparency of the sanctions regime and contributed to have the opportunity for fair hearing and remedy.
\textsuperscript{222} General Court, 30 September 2010, Judgement of the General Court, Case T-85/09, paragraph 172.
\textsuperscript{223} Ibid. paragraph 173.
\textsuperscript{224} Ibid. paragraph 193.
\textsuperscript{225} Ibid. paragraph 194.
\textsuperscript{227} General Court, 30 September 2010, Judgement of the General Court, Case T-85/09, paragraph 150.
Court, but the High Commissioner for Human Rights raised awareness on the issue in his report of 2 September 2009: “Because individual listings are currently open-ended in duration, they may result in a temporary freeze of assets becoming permanent which, in turn, may amount to criminal punishment due to the severity of the sanction. This threatens to go well beyond the purpose of the United Nations to combat the terrorist threat posed by an individual case. In addition, there is no uniformity in relation to evidentiary standards and procedures. This poses serious human rights issues, as all punitive decisions should be either judicial or subject to judicial review.”

The United Kingdom’s Supreme Court in a case where funds of individuals were frozen stated that the designated persons were like ‘prisoners of the state’ because “their freedom of movement is severely restricted without access to funds or other economic resources, and the effect on both them and their families can be devastating.”

All in all, the regulation, so far as it concerns the applicant was annulled. After all these decisions however, Mr. Kadi still remained on the list of the EU, as the timely appeal by the Commission, Council and the United Kingdom prevented the challenged measures from being invalidated. Mr. Kadi’s de-listing from the United Nations’ 1267 Consolidated List eventually occurred on 5 October 2012, after he applied for de-listing through the highly criticized Office of the Ombudsperson.

Later, on 18 July 2013, the Court of Justice finally decided in favour of him, dismissing the appeals on the reasons “that none of the allegations presented against Mr. Kadi in the summary provided by the Sanctions Committee are such as to justify the adoption, at European Union level, of restrictive measures against him, either because the statement of reasons is insufficient, or because information or evidence which might substantiate the reason concerned, in the face of detailed rebuttals submitted by the party concerned, is lacking.” Ergo his inclusion on the list of subjects whose resources must be frozen on account of their potential relationship with Al-Qaida was in breach of his fundamental rights.

Several legal experts drew comparison between Mr. Kadi’s struggles and the endeavours of Kafka’s protagonist in his book The Trial, pointing at the similarities of

---

229 United Kingdom Supreme Court, 27 January 2010, Her Majesty’s Treasury v. Ahmed and Others (2010), UKSC 2, paragraph 60.
230 General Court, 30 September 2010, Judgement of the General Court, Case T-85/09, paragraph 195.
231 Criticized in the way that it isn’t independent along with other shortcomings.
233 Court of Justice of the European Union, 18 July 2013, Judgement of the Court of Justice of the European Union, Cases C-584/10 P, C-593/10 P, C-595/10 P.
the two persons, who try to fight the unknown accusations against them without any progress. The only difference is that while Kafka wrote his fictional work with an absurd, sarcastic aspect to the world, Mr. Kadi had to face these events in real life.

These European judgements, the reports of international organizations and governments, observations of scholars and special rapporteurs concerning the inadequacy of the procedures of listing or de-listing revealed the need for substantial change, what happened through numerous resolutions amending the 1267 Committee’s “founding” document, Resolution 1267.
3.2. Security versus Justice

“It would be easy to define terrorism as attacks against human rights and international humanitarian law forbids attacks against innocent non-combatants which is often the definition used for terrorism.”

Joichi Ito

It is clearly visible that security and justice are the two concepts connected the closest to the Sanctions Committee and the case of Mr. Kadi. The norms, rules, international treaties what humanity created or, *a fortiori* (argument from a yet stronger reason), compliance with these keep our world a safe, understandable and just place. Governments, states signed multiple international agreements to cooperate with and for each other in maintaining the wholeness and peace of the international scene. The controversies of Mr. Kadi’s case and the dilemma that will be presented are stemming from the same question. Can security, its sustenance override fundamental human rights in a given situation, or vice versa? Since fundamental rights are substantial in order not to be able to be deprived of them, what consequences does it bring if Courts, decisions, procedures make exemptions whether they are aware or not of their actions? The two investigated concepts are justice and security. During the following examination they will be observed in a very broad way, not only considering international security and (fundamental) human rights, because it may distort some of the findings, but as security of all sorts involving international security, public security or food security; and justice as a collective term for law, legal order, and human rights.

234JOICHI ITO, 12 March 2005, More notes from Atocha, see at: http://joi.ito.com/weblog/2005/03/12/more-notes-from.html
In order to investigate the possible outcomes three scenarios will be examined:

1. Justice and security are equal, they have interrelating parts, they interfere in each other’s sphere;
2. Security incorporates justice, meaning that security is primary compared to justice;
3. Justice incorporates security, meaning that justice is primary compared to security.

In my opinion the first is the basis for the following two; it is only the measure, the scale of the interrelating parts which determines the outcome. There could have been a fourth scenario where justice and security does not meet at all, but only on the ground of fiction, since a breach of justice consequently brings a breach of security, even if it is strikingly small. According to the legal documents, experts, individuals, groups, entities and governments, the unique occasions of the extreme oppression of one another raise the most disputes and legal cases concerning these concepts.

First, defining of basic concepts (security and justice) and of the treaties on what the research is based is necessary. These two are linked because basically the treaties and statutes determine the concepts. The most important in this sense is the United Nations Charter, because according to its Article 103 the Members’ obligation under the Charter and any other international agreement, their obligations under the Charter shall prevail²³⁵, and therefore it will be the basis of this research. As Article 1 of the Charter declares, to reach security, “the prevention and removal of threats to peace...the suppression of acts of aggression or other breaches of peace”²³⁶ must be established. Oddly or not, the article describes that to reach the state of security - actions must be in conformity with the principles of justice and international law. In its second paragraph the two concepts seems to intertwine for another time - if we consider peace as the ultimate state of security - when it declares: “respect for the principle of equal rights and self-determination of peoples, and to take other appropriate measures to strengthen universal peace.”²³⁷ Article 1 furthermore advertises respect for human rights and fundamental freedoms. The fundamental rights are those rights to which all human beings are inherently entitled. The United Nations adopted the Universal Declaration of

Human Rights (UDHR) in 1948 in order to define the meaning of ‘fundamental freedoms’ and ‘human rights’ in the United Nations Charter, thus the organization obliged itself to follow and comply with its guidelines.

International peace and security is a rather narrow concept, meaning that achieving it would only take as much as ceasing all domestic (?) and international conflicts and agree on maintaining this state. However, the world seems a rather violent place where conflicts arise on a daily basis. The United Nations has dedicated its work on settling disputes and achieving peace through different channels, such as the resolutions of the Security Council or building economic or social welfare. Engaging in war as such has been condemned as crimes multiple times throughout the twentieth century (Kellogg-Briand Pact, Nuremberg Charter, United Nations Charter) by notable documents. The Charter of the United Nations binds nations to seek resolution of disputes peacefully, thus basically only self-defense against an armed attacked is seen lawful\(^{238}\).

Justice as such will have a very broad interpretation involving fundamental rights as the core debate in the Kadi cases. According to the UDHR the equal inalienable rights of all members of humanity consequently are the foundation of freedom, justice and peace in the world\(^ {239}\). As the UN Charter’s purpose of international peace should be in conformity with justice, international law and with respect to equal rights, the same way around equal rights could bring peace in the world. From comparing only the purposes of the two documents we can see how interrelated the two concepts are.

Concerning the examination of the scenarios that are set up, my theory is that the first scenario is the base for all the following ones. Every impact, breach on justice necessarily damages security and vice versa. The only matter to be decided is how large is the impact is in one another’s sphere. The second and third scenarios investigate the extreme examples of such interferences.

The moderate interference model describes a stance where either a breach of justice or a breach of security generates an effect on the other, but restoration happens by co-operation and complement of each other.

\(^{238}\) United Nations Charter, 1945, Article. 42.
\(^{239}\) The Universal Declaration of Human Rights, 1949, Preamble.
If justice is harmed in any way, security will be harmed as well, because justice and law were created to maintain the norms and moral of humans to live peacefully together. To interpret it more clearly, in such a case a not so severe breach of law only accounts for a not so severe breach of complete security. As an example: A person enters the Schengen area with a granted visa of three months, but he does not leave it nor renews his visa. According to Article 5 of the Convention applying the Schengen Agreement, the man violates the law and therefore poses a threat to the security of the European Union. Procedures against the person will end in extradition, which after the security of the EU is re-established and the infringement of law will cease to exist. The example, although covers a breach of law resulting in the violation of security, it does not pose global threat, nor does law has been set in primacy compared to security or vice versa. Our two main concepts co-operate to restore the integrity of the other. As it is mentioned above, this does not accounts for a severe breach of law. Although the severity of the infringement of security in the following example does not, but the severity of infringement of justice is considerable. In this example a European citizen wishes to travel within the Schengen area, but he is refused to do so. In this case the person’s fundamental rights, specifically, his right to free movement is violated. A

---

possible prevention of breach of security may occur; nevertheless, from a legal aspect such a case is severe.

The second model describes a situation where security enjoys primacy compared to justice.

The cases of Mr. Kadi basically fall under this model, since he was deprived of his fundamental rights of due process and freedom of movement. Throughout his cases against the ECJ and the General Court Mr. Kadi’s lawyers pleaded the absence of opportunity to be presented of the charges against their protégé. The United States refused to present the charges it upheld against Mr. Kadi, and he is still on the List of Specially Designated Nationals (SDN) as of 17 April 2014\textsuperscript{242}. The model illustrates a situation where security - whether global or local – is deemed more important than the integrity of law. Such setting is impossible to exist in theory, but Mr. Kadi’s case is a unique instance where this highly controversial and from the aspect of law unthinkable phenomenon occurred. The 1267’s Consolidated List, as well as the SDN is entitled to take restrictive measures against individuals for the sake of security, but no one is entitled to violate fundamental rights under any circumstances. Over the ten years of Mr. Kadi’s listing a long list of shortcomings revealed itself of the sanctions regimes. The undisputable nature of the sanctions violated due process rights, and many have

also argued that the temporary assets freeze measures turning into permanent one - because they are maintained for years or as in the case of Mr. Kadi almost a decade - are indirectly violating the right to life of not only the designated individual, but also his close relatives. The lack of the opportunity to seek effective remedy was the first sign of a probable outcome as such illustrated in this model. While in the first model the two concepts were co-operating to restore the balance and their reciprocal protection, here, security seem to be overwriting justice intentionally to secure its primacy. This behaviour is not common and it does not happen frequently. One of the other examples of such model realizing is when people are secluded from public into quarantine for health safety reasons. Although the right to freedom of movement is severely violated, the security of the public is deemed more important, and in most cases, the quarantined people understand their risk to others deriving from free movement and accept their separation. Terrorism of course requires a different, special kind of quarantine, which is the List at the moment. Amnesty International and Human Rights Watch are organizations which had campaigns to draw attention to violations of human rights connected to terrorism, but weren’t too successful. They concentrated on the treatment in Guantanamo Bay, especially the trivialization of torture, possibly because it was much more spectacular than due process rights. The issue of the established sanctions regime bearing this burden of shame to not comply with fundamental rights was and is the most usual complaint against it. The assets freeze and the travel ban are tremendously effective regulations to place a hold on the dispersal and support of terrorism by mobilizing only minor force, therefore useful measures in order to respond to threats against a possible violation of global security, but their drawbacks are harmful not only for certain individuals and entities but for the integrity of justice. As a former Security-General of the United Nations, Kofi Annan has stated: “We cannot achieve security by sacrificing human rights. To try and do so would hand the terrorists a victory beyond their dreams.”

Obviously, policymakers of the United Nations did not intend to configure the restrictive measures to be adverse to justice, but the long-lasting (and potentially still existing) lack of reformation is an accountable deficiency of their work. Establishing more transparent procedures of listing and adequate, although not completely effective remedy for de-listing are the reactions to the complaining echo of

legal experts, governments, and of course wrongly listed individuals and entities. Wrongly listed individuals such as Mr. Kadi were the most disturbed by these deficiencies of the sanctions regime. The United Nations Security Council is entitled with special powers and its resolutions are binding to all members. A resolution - such as Resolution 1267 - which is adopted under Chapter VII of the Charter even has higher authorization stemming from the fact that it can be enforced in case of not-compliance with its provisions. Because Chapter VII’s actions are matters concerning threats to peace and acts of aggression, it stands as the foundation of global security. Problems arose in the case of Mr. Kadi when the appellants pointed to Article 1 of the Charter which claims unalienable rights equally entitled to everyone. According to the Charter, security and justice shall bear equal importance and shall not harm each other’s integrity for the primacy of one another.

The next scenario sets up the opposite end of extremist evaluation of the power of concepts where justice is set ahead of security.

Fig. 3: Model three. (The illustration is the work of the author.)

Such model comes to existence if justice is deemed more important than security even if a severe breach on the latter occurs. While the opposite also seemed impossible to happen but eventually it did, this far-out scenario has to be examined as well. The potential occurrence of this model though is much smaller, because law respects other laws, such as the Charter, therefore justifying a law which is probable to harm an
already existing law\textsuperscript{245} is scarce or simply non-existing. Although if we try to interpret the situation from another aspect, we can see how the scenario models everyday life wherein law stands over the society in order to protect it. Law as in the most general meaning is a behavioural rule or norm what regulates what an individual or entity may or may not do in certain situations. There are numerous functions of law, but the functions of criminal law along others are to maintain order and to protect individuals and property, while administrative law is regulating administrative units of governments. In democracies the rule of law controls everything, thus law, and its inviolability is fundamental for a constitutional state. The Bush administration in 2006 created the institution of military commissions\textsuperscript{246} in order to try “alien unlawful enemy combatants engaged in hostilities against the United States for the violation of the law of war and other offenses”\textsuperscript{247}. The Act basically established a Court against terrorist suspects, but in 2008 the Supreme Court held in the case Boumediene vs. Bush (2008) that because the detainees’ use of habeas corpus\textsuperscript{248} and their access to court was restricted, the Military Commissions Act is unconstitutional. In 2009, with one of the first orders after his inauguration, President Obama closed the Guantanamo Bay detention camp and directed a halt on military commissions\textsuperscript{249}, although the Congress prevented the closure of the facility by refusing to appropriate the required funds\textsuperscript{250}. This example shows the primacy of justice, because closure of unlawful commissions and detention camps truly enhances the rule of law against security measures.

\textsuperscript{245} Treaties, such as the United Nations Charter are agreements under international law, violation of obligations of them are reasons to hold the perpetrator liable under international law.

\textsuperscript{246} Congress of the United States, 17 October 2006, Military Commissions Act of 2006, HR-6166.

\textsuperscript{247} Ibid. paragraph 948b. (a).

\textsuperscript{248} A judicial mandate to a prison official ordering that an inmate be brought to the court so it can be determined whether or not that person is imprisoned lawfully and whether or not he should be released from custody. A habeas corpus petition is a petition filed with a court by a person who objects to his own or another's detention or imprisonment.


Conclusion

“I think one has to say it's not just simply a matter of capturing people and holding them accountable, but removing the sanctuaries, removing the support systems, ending states who sponsor terrorism. And that's why it has to be a broad and sustained campaign.”

Paul Wolfowitz

The Al-Qaida and Taliban Sanctions Committee and later their divided successors are one of the most divisive topics among legal and security experts, organizations, individuals and governments. Since the end of the Cold War terrorism has stepped up as probably the most constant and fearful threat to global security. Its inscrutable and cross-border nature makes it tremendously hard to fight it and though countries had and have individual counter strategies developed against it, the international collaboration is obviously more successful. Conventions and multilateral agreements were the first steps of such collaboration, but leaders and experts realized that without any obligatory pressure to ratify these and therefore without insufficient global cooperation the threat will not cease to exist. This is the reason, why in 1999 the Security Council has decided to make a difference and to adopt Resolution 1267 under Chapter VII of the Charter and by it, make it a militarily enforceable decision. The special character of targeted sanctions seemed to be just the right way to confront the terrorists and associates of them, but simultaneously not harming innocent people, regions or countries. The extraordinary nature and purpose of the established sanctions regime was to be perfected during its operation several times and obviously, a changing environment and new dimensions still require time-to-time amendments, such as the partition to function further as two sanction regimes. Other alterations considered fastidious aspects, like the transparency and procedures of its functioning, and most importantly: human rights. While some problems were easier to challenge, others seemed and still seem to be somewhat unsolvable. Transparency for example, as in the

---

appearance of information provided for listing is a matter of dispute between designating states and designated individuals, groups, entities. While the persons and groups on the list complained about the lack of information provided to them about their listing, the usual response of governments included security concerns and secret intelligence matters. Today, the current operating rules demand as much information provided as possible, but of course this does not necessarily equals with the amount of information it there might be. Human rights on the other hand are inalienable and inherent to all human beings and the United Nations itself proclaims to be so in its founding Charter. Although the imposed sanctions are opposed to several fundamental rights such as the freedom of movement or right to due process of law, it was rather the latter which raised serious questions and thus gave rise to doubts of the legality of the sanctions regime in whole and for some for even the credibility of the United Nations. In some cases in the early stage of the sanctions regime, the shortcomings occurred simultaneously, like in the case of Mr. Kadi, who couldn’t get to know the reasons for his listing nor could he challenge it according to his rights because of the lack of an established de-listing procedure for individuals. In such instances the relation of security and justice comes up as a question. During my research on the sanctions regime of the 1267 Committee, I perceived that the shortcomings and the resolutions correcting them followed each other. At first, the amendments trying to set the regime ‘straight’ were coming rather slowly, altering, expanding and perfecting the sanctions regime. The modifications to be able to apply for de-listing as an individual without relying on a state was a significant step towards transparency. The introduction of the Focal Point, and later of the Office of the Ombudsperson extended the rights of designated individuals to challenge their listing and the latter established a reversed decision-making process, concluding in more desirable results towards reaching fair and clear procedures and guarantees of due process. Although at the moment, to apply for de-listing is available to everyone and the Ombudsperson’s recommendations have always prevailed so far, the fact that the Council – which is obviously not a judicial body – can decide contrary to her decision still generates disputes.

Mr. Kadi’s cases challenging his listing and the judgements contributed to the development of the procedural flaws in the regime by highlighting the deficiencies of the lack of respect for fundamental human rights. The Charter clearly states that security and human rights are equally important and that its main purposes are achieving a peaceful and just world where everybody is equal. The reason for the Security Council
to not respond to criticisms instantly and not amending the functions of the Committee or not creating a judicial body that would be responsible for the review of cases is simple. Since the Committee is the creation of the Security Council – a purely political body – the actors want to hold their power over the List. In case they would establish a judicial body, The Council would not have authority anymore to oppose any decision the judicial body makes, thus the Members – who are the designators as well – would lose the ability to hold the person or group on the List. A judicial body should also have the power to demand further information from the States concerning the listed, therefore secret intelligence material would be exposed to the public, which is unacceptable to certain governments. The infringement of human rights seems to be neglected if security concerns are present. Although the reasoning that global security is more important than fundamental rights is somewhat pleasing to a lot of people and governments, since equality for everyone is a cornerstone of modern humanity, the actors must suit their strategies accordingly. The dilemma should not be that global security - or directly in a case-by-case event the life of hundreds of people as it is in terrorist attacks - is at stake contrary to the inalienable rights of someone, but rather his or her listing is rightful with certainty. Although fundamental human rights must be granted to everyone despite of his or her actions or occupation, on a scale where the other pan of the scale contains global security or possibly the right to life, the latter will prevail. The conclusion is, that as in so many other instances, security, or as it is in this case: global security is deemed more important for the political decision-makers. In my opinion this should not be necessarily condemned, since it seems, that the States and their leaders are thinking in the long run. Therefore my recommendations would concentrate on the further enhancement of an undisputable listing procedure with emphasizing on the identification of the persons in order to reduce wrong listing and to make a bigger effort in checking the background and the basis for inclusion on the list. An office for monitoring all incoming proposals for listing, who could give recommendations, could be sufficient. The Ombudsperson would have the capacity and resources to conduct such a work, but creating another independent body is also possible. States would still bear the opportunity to halt automatic listing, but an independent body could help them in their work, which would obviously function with complete discretion. In order to achieve complete discretion the person should have long-term mandate, which would also naturally enhance his or her perception. If the position would not be fulfilled by the Ombudsperson, the new position shall report to
the Committee. Such a position would reduce the now already small number of wrong listings even more and could contribute to reach a higher level of fair and clear procedures. Concerning due process rights, because of the obvious reasons why the Security Council continuously refuses the idea to establish an independent judicial body, the further expansion of rights of the Ombudsperson is the only viable way to strengthen these rights. Without an independent judicial body, these rights will never be granted completely, but unfortunately it is highly unlikely that the Council would allow to any body to overwrite its decisions.
Epilogue

The topic – the sanctions regime against terrorists connected with the Taliban and Al-Qaida – of the thesis covers an area of security studies which is a highly disputed and profoundly researched subject. Many scholars, political decision-makers, legal and security experts have dealt with the essential questions the topic brought along. The reports of external observers, the articles written about the shortcomings of the regime and about the legal cases all contributed to the development of the regime and to the successful tackles of all kinds of legal disputes connected with it. For these reasons and furthermore because of the still existing problems I encourage every forthcoming scholar interested in counter-terrorism to research the topic. Among the sanctions regime in force, the 1267 Committee has the most names on its list, and is deemed the most developed, therefore further progress in perfecting its functioning would help to evolve other sanctions regimes. Additional research of the United Nations’ specifically counter-terrorism related committees could offer an even more complex view on this excessively important phenomenon and could deliver results which bring closer the ultimate purpose of the organization: universal peace and equal rights.
References

Primary References

ANNA LINDH, 4 December 2002, Helsinki Conference.

BAN KI-MOON, 16 February 2007, Statement to the General Assembly.


Convention on Offences and Certain Other Acts Committed on Board Aircraft.

Court of First Instance, 21 September 2005, case T-315/01.

Court of Justice of the European Union, 18 July 2013, Judgement of the Court of Justice of the European Union, Cases C-584/10 P, C-593/10 P, C-595/10 P.


Court of Justice of the European Union, 3 September 2008, Judgement of joint cases C-402/05 P & C-415/05 P.


European Court of Human Rights, König vs. Germany, judgement, 28 June 1978.

Executive Order 13660, 6 March 2014.

General Court, 30 September 2008, Judgement of the General Court, Case T-85/09.

GEORGE W. BUSH, 20 September 2001, Address to a joint session of Congress and the nation.


International Covenant on Civil and Political Rights, 1954.

KING ABDULLAH II OF JORDAN, 7 February 2010, Interview.

Office of Foreign Assets Control, Specially Designated Nationals and Blocked Persons List, 17 April 2014.
PATTY HEARST, 26 January 2002, Interview.
SIR JEREMY GREENSTOCK, 1 October 2001, General Assembly Debate on Terrorism.
TONY BLAIR, 18 March 2003, Speech in Great Britain’s House of Commons.
Treaty of the European Community, 1957
United Nations General Assembly Resolution, 18 December 1990, 45/158.
Committee for the conduct of its work.
Guidelines, Amended version.

VIRGINIA FOXX, 13 July 2005, Speech in the US Congress.

Secondary References


Jürgen Habermas, 2003, Philosophy in a Time of Terror, University of Chicago Press.


Simon Chesterman & Beatrice Pouligny, 2003, Are sanctions meant to work? The politics of creating and implementing sanctions through the UN, Global Governance, Vol. 9, pp. 503-518.


Bibliography


GILES FRASER, 8 November 2013, *Yassin Kadi’s ordeal at the hands of the US security services is Kafka incarnate*, The Guardian, see at: http://www.theguardian.com/commentisfree/belief/2013/nov/08/vassin-kadi-ordeal-us-kafka-incarnate.


