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TARGETED SANCTIONS AND ACCOUNTABILITY OF THE UNITED NATIONS' SECURITY COUNCIL

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Table of Contents

Abbreviations

AJIL	American Journal of International Law
CFSP	Common Foreign and Security Policy
EC	European Communities
CFI	European Court of First Instance
ECHR	European Convention on Human Rights
ECJ	European Court of Justice
ECtHR	European Court of Human Rights
EU	European Union
FRY	Federal Republic of Yugoslavia
GA	General Assembly
ICCPR	International Covenant on Civil and Political Rights
ICJ	International Court of Justice
ILC	International Law Commission
ILA	International Law Association
NYIL	Netherlands Yearbook of International Law
SC	Security Council
UN	United Nations

1. Introduction

It is generally considered amongst states and scholars that the activities of the Security Council in recent years, especially after September 11, 2001, have broken new ground. Recent developments, namely the increasing role of the Security Council in confronting the dangers created by international terrorism, have marked a milestone for an organization which for decades was faced with a constitutional stale-mate as a result of the East-West conflict. It seems that the Security Council does not only execute the primary responsibility for the maintenance of international peace and security, but has recently acted as a sort of supranational administration in the fight against terrorism. The Security Council's current sanctions structure is not directed solely towards member states, but also against individuals and private entities resulting in serious consequences for the parties involved. This development marks a stark difference from the Security Council's earlier practice.[1]

This new development has been subjected to criticism from various entitites in the international fora, including institutions within the United Nations system. The most prominent example was a call from the UN General Assembly in its World Summit Outcome Document of 2005. It stated the following:

"We also call upon 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 humanitarians exceptions."[2] [emphasis addes]

There are currently ten sanctions regimes in place which have been imposed by the Security Council acting under Chapter VII of the UN Charter. Eigth of the ten sanctions regimes have been established with the purpose, *inter alia*, of designating individuals and entities as targets of sanctions.[3] Usually these sanctions encompass a travel ban, an

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[1] See e.g. K. Zemanek, *Is the Security Council the Sole Judge of its Own Legality? A Re-Examination*, in A. Reinisch and U. Kriebaum (eds.), *The Law of International Relations – Liber Amicorum Hanspeter Neuhold*, Eleven International Publishing 2007, pp. 484-489.

[2] See World Summit Outcome Document, General Assembly Resolution 60/1, UN Doc. A/RES/60/1 (16 September 2005), para 109.

[3] See B. Fassbender, *Targeted Sanctions and Due Process*, Study commissioned by the United Nations Office of Legal Affairs, Humboldt-Universität zu Berlin 2006, p. 4.

asset freeze and arms embargoes. One sanctions regime in particular has gained importance because of the relative high number of individuals and entities listed.[4] That sanctions regime concerns Al-Qaida and Usama bin Laden. This sanctions regime and its implications is the subject of this paper.

2. The concept of targeted sanctions

According to Art. 24 of the UN Charter the Security Council has the primary responsibility for the maintenance of international peace and security. One of the measures which the United Nations has at its disposal for the maintenance of international peace and security according to the same instrument are economic sanctions as prescribed in Art. 41. According to the article the Security Council may:

> "[...] decide what measures not involving the use of armed force are to be employed to give effect to its decisions, and it may call upon the Members of the United Nations to apply such measures. These may include complete or partial interruption of economic relations and of rail, sea, air, postal, telegraphic, radio, and other means of communication, and the severance of diplomatic relations."[5]

This measure, as well as the ability to authorize the use of force according to Art. 42, serve as tools in consequence of a breach of international rules by individual states. When the Security Council imposes economic sanctions or authorizes the use of force it has come to the conclusion that the targeted state is in violation of international law (or

[4] As of September 30, 2007, the committee responsible for the maintenance of a sanctions list, the socalled 1267 Committee, had a list of 489 individuals and entities subject to sanctions. The list included 142 individuals associated with the Taliban and 223 individuals and 124 entities involved with the Al-Qaida network. See further Letter dated 15 November 2007 from the Chairman of the Security Council Committee established pursuant to resolution 1267 (1999) concerning Al-Qaida and the Taliban and associated individuals and entities addressed to the President of the Security Council, S/2007/677, p. 11.

[5] The precursor of and partial model for Art. 41 of the UN Charter was Art. 16 para 1 of the League of Nations Covenant. See further B. Simma (ed.), *The Charter of the United Nations – a commentary*, 2nd ed., C.H.Beck 2002, pp. 736-737.

values which are thought to be common to the international community) and the imposition of the values of the international community is necessary.[6]

The Security Council has on many occasions decided on or recommended economic sanctions which have entailed breaking off economic relations, embargoes on imports and exports, the blocking of financial operations, as well as other sanctions, e.g. embargoes on weapons, the suspension of co-operation in scientific and technical fields.[7] The Security Council imposed economic sanctions prior to 1990 on only two occasions, namely on Southern Rhodesia in 1965 and South Africa in 1977. However, between 1990 and 2000, sanctions were imposed on numerous occasions. The states which were targeted were e.g. Iraq, Somalia, FRY, Libya, Liberia, Angola, Rwanda, Sudan and Afghanistan.[8]

These sanctions had serious consequences for the states targeted, in particular the civilian population. As the effects of economic sanctions, in particular horrific loss of human life and distortion of economic activity in forms of black markets, and the sanction‘s inability to affect directly the individuals responsible for the violation of international law, many began to question not only the ethical basis of the imposition of economic sanctions, but also the legal limitation thereof.[9]

These sanctions were directed at authoritarian regimes which acted in violation of international law. The rationale for emposing economic sanctions has been that in this way the regime controlling the state would be forced to comply with the will of the Security Council – representing the international community – but not to punish the

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[6] The principles laid out in the Charter have their own internal morality as they are created in the conviction that preservation of peace is the most important factor in the protection of human rights. When the Security Council acts in accordance with Chapter VII of the Charter it acts on behalf of the international community, but is bound by this morality which the Charter‘s principles are founded upon. If a state acts unilaterally based upon its own moral or political assessment it rejects the community‘s shared morality in preference for its own. See further M.E. O‘Connell, *Taking Opinio Juris Seriously, a Classical Approach to International Law on the Use of Force*, Customary International Law On The Use of Force, Koninklijke Brill NV 2005, p. 29.

[7] A. Cassese, *International law*, 2nd ed., Oxford University Press 2005, p. 311.

[8] See H. Freudenschuss, *Collective Security*, in F. Cede and Lilly Sucharipa-Behrmann (eds.), *United Nations – Law and Practice*, Kluwer Law International 2000, p. 80.

[9] A. Reinisch, *Developing Human Rights and Humanitarian Law Accountability of the Security Council for the imposition of Economic Sanctions*, 95 AJIL 2001, pp. 851-852.

state in question.[10] Furthermore, the economic sanctions according to Art. 41 of the Charter have been viewed as a logical approach to a problem of compliance as they are not as grave as the authorization of the use of force based on Art. 42 of the Charter.[11] The regimes, which the sanctions have been targeted against, have, however, turned this rationale around and presented a totally different picture to its citizens which have borne the consequences as a result. This fault in the United Nations sanction system was acknowledged and efforts made to remedy the incomplete system.

The effectiveness of economic sanctions has on numerous occasions been questioned.[12] As a result of considerable criticism individual states began initiatives and proposals to amend the sanctions regime and to make it more targeted, i.e. to direct the sanctions not at states – and in practice against the civilian population as a whole – but at the power elites which were responsible for government policy inconsistent with international law. These inititatives can be divided into three processes. Each part entailed meetings between government officials and international experts concerning a possible reform of the UN's sanctions regime. The first part, the Interlaken process, took place in 1998-1999 and addressed targeted financial sanctions[13]; the second part, the Bonn-Berlin process, took place in 1999-2000 and was directed at the design and implementation of arms embargoes and travel and aviation related sanctions[14]; the third part, the Stockholm process, took place in 2002-2003 and focused on how the sanctions covered in the Interlaken process and the Bonn/Berlin process could be implemented and monitored.[15]

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[10] J. Combacau, *Sanctions*, in R. Bernhardt (ed.), Encyclopaedia of Public International Law, Vol. IV, Elsevier 2000, p. 314.

[11] M.D. Evans, *International law*, 2nd ed., Oxford University Press 2006, pp. 606-607.

[12] See Millennium Report of the Secretary-General of the United Nations, "We the Peoples": The Role of the United Nations in the 21st century at 49-50. UN Doc. A/58/817.

[13] See further *Targeted Financial Sanctions – a manual for design and implementation*, Watson Institute for International Studies, Brown University 2001, and www.smartsanctions.ch (visited April 18, 2008).

[14] M. Brzoska (ed.), *Smart Sanctions: The Next Steps. The Debate on Arms Embargoes and Travel Sanctions within the Bonn-Berlin Process*, Bonn International Center for Conversion 2001.

[15] P. Wallensteen, C. Staibano and M. Eriksson (eds.), *Making Targeted Sanctions Effective – guidelines for the Implementation of United Nations Policy Options*, Uppsala University 2003. See also the homepage www.smartsanctions.se which is dedicated to this initiative (visited April 18, 2008).

The current sanctions regime of target lists containing names of individuals and entities administered by a subentity of the Security Council is not a product of the Interlaken process, Bonn/Berlin process and Stockholm process. As will be discussed later the current system of targeted sanctions was established while the afore-mentioned initiatives were in progress. However, the discussion which took place seems to have affected the current system of targeted sanctions.

3. The United Nations Targeted Sanctions Regime

3.1 The Establishment of the Sanctions Regime

The bombings of the United States embassies in Nairobi, Kenya and Tanzania on August 7, 1998, and the escalating fighting in the civil war in Afghanistan resulted in the adoption of S/RES/1189 (1998), S/RES/1193 (1998) and S/RES/1214 (1998). These resolutions were directed at the Taliban regime, which would eventually take control of Afghanistan, and its close ties with Usama bin Laden and the Al-Qaida network. Following the killing of Iranian diplomats and a journalist, the Security Council adopted S/RES/1267 (1999). According to the resolution the Council acted under Chapter VII of the UN Charter and Rule 28 of its provisional rules of procedure when it established a committee consisting of all members of the Security Council (hereinafter refered to as the Committee or 1267 Committee).

The resolution insisted that the Taliban regime comply with previous resolutions of the Security Council concerning international terrorism and further demanded that the Taliban regime turn over Usama bin Laden. In order to facilitate compliance the resolution described measures which all member states were to implement.

The Committee had mainly two tasks in this respect. Firstly, it had an administrative function, which entailed communication with member states concerning implementation and the forwarding of periodical reports to the Security Council. Secondly – and more importantly – the Committee was to supervise the implementation of measures instructed by the resolution. The measures concerned meant that member states should: (a) deny permission for aircrafts to take off from or land in their territory if owned, leased or operated by the Taliban, and (b) freeze funds and other financial

resources owned or controlled by the Taliban.[16] This resolution was not the first of its kind.[17] Its stipulation presupposed, as had been done on one occasion, that implementation, including the assessment whether an individual or entity were associated with the Taliban regime, would fall solely under the jurisdiction of individual member states.

A new approach was taken with the adoption of S/RES/1333 (2000). That resolution introduced new measures which were wider in scope and included: (a) prevention of the direct or indirect supply, sale and transfer of arms and related material; (b) prevention of direct or indirect sale, supply and transfer of technical advice, assistance, or training related to the military activities of armed personnel under the control of the Taliban; and (c) the withdrawal of member states' military officials, agents, advisers and other individuals advising the Taliban. Furthermore, measures which entailed the freezing of funds and other financial assets were not limited to the Taliban regime, but included also the Al-Qaida network. Finally, a widened mandate for the 1267 Committee was introduced. The new mandate included the establishment and maintenance of updated lists, based on information provided by states and regional organizations, of individuals and entities associated with Usama bin Laden.[18]

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[16] Para 4 of S/RES/1267 (1999) reads:

> (a) 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 as designated by the Committee [...], unless the particular flight has been approved in advance by the Committee on the grounds of humanitarian need [...];
>
> (b) Freeze funds and other financial resources, including funds derived or generated from property owned or controlled directly or indirectly by the Taliban, or by any undertaking owned or controlled by the Taliban, as designated by the Committee [...], and ensure that neither they nor any other funds or financial resources so designated are made available, by their nationals or by any persons within their territory, to or for the benefit of the Taliban or any undertaking owned or controlled, directly or indirectly, by the Taliban, except as may be authorized by the Committee on a case-by-case basis on the grounds of humanitarian need.

[17] Although the UN's sanction regime included financial elements and other sanction efforts on previous occasions, it did not entail financial sanctions against individuals until the adoption of S/RES/1173 (1998) which imposed targeted financial sanctions against the UNITA political movement in Angola, its senior officials and their immediate families. See further *Targeted Financial Sanctions – a manual for design and implementation*, Watson Institute for International Studies, Brown University 2001, pp. ix-x.

[18] Resolution S/RES/1333 (2000), para 16(b) reads: "To establish and maintain updated lists, based on information provided by States and regional organizations, of individuals and entities designated as being associated with Usama bin Laden, in accordance with paragraph 8 (c) above." Although not mentioning the Taliban or Al-Qaida, the list included also those entities due to measures contained in paragraph 8 (c) of the resolution.

These two Security Council resolutions, S/RES/1267 (1999) and S/RES/1333 (2000), constitute the core regulatory framework which the sanctions regime rests upon. However, other resolutions were adopted which have changed the sanctions regime. These resolutions and their implications are:

- S/RES/1390 (2002) extended the financial measures, broadened the travel ban and arms embargo, and requested states to report to the Committee.
- S/RES/1455 (2003) enhanced the monitoring role of the 1267 Committee and urged states to report progress on implementation of the sanctions.
- S/RES/1526 (2004) strengthened the mandate of the Committee, refined applicable sanctions measures and established the Analytical Support and Sanctions Monitoring Team, a support body to the 1267 Committee.
- S/RES/1617 (2005) broadened the mandate of the 1267 Committee and Monitoring Team, further defined the sanction's primary targets, the "associated with" standard and elaborated on de-listing procedures.
- S/RES/1730 (2006) established "a focal point" within the Secretariat to process submissions for de-listing under council resolutions involving targeted sanctions.
- S/RES/1735 (2006) expanded scope of sanctions regime and the Committee's mandate, new listing requirements adopted, and mandate of the Monitoring Team extended.

These resolutions have in general widened the scope of the sanctions, but also provided for new procedures concerning the administrative structure of the regime and principles in relation to de-listing of individuals or entities. The implementation of these resolutions as regards to the Committee itself is proactive.[19] The Committee is in constant contact with member states concerning implementation.

[19] See Letter dated January 8, 2008, from the Chairman of the 1267 Committee to the President of the Security Council, S/2008/25, p. 2 et seq.

3.2 The Guidelines of the Sanction Committee

During the Committee's initial period of work the creation of the list was based on political trust. The Committee had no guidelines or standards for states to follow in proposing names. This led to a procedure criticised by many, especially for the lack of information provided when a name was proposed – in particular concerning the link of that name to the Al-Qaida network or Usama bin Laden.[20] This resulted in the adoption of guidelines approximately two years after the establishment of the Committee which provided for more advanced and structured procedure in the Committee's work.[21]

According to the guidelines the Committee shall consist of all members of the Security Council. The chairman of the Committee is appointed and acts as chair in a personal capacity by the Security Council. Two delegations, appointed by the Security Council, assist the chairman of the Committee. The meetings of the Committee are both formal and informal and are convened at any time when the chairman deems necessary or at the request of a member of the Committee. If the meetings are formal, they are to be closed, unless otherwise decided. The Committee may invite any member of the United Nations to participate in the discussion taking place if the interests of that member are specifically affected.[22]

Decisions are taken by consensus of its members. If consensus cannot be reached on a particular issue, the chairman will undertake the necessary consultations to facilitate an agreement. If after these consultations, consensus cannot be reached, the matter may be submitted to the Security Council. If the Committee determines to decide on a particular matter by a written procedure, the chairman will circulate to all members of the Committee a proposed decision. The chairman will also request the members to indicate any objection they may have to the proposed decision. If no such

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[20] The criticism culminated in a case concerning Somali born Swedish citizens who were added to the list at the request of the US government. Immediately after their inclusion Swedish financial institutions froze their bank accounts. After the individuals protested publicly, a public outcry ensued which resulted in an action taken by the Swedish government before the Committee in order to delist the individuals. The US, UK and Russia objected. The individuals were removed from the list after bilateral discussion between the United States and Sweden. See further E. Rosand, *The Security Council's Efforts to Monitor the Implementation of Al Qaeda/Taliban Sanctions*, 98 AJIL 2004, p. 750.

[21] E. Rosand, *The Security Council's Efforts to Monitor the Implemantation of Al Qaeda/Taliban Sanctions*, 98 AJIL 2004, pp. 748-749.

[22] See Guidelines of the Sanction Committee, para 3(a)-3(b).

objection is received within five working days the decision shall be deemed adopted. If a member places a hold on a matter before the Committee it will cease to have effect at the time its membership of the Committee ends.[23]

3.3 The Listing Procedure

Any state may propose a name to the consolidated list.[24] Despite the even right of states to propose names to the list, some states have been more active than others. As an example of this is the addition of 200 names at the request of the United States in the aftermath of the attacks of September 11, 2001. A member state is encouraged, before proposing that a name be added to the list, to approach the state of residence and/or citizenship of the individual or entity concerned. However, despite this encouragement, it is at the member's discretion whether he decides to do so, as the guidelines emphasize that the member should only do so if he deems it appropriate.

An entity has to follow certain criteria when proposing a name to the consolidated list. Although a criminal charge or conviction is not necessary for inclusion on the list, the Committee will assess whether a person or an entity should be registered according to the "associated with" standard as it is described in S/RES/1617 (2005).[25]

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[23] See Guidelines of the Sanction Committee, para 4(a)-4(c).

[24] The original list contained only information concerning points of entry and landing areas for aircraft within the territory of Afghanistan, cf. S/RES/1333 (2000), para 16(a), and individuals and entities designated as being associated with Usama bin Laden, cf. S/RES/1333 (2000), para 16(b). The concept of "associated with" was however linked to funds, other financial assets and property of Usama bin Laden and Al-Qaida and entities associated with them. This was widened considerably in S/RES/1617 (2005), para 2-3, under the more detailed "associated with" standard.

[25] According to para 2-3 in S/RES/1617 (2005) the "associated with" standard reads as follows:

2. [...] acts or activities indicating that an individual, group, undertaking, or entity is "associated with" Al-Qaida, Usama bin Laden or the Taliban include:

   - participating in the financing, planning, facilitating, preparing, or perpetrating of acts or activities by, in conjunction with, under the name of, on behalf of, or in support of;
   - supplying, selling or transferring arms and related material to;
   - recruiting for; or
   - otherwise supporting acts or activities of;

   Al-Qaida, Usama bin Laden or the Taliban, or any cell, affiliate, splinter group or derivative thereof;

3. [...] any undertaking or entity owned or controlled, directly or indirectly, by, or otherwise supporting, such an individual, group, undertaking or entity associated with Al-Qaida, Usama bin Laden or the Taliban shall be eligible for designation.

When a member state decides to propose a name for listing it shall provide a statement of case in support of its decision that forms the basis or justification for the listing in accordance with the relevant resolutions. The information which shall be included in the statement of case shall include: (1) specific findings demonstrating the association or activities alleged; (2) the nature of the supporting evidence (e.g. intelligence, law enforcement, judicial, media, admissions by subject, etc.) and (3) supporting evidence or documents that can be supplied. A state shall indiciate which portion of the statement of case may be publicly released.[26]

Any modifications to the list are communicated to member states of the United Nations. Furthermore, the statement of case shall in part or in whole, as authorized by the designating state, be forwarded to member states. When the updated list has been forwarded, states are encouraged to circulate it widely, such as to banks and other financial institutions, border points, airports, etc. The Committee‘s secretariat shall, after publication, but within two weeks after a name is added to the list, notify the permanent mission of the country where the individual or entity is belived to be located or in the event that it is an individual, the country of which the person is a national. The states in question shall inform the designated person or entity of the Committee‘s decision. Finally, an updated version of the list shall also be published on the Committees website.[27]

3.4 The Procedure of De-listing

There are two approaches for petitioners with regard to the process of de-listing. Firstly, a state can petition for an individual, group, undertaking or other entities to be de-listed. Secondly, the targeted individual, group, undertaking or entity can submit such a petition. Petitioners seeking to submit a request for de-listing can do so either through the focal point process provided for in S/RES/1730 (2006) or through their

[26] See S/RES/1526 (2004), para 17, S/RES/1617 (2005), para 4, and S/RES/1735 (2006), para 5.

[27] See Guidelines of the Sanction Committee, para 6(g)-6(h).

state of residence or citizenship. A state can, however, decide that as a rule its citizens or residents should address their de-listing requests directly to the focal point.[28]

If a petitioner chooses to submit a petition directly, the focal point shall receive the de-listing request and verify if it is new or a repeated request. A receipt shall be sent to the petitioner in which the reception is acknowledged and the petitioner informed about procedural issues.[29] The petition is forwarded to the designating government and to the government of citizenship or residence. These governments will consult on whether to recommend de-listing. If the consulting governments agree on de-listing they will recommend de-listing either through the focal point or directly to the chairman of the Committee who will put the matter on the Committee's agenda.[30]

The substantive assessment whether an individual or entity should be listed or not is subjected to the "associated with" standard in S/RES/1617 (2005)[31]. In the event that names of groups, undertakings and/or entities are used, the list shall also include the names of individuals responsible for the decisions of these entities. However, the Committee can, in the event that an individual or entity has been placed on the list due to mistaken identity, decide that a removal from the list is appropriate, especially when the individual or entity no longer meets the criteria set out in relevant resolutions or when an individual is deceased.[32]

If any of the governments, which were consulted on the de-listing request oppose the request, the focal point will inform the Committee. Any member of the Committee which possesses information in support of the de-listing request is encouraged to share such information during the consultation period. If none of the governments, which took part in the consultation period, has not within 3 months indicated that work is being done on the de-listing request or require additional time for that work, the focal point will notify all members of the Committee. If no Committee member recommends de-listing, accompanied with an explanation, to the chairman of the Committee, it shall

[28] See preamble to Annex I of S/RES/1730 (2006).

[29] See Annex I to S/RES/1730 (2006), para 1-4.

[30] See Annex I to S/RES/1730 (2006), para 5.

[31] See S/RES/1617 (2005) para 2-3, *supra* note 25.

[32] See S/RES/1735 (2006), para 14.

be deemed rejected and the chairman shall inform the focal point of that decision. Subsequently, the focal point shall inform the petitioner whether the request has been accepted or denied.[33]

3.5 Exemptions from measures imposed due to listing

The current sanctions regime affects many of the most fundamental human rights of individuals and entities by targeting them and their assets, resulting in infringement of the freedom of movement and the right to property. Therefore, the sanctions regime provides for exemptions from imposed sanctions due to listing – the rationale of such exemptions are humanitarian needs of the listed individual or to promote a peaceful resolution of the conflict in Afghanistan.[34]

Two kind of exemptions exist depending on which resolutions they are based. According to S/RES/1333 (2000) exemptions can be granted from the imposed travel ban if it would promote discussion of a peaceful resolution of the conflict in Afghanistan or if it were likely to promote Taliban compliance. Furthermore, S/RES/1452 (2002) allows for exemptions to be granted with regard to frozen funds or other financial assets or economic resources to cover "basic expenses" or "extraordinary expenses" of the targeted individuals.[35]

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[33] See Annex I to S/RES/1730 (2006), para 6.

[34] The 1267 Committee received 22 communications in 2007 from states seeking exemptions to the asset freeze measures. Exemptions in 15 cases were granted concerning para 1(a) of S/RES/1452 (2002), but 5 exemptions were granted regarding para 1(b) of same resolution. See further Letter dated 8 January 2008 from the Chairman of the 1267 Committee to the President of the Security Council, S/2008/25, p. 5.

[35] S/RES/1452 (2002), para 1(a)-1(b) states that paragraph 4(b) of resolution 1267 (1999) and para 1 and 2(a) of resolution 1390 (2002) do not apply to funds and other financial assets determined to be:

(a) necessary for *basic expenses*, including payments for foodstuffs, rent or mortgage, medicines and medical treatment, taxes, insurance premiums, and public utility charges, or exclusively for payment of reasonable professional fees and reimbursement of incurred expenses associated with the provision of legal services, or fees or service charges for routine holding or maintenance of frozen funds or other financial assets or economic resources, after notification by the relevant State(s) to the [1267 Committee] of the intention to authorize, where appropriate, access to such funds, assets or resources and in the absence of a negative decision by the Committee within 48 hours of such notification;

(b) necessary for *extraordinary expenses*, provided that such determination has been notified by the relevant State(s) to the Committee and has been approved by the Committee;" [emphasis added]

4. Accountability issues of the United Nations due to its sanctions regime

4.1 The concept of accountability in international law

The concept of accountability has been considered a somewhat problematic issue in international law. The concept's origin is derived from countries based on common law and has, therefore, been difficult to align with other legal cultures. An example of this is that the concept cannot be translated into other languages as an identical or similar concept cannot be found.[36] Another area of difficulty is the exact division between responsibility and accountability within the common law systems which the concept stems from. An example of this are the Draft Articles of the ILC concerning Responsibility of International Organizations in which the committee chose to focus the articles on responsibility, but not accountability. Furthermore, the Draft Articles focus on responsibility of international organizations for violations of international law, but not for violations of national law.[37]

The concept of accountability has, nevertheless, gained widespread acceptance amongst legal scholars and within international fora. Accountability, which literally means "having to account for" traditionally signifies a broad set of control mechanisms which are not only legal in nature, but also political, administrative and various other informal non-legal mechanisms which hold an individual or entity answerable. The ILA Committee on Accountability of International Organizations has stressed that accountability is a "multifaceted phenomenon".[38] The Committee has emphasized that accountability of international organizations has to be conceived in terms of legal and non-legal forms and mechanisms, without *per se* considering the issue of the traditional

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[36] The concept of accountability originates from the public accountability of government officials and civil servants of the United States more than 220 years ago. Neither Romanic languages, e.g. French and Italian, nor Slavic or Germanic languages, have an equivalent expression. See further G. Hafner, *Accountability of International Organizations – a critical view*, in R.St.J. Macdonald and D.M. Johnston (eds.), *Towards World Constitutionalism*, Martinus Nijhoff Publishers 2005, pp. 584-598.

[37] International organizations enjoy functional immunity with regard to their activities. However, the fact that agreements or stipulation of international instruments concerning their immunities are necessary, leads *e contrario* to the conclusion that they are generally subjected to national law applicable at the place where they act, unless a treaty, agreement or national law suggests otherwise. See further A. Reinisch, *International organizations and national law*, NYIL 2005, T.M.C. Asser Press, p. 124 et seq.

[38] ILA Committee on Accountability of International Organisations, Final Report 2004, *Report of the Seventy-First Conference*, Berlin 2004, p. 168.

legal concepts of "liability" and "responsibility" of these organizations for damage caused and/or breaches of international law. In other words "accountability" is presented as a notion encompassing legal, political, administrative and financial forms of internal and external scrutiny and monitoring of activities and omissions of which "liability" and "responsibility" are important but separate components. Therefore, "liability" of international organizations can be raised for causing damages by lawful operational activities and "responsibility" for damages caused by breaches of international obligations.[39]

4.2 The obligation of the United Nations to respect human rights

The current UN sanctions regime has been considered to challenge and in individual cases infringe human rights guaranteed in numerous international instruments. The questions which need to be addressed are fundamental as they relate to the fundamental issues of the relationship between international law and international organizations. In this respect two issues need to be addressed: (a) whether the United Nations itself needs to respect general human rights in the adoption of its sanctions; and (b) how far states are obliged to apply such sanctions irrespective of their human rights obligations derived either from general international law or specific human rights treaties to which they are parties.[40]

As regards the first issue it has been the subject of considerable academic debate. The majority of scholars seem to adhere – at times without much analytical reasoning – that the United Nations is bound by international human rights law.[41] The United Nations is not a party to the international instruments which ensure the human rights in question. Furthermore, the many resolutions of the General Assembly are not legal instruments and non-binding as regards to both member states and the United Nations. It seems that the only legal obligation which could be put upon the United Nations

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[39] I.F. Dekker, *Accountability in international institutional law*, NYIL 2005, T.M.C. Asser Press, pp. 86-7.

[40] See G. Hafner, *Accountability of International Organizations – a critical view*, in R.St.J. Macdonald and D.M. Johnston (eds.), *Towards World Constitutionalism*, Martinus Nijhoff Publishers 2005, p. 612.

[41] A. Reinisch, *Developing Human Rights and Humanitarian Law Accountability of the Security Council for the imposition of Economic Sanctions*, 95 AJIL 2001, p. 858.

would be general international law. This view has been shared by the United Nations itself which has perceived itself to be a promoter of human rights, but not responsible for protecting and guaranteeing human rights. Moreover, the United Nations has not thought itself capable of violating human rights.[42] However, the United Nations cannot but respect its constituent document, the UN Charter, which emphasizes the promotion of human rights and takes note of this as one of the main purposes of the organization. The United Nations – including the Security Council – would indeed not fulfill its purpose if it were to violate human rights by implementing economic or targeted sanctions according to Chapter VII of the Charter.[43]

With regard to the second issue Article 103 of the UN Charter prescribes that member states are to comply with resolutions made by the Security Council under Chapter VII of the Charter. A textual interpretation reveals that this provision entails the duty of a state to comply with a resolution of the Security Council irrespective of its human rights obligations. Even though this remains the accepted position, domestic and regional courts have become somewhat more open to the notion of assessing UN practices in a substantive way, in particular in cases of clear and flagrant human rights violations.[44]

But even if the conclusion is reached that the United Nations should respect human rights, the question still remains what human rights are topical in connection to the sanctions regime. For instance, a travel ban interferes primarily with the freedom of movement,[45] but financial sanctions have an impact on property rights,[46] as well as affecting in some cases a person‘s privacy, reputation and family rights.[47] Furthermore,

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[42] F. Mégret and F. Hoffmann, *The UN as a Human Rights Violator? Some reflections on the United Nations Changing Human Rights Responsibilities*, Human Rights Quarterly 25 (2003), p. 315.

[43] See further Bossuyt report, *The Adverse Consequences of Economic Sanctions on the Enjoyment of Human Rights*, Working paper prepared by Marc Bossuyt, UN Doc. E/CN.4/Sub.2/2000/33.

[44] Watson Institute for International Studies, *Strengthening Targeted Sanctions Through Fair and Clear Procedures*, White Paper sponsored by Switzerland, Germany and Sweden, Brown University 2006, p. 23.

[45] Article 12 of the ICCPR and Article 2 of Protocol 4 to the ECHR.

[46] Article 1 of Protocol 1 to the ECHR.

[47] Article 17 of the ICCPR includes as a substantive right the right to privacy, family, home or correspondence honor and reputation, whereas Article 8 of ECHR protects private and family life.

in extreme cases sanctions could violate the right to life, e.g. when a travel ban prevents a targeted person from leaving the country to seek medical aid.[48] Despite the fact that the sanctions regime touches upon all of the aforementioned rights, the most fundamental issue being discussed is that of due process, as it is a presupposition for the enjoyment of the aforementioned rights. The concept of due process, or fair trial, is one of the most fundamental rights accorded to any individual or entity. Such right can only be protected and enforced if a citizen has recourse to courts, tribunals or other impartial institutions. Still, that is often not enough in itself, as the institutions in question need to enjoy sufficient independence from the governmental or administrative organs of a state and resolve disputes in accordance with fair procedures. However, this right does not include a judicial remedy against any administrative act of a state organ or agency. In many states the socalled "act of state" doctrine entails that acts of states or legislative acts are exempt from judicial review.[49]

4.3 Possible remedies for victims of human rights violations and relevant case law

It has often been argued that the UN as an international organization, including its internal bodies, is the sole judge of its own legitimacy.[50] Therefore, remedies for individuals which have unjustly been targeted seem to be limited. Two approaches, in addition to the de-listing procedure, seem to be possible. Firstly, an individual could file

[48] In the case of the Sierra Leone sanctions regime, a request was made to lift a travel ban for one of the listed persons so that he could receive medical treatment. The individual concerned died as the committee deliberated for months over the request and sought to acquire assurances that he be kept in custody and that the request be accompanied with more specific information. See Annual Report of the Sierra Leone Sanctions Committee, UN Doc. S/2004/266, February 27, 2004, para 13-14.

[49] See D. Shelton, *Remedies in International Human Rights Law*, Oxford University Press 1999, pp. 64-68.

[50] See for a critical view A. Reinisch, *Developing Human Rights and Humanitarian Law Accountability of the Security Council for the imposition of Economic Sanctions*, 95 AJIL 2001, p. 865, and K. Zemanek, *Is the Security Council the Sole Judge of its Own Legality? A Re-Examination*, in A. Reinisch and U. Kriebaum (eds.), *The Law of International Relations – Liber Amicorum Hanspeter Neuhold*, Eleven International Publishing 2007, pp. 503-505.

suit against the United Nations and secondly, an individual or entity could challenge the enforcement measures of individual members states in domestic or regional courts.[51]

Filing a suit against the United Nations before a national court or tribunal is not an effective option for a listed individual or entity. According to Article 103 of the UN Charter member states are to comply with resolutions made by the Security Council under Chapter VII of the Charter. If, exceptionally, a domestic legal order allows an individual directly to take legal action against a Security Council resolution, Article 105(1) of the United Nations Charter provides that the United Nations enjoys absolute immunity from every form of legal proceedings before national courts and authorities. This immunity has been further elaborated in the General Convention on the Privileges and Immunities of the United Nations and other agreements.[52] This situation only emphasizes the importance of an independent review mechanism within the United Nations sanctions regime, as a targeted person does not have a remedy in his or her national jurisdiction to challenge directly the sanctions imposed upon him.[53] Some scholars have argued that this situation amounts to "denial of justice" for the individual and entities concerned,[54] whereas others have gone further and argued that national courts cannot grant the United Nations immunity due to the fact that the current regime entails a violation of the Universial Declaration of Human Rights and fundamental human rights protected by constitutional provisions.[55]

The sanctions regime is based upon the concept of state enforcement. There have been numerous challenges to the enforcement measures of individual member states – both in domestic and regional courts – on the grounds of human rights violations.

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[51] Challenging the measures in an international court, e.g. the ICJ, is not a viable option due to the fact the the Court's jurisdiction is according to Article 34 of its statute limited to states. See further J.G. Merrills, *International Dispute Settlement*, Cambridge University Press 2005, pp. 127-8.

[52] See General Assembly Resolution 1/22A of Febrary 13, 1946. 1 UNTS 15.

[53] B. Fassbender, *Targeted Sanctions and Due Process*, Study commissioned by the United Nations Office of Legal Affairs, Humboldt-Universität zu Berlin 2006, pp. 4-5.

[54] See e.g. C. Tomuschat, *Human Rights: Between Idealism and Realism*, Oxford University Press 2003, p. 90, and K. Wellens, *Remedies against international organisations*, Cambridge University Press 2002, p. 89.

[55] M. Gerstner and D. Rotenberg, *Commentary on Art. 105 of the UN Charter*, in B. Simma (ed.), *The Charter of the United Nations – A commentary*, 2nd ed., Vol. II, Oxford University Press 2002, pp. 1314-1324.

Currently legal challenges have been presented to the national courts of Belgium, Switzerland, the Netherlands, Pakistan, Turkey and the United States. The court cases vary in nature. In some cases individuals complained about being listed by the 1267 Committee or directly about the sanctions themselves. In other cases, the national designation was challenged, or the court was asked to compel the home state to start a de-listing procedure. The decisions in individual cases vary considerably, but still most of the cases are pending.[56]

Despite of these domestic legal challenges the jurisprudence derived from a number of regional cases are of particular interest. The *Bosphorus case* dealt with economic sanctions against FRY in 1991. The sanctions included an arms embargo against the country. This embargo resulted in the impoundment of two aircrafts which a Turkish company, Bosphorus, had leased from a Yugoslav company. The impoundment took place in Ireland and was based on EC regulations implementing the United Nations sanctions. The Turkish company challenged these measures before Irish courts which requested a preliminary ruling from the ECJ. The court found that the airplanes could be subjected to sanctions measures as "...the importance of the aims pursued by the regulation at issue is such as to justify negative consequences, even of a substantial nature...".[57] The Turkish company lodged a complaint before the ECtHR and claimed violation of its right to property. The ECtHR argued with regard to the sanction regime:

"In the Court's view, State action taken in compliance with such legal obligations is justified as long as the relevant organisation is considered to protect fundamental rights, as regards both the substantive guarantees offered and the mechanisms controlling their observance, in a manner which can be considered at least equivalent to that for which the Convention provides ... [i]f such equivalent protection is considered to be provided by the organisation, the presumption will be that a State has not departed from

[56] As of September 30, 2007, there were 26 cases pending. Most of the cases in the US and the United Kingdom, which have been concluded, have been dismissed, whereas courts in Switzerland have ruled in favour of the plaintiff. Minor damages were rendered. See further the Report of the Analytical Support and Sanctions Monitoring Team appointed pursuant to Security Council resolutions 1617 (2005) and 1735 (2006) concerning Al-Qaida and the Taliban and associated individuals and entities, pp. 40-42.

[57] ECJ, *Bosphorus Have Yollari Turzm ve Ticaret AS v. Minister for Transport, Energy and Communications and others*, C-84/95, July 30, 1996, para 23.

the requirements of the Convention when it does no more than implement legal obligations flowing from its membership of the organisation."[58]

The Court then went on to assess whether the EC had offered "equivalent" protection, but did not apply such a test to the United Nations. It came to the conclusion that the EC had not violated the provisions of the Convention. In brief, even though Bosphorous, as a third party, was affected by the santions imposed on FRY, the two European courts could not find any human right violation.

The *SEGI case* is more topical with regards to the targeted sanctions regime. The case concerned measures taken by the EU with a view to implementing Security Council Resolution 1373 (2001) regarding certain anti-terrorism measures overseen by the Counter Terrorism Committee. This committee does neither impose sanctions nor draw up lists of individuals, but it relies on the list developed by the 1267 Committee, individual member states or regional organizations. The EU sought to implement Resolution 1373 (2001) by adopting certain common positions which entailed the composition of lists annexed to the respective positions.[59] SEGI, which was a Basque organization, was placed on one of those lists containing entities considered to be involved in terrorists acts. The SEGI organization complained as it considered some of its basic rights violated. The Court did not concur with SEGI's argument as no provisions of the ECHR had been violated. Moreover, the court emphasized by referring to its case law that complaints which referred to possible violations that may occur in the future or about the law *in abstracto* were inadmissable. In sum, the court acknowledged that the listing could be seen as embarassing, but distinguished between the listing itself and the

[58] ECtHR, *Bosphorus Hava Yollari Turzïm ve Tïcaret Anonïm Şïketï v. Ireland, Application no. 45036/98, Grand Chamber*, June 30, 2005, para 155-6.

[59] The common positions concerned were 2001/930/CFSP and 2001/931/CFSP. It should be noted that these common positions are taken under the second pillar of the EU which concerns its CFSP and is thus inter-governmental in nature. In order to implement a Security Council resolution simultaneously in all member states of the EU a proposal is drafted by the Commission which is adopted by the Council. Thus, the common position is stipulated further in a EC regulation which is supranational in nature and has direct effect in all member states. See further P. Eeckhout, *External relations of the European Union*, Oxford University Press 2005, p. 436 et seq.

imposition of measures as two independent acts. Therefore, the mere listing could not be in itself considered a human right violation.[60]

Two cases relevant for this discussion are currently pending before the ECJ. The *Kadi* and *Yusuf cases*.[61] The cases concern a Swedish citizen of Somali origin, Ahmed Ali Yusuf, and a Saudi national, Yassin Abdullah Kadi, who were residents in Sweden. Both had their assets frozen after having been included on the list of the 1267 Committee. They challenged the EC regulations, which implemented the Security Council resolutions concerning the sanctions regime supervised by the Committee, before the CFI *inter alia* on the grounds that the regulations violated fundamental human rights and should on that basis be annulled. After an elaborate argumentation the CFI upheld the primacy of the Security Council. Two of its conclusions are of particular importance. Firstly, the court argued that it was not competent to review Security Council actions because Security Council decisions are binding, as prescribed in Articles 25 and 48 of the Charter, and because the UN Charter had a special and higher status in international law, cf. Article 103. Secondly, it did find itself empowered to check whether the Security Council resolutions were coherent with norms of *jus cogens* as these rules are of a higher status, nonderogable and binding on all subjects of international law. The court then continued to assess whether the alleged infringed rights of the plaintiffs, namely the right to property, the right to a fair trial and the right to an effective remedy, constituted *jus cogens* norms. In short, the court weighed the conflicting interest and tried to strike a balance taking into account the interests of the individuals against the overriding interest of the community. The argument concerning the right to a fair trial was partly based on the assessment of the Guidelines of the Sanction Committee of 2002. All demands of the plaintiffs were denied. On November 24 and December 1, 2005, the plaintiffs appealed against the decision of the CFI; their cases are still pending. The Advocate General has argued that the decision of the CFI should be overturned as

[60] ECtHR, *SEGI and others v. 15 States of the European Union*, Application number 6422/02, May 23, 2002.

[61] CFI, *Ahmed Ali Yusuf and Al Barakaat International Foundation v. Council and Commission*, Case T 306/01; *Yassin Abdullah Kadi v. Council and Commission*, Case T 315/01, September 21, 2005.

the regulations, which the cases concern, violate fundamental rights under Community law.[62]

This approach is interesting for a number of reasons as it marks a stark difference in some respect to accepted practice in international fora, but is at the same time coherent in another respect to accepted practice. An example of the former is the approach of the CFI in connection to the legality of Security Council decisions. This approach does not concur with that of the ICJ which has been very reluctant to review the legality of Security Council resolutions.[63] Furthermore, the CFI referred frequently to the concept of *jus cogens* and in doing so remained fully coherent with the judgments of the ICJ.[64]

The analysis of these judgments, especially judgments regarding the economic sanctions regime in general and the targeted sanctions regime in particular, seem so far to demonstrate an interorganizational hiearchy and reluctance on the part of the courts to assess the practices of the United Nations in a substantive way. The courts show that they are aware of the existing hierarchy and the special position of the United Nations and especially that of the Security Council. Yet the courts also have made it clear that in cases of clear and flagrant human rights violations they will not shy away from assessing whether violations of principles of *jus cogens* have occured and have hinted that in these instances they will no hesitate to act in protection of human rights.[65]

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[62] See Opinion of the Advocate General, Official Journal of the European Union, 2006/C 36/39.

[63] See ICJ, *Case concerning Questions of Interpretation and Application of the 1971 Montreal Convention Arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v. United Kingdom)*, Provisional Measures, ICJ Reports, 1992.

[64] See ICJ, *Case concerning Military and Paramilitary activities in and against Nicaragua* (Nicaragua v. United States of America), International Court of Justice, June 27, 1986, in which the ICJ affirmed *jus cogens* as an accepted doctrine in international law. The ICJ continued later to endorse the concept in *Case of Armed Activities on the Territory of the Congo* (The Democratic Republic of the Congo v. Rwanda) of February 3, 2006.

[65] Watson Institute for International Studies, *Strengthening Targeted Sanctions Through Fair and Clear Procedures*, White Paper sponsored by Switzerland, Germany and Sweden, Brown University 2006, p. 23.

5. Conclusion

The United Nations' sanctions regime and the challenges it poses to human rights poses an extraordinary test to the United Nations as an organization. The continued expansion and diversification of international law has revealed new challenges to the organization, in particular the Security Council. This applies especially to its structure which resonates the fact that it was set up half a century ago and reflects the political realities at that time. Because of that fact and the reluctancy of the permanent members of the Council of any reform, it is increasingly contested as the legitimate body responsible for the maintenance of international peace and security. This discussion is relevant as the Council's focus has broadened; it is at present not only directed at states, but also at individuals and private entities. Therefore, the United Nations has an enormous interest not only to face the threats posed by international terrorism towards its member states, but also to respect the human rights enjoyed by the peoples who inhabit them.

Despite not being a party to international human rights instruments, the United Nations is undeniably subjected to its own constitutent document, the UN Charter. The Charter emphasizes the promotion of human rights and takes note of this as one of the main purposes of the organization. Hence, the United Nations and the Security Council would not fulfill its purpose if these entities were to violate human rights through its targeted sanctions regime.

The establishment of *fair and clear procedures* within the sanctions regime itself is particularly important taking into account the absolute immunity of the United Nations in individual jurisdictions. However, both domestic and regional courts seem to be becoming more open to assess the implementation of the Security Council resolutions within the context of human rights. This development is not unexpected in light of the fact that member states of the United Nations are parties to numerous international human rights instruments, whereas the organization is not. Furthermore, the substantive rights described therein have either been included in the constitutions of individual member states for a long time or have been adopted, in part due to the initiative of the United Nations. It is therefore safe to argue that it is unlikely that this development will change in the near future, not unless a general compromise will be reached acknowledging the importance of the aims for fighting international terrorism and at the same time justifying the negative consequences on the human rights of the individuals and entities listed by the 1267 Committee.

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