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The European Convention on Human Rights, Due Process and United Nations Security Council Counter-Terrorism Sanctions

Report prepared by Professor Iain Cameron

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Summary

The present study examines the problems caused for due process by sanctions introduced by the UN Security Council in the context of counter-terrorism. It analyses the case-law of the European Court of Human Rights (ECtHR) relevant to the issue. It also addresses the question whether the ECHR standards can be said to represent general human rights principles in the field. Finally, it examines the extent to which Council of Europe states bear a residual responsibility under the ECHR for the adoption and implementation of UN Security Council targeted sanctions.

Listing of a person or an entity by the Resolution 1267 Committee entails a duty on all UN members to impose travel bans, an assets freeze and an arms embargo. At present, there is no international legal mechanism for checking or reviewing the accuracy of the information forming the basis of a sanctions committee blacklisting or the necessity for, and proportionality of, measures adopted. The individual has no right of access to a court or a quasi-judicial body at the UN level. UN blacklisting thus does not fit into the traditional pattern of due process. Nor does blacklisting fit into the pattern – implicit in the ECHR and other human rights treaties – of the legislature proscribing conduct in general terms which is then applied by the executive (police or prosecutor) in a specific case (a decision to order a criminal investigation or to bring criminal charge). This causes considerable problems under human rights treaties.

As far as assets freezing is concerned, this raises issues primarily under ECHR Article 6 (access to court/fair trial), Protocol 1, Article 1 (protection of property) and Article 13 (effective remedies). Problems under other articles for assets freezing and travel sanctions can possibly be solved within the existing system, by issuing dispensations.

The effects of blacklisting may be sufficiently serious to be the “determination of a criminal charge”, triggering the application of Article 6 in its entirety. If this is not the case, then blacklisting fits into the Convention framework of disputes over “civil rights” under Article 6 (1), i.e. the rights to property and to reputation. The ECtHR has refused to accept that access to a court can be totally blocked for national security reasons or that the court is, for national security reasons, not capable of determining the dispute on the merits. On the other hand, in both criminal and civil cases the ECtHR has accepted that the requirements of a fair trial may be modified in anti-terrorism matters. It has allowed courts with a special composition, and the application of special procedures to maintain secrecy. It is however crucial that the court in question be independent, impartial and competent and that the procedure before it follows the principle of equality of arms. The court must be capable of judging the merits of the measure, and of ordering its cessation.

As regards property rights, an assets freeze will usually be adjudged as a “control on use”. The margin of appreciation is wide and national security is a pressing need. Thus, the possibility exists under the ECHR to take fairly drastic measures against property for anti-terrorism purposes. However, the room for error exists in this field as in any other. Indeed, it probably is even more likely in a field where enforcement agencies are required to act on limited intelligence material, under political pressure to show results. The ECtHR has tended to take into account the availability of safeguards, particularly judicial safeguards, against wrongful or arbitrary controls on use.

Article 13 (effective remedies) is a subsidiary article, and only comes into play when an application falls within the scope of another material right. Even where an allegation of a threat to national security is made, the ECtHR case law makes it clear that the guarantee of an effective remedy requires as a minimum that a competent, independent appeals authority must exist which is to be informed of the reasons behind the decision, even if such reasons are not publicly available. The authority must be competent to reject the executive’s assertion that there is a threat to national security where it finds it arbitrary or unreasonable.

There must also be some form of adversarial proceedings, if need be through a special representative after a security clearance.

There are corresponding provisions on due process in the UN Universal Declaration of Human Rights and the Covenant on Civil and Political Rights, and it is submitted that the above ECtHR case law to a large extent expresses general principles of due process.

The Security Council is bound by UN human rights norms insofar as these are authoritative interpretations of the UNC and/or have passed into general international law. The case law of the ECtHR, particularly the Bosphorus case, also makes it clear that there can be a "residual" responsibility on state parties for violations of the ECHR, even when the violation has come about when these states are implementing legal obligations arising out of their membership of an international organization. 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 as equivalent to that which the ECHR provides.

The position taken in the present study is that *either* the *adoption* by ECHR state parties acting in the Security Council of targeted anti-terrorist sanctions containing no equivalent safeguards *and/or* the *implementation* by ECHR state parties of these sanctions in their territories is contrary to general human rights principles as embodied in the ECHR. This does not mean that the sanctions are invalid, only that the relevant state parties incur state responsibility for violation of the Convention. States have admittedly agreed to carry out decisions of the Security Council (Article 25 UNC). Moreover, obligations under the UNC take precedence over their obligations under other treaties (Article 103 UNC). But as there is no *necessary* conflict between UN targeted sanctions and the ECHR, the principle of good faith means that Article 103 cannot be invoked by a state party to the ECHR, either when it is acting within the Security Council and/or when it is implementing a Security Council resolution, to avoid its obligations under the ECHR, and to avoid responsibility for breaching the ECHR. The process of improving legal safeguards at the level of the Security Council admittedly involves some difficulties, *inter alia* because there are legitimate security interests that have to be protected. Nonetheless, the whole purpose of human rights is to place reasonable limits on absolute power. It is quite possible to create an equivalent level of protection at the UN level while maintaining security concerns.

Introduction

The present report analyses the human rights problems involved in UN Security Council counter-terrorism sanctions from the perspective of the European Convention on Human Rights (ECHR).¹ It also examines briefly the extent to which the ECHR standards, as laid down by the European Court of Human Rights (ECtHR) can be said to represent general human rights principles in the field. The issue of *how* the ECHR standards could be said to be applicable to the UN targeted sanction system is also examined. First it is necessary to give some background. In a short report of this nature concerning a complicated subject it is difficult to cover all the issues. This report can thus be usefully read together with my other work on the subject.²

Background

On 15 October 1999 and 19 December 2000, the Security Council, acting under Chapter VII of the United Nations Charter (UNC), brought in sanctions against the Taliban-regime in Afghanistan (resolutions 1267 and 1333 respectively). Resolution 1333 inter alia ordered states to freeze funds controlled directly or indirectly by Usama Bin Laden and individuals associated with him. Following the defeat by the Northern Alliance, assisted by US forces, of the Taliban the Security Council adopted resolution 1390 of 16 January 2002. This resolution renewed the Taliban/Al-Qaida blacklists, extending even travel and arms embargo sanctions to the listed persons. Resolution 1390 is “open-ended” and, in contrast to earlier targeted sanctions, involves a qualitative difference in that there is no connection between the targeted group/individuals and any territory or state. In Resolution 1455, of 17 January 2003, the Security Council reiterated states’ obligations to comply with the earlier resolutions and required the submission of updated implementation reports within 90 days. These resolutions have been reaffirmed and slightly modified by subsequent resolutions (Resolutions 1452, 20 December 2002, 1455, 17 January 2003, 1526, 30 January 2004 and 1617, 29 July 2005).

Targeted sanctions are implemented by the Security Council establishing a sanctions committee. There is only one sanctions committee for the above resolutions. There is also a monitoring group/team, which was appointed by Resolution 1363 (2001). Its mandate has been extended regularly, most recently in Resolution 1617 (hereinafter the “1267 Monitoring Team”). The work of the Resolution 1267 Committee is separate from, but intended to be coordinated with, the work of the Counterterrorism Committee (CTC) established by Resolution 1373. The CTC has a more “legislative” role, whereas the 1267, and other targeted sanctions committees, have an “operative” role.

The sanctions work by means of a “blacklist” of individuals and entities drawn up by a sanctions committee on the basis of information provided primarily by the members of the Security Council. The effect of these resolutions is to impose a duty on all state parties to the UNC inter alia to freeze the assets of a blacklisted entity or person and to prohibit any payments to him or her, except for humanitarian purposes (food, lodging, medical care etc.). As of 18 January 2006, there are 142 individuals and one entity on the Taliban list and 203 individuals and 118 entities on the Al-Qaida list.³ The results of an order freezing assets (and, to a lesser extent, imposing travel restrictions) are severe for the individuals affected, and their families. The substantive rights involved depend upon the type of sanctions

¹ ETS No. 5 (1950).

² See in particular my Report to Swedish Foreign Office on Targeted Sanctions and Legal Safeguards, October 2002 (<http://www-hotel.uu.se/juri/sii/index.html>), revised and updated and published as UN Targeted Sanctions, Legal Safeguards and the ECHR, 72 Nordic Journal of International Law 1-56 (2003) (hereinafter Cameron 2003).

³ The Committee is “currently considering the addition of a considerable number of names”, S/2005/761, p. 2.

(financial, travel).⁴ In all cases, it tends to be civil and political rights which are affected. Air travel bans interfere primarily with freedom of movement (although there can be secondary effects on private and family life, and even on the right to life, e.g. where a targeted person needs foreign medical care).⁵ Financial sanctions interfere with a person's private and family life, and his or her property rights. In both cases, an interference which cannot be appealed to a tribunal may violate the right of access to court as well as the right to effective remedies. In both cases, there may be an interference with the right to reputation. The rights under the ECHR which are relevant are primarily access to court/fair trial (Article 6) to property (Article 1, Protocol 1), to private and family life (Article 8), to freedom of movement (Article 2, Protocol 4) and to effective remedies before national bodies (Article 13).

The information on which blacklisting is proposed can vary. The formal basis is often a public source, company registers, newspaper reports etc. Banking suspicious and unusual transaction reports (STR, UTR) can also be a source as regards people suspected of money laundering. However, secret intelligence material or confidential material such as embassy reports can lie behind the formal source, either as leads in looking into the person in the first place, or as confirming the public reports. As regards terrorist suspects, secret intelligence material can assumed almost invariably to lie behind the listing. As far as I am aware, on the occasions in which a sanctions committee member has asked a designating state for the basis for a particular blacklisting to be disclosed, and this basis is intelligence or diplomatic material, the reply has been given that the information comes from a reliable source, but that national security considerations rule out disclosing it. Occasionally, information might be given on a bilateral basis where the designating state trusts the requesting state to maintain the confidentiality of the information. Thus, the sanctions committees as such have rarely, or ever, evaluated the "evidence" that the named person is engaged in activities involving a threat to international peace and security. The human rights problems sketched out above, and examined in greater detail below, apply to all the other targeted sanctions regimes. However, for reasons I have explained in detail elsewhere, the independent review process necessary to ensure that other targeted sanctions regimes comply with minimum human rights standards can relatively easily be put in place.⁶ This is more difficult not the case for anti-terrorist sanctions where the nature of the decision that a particular person is a threat and the legitimate need to maintain the secrecy of the material behind the anti-terrorist blacklisting decisions causes more problems for a review body.

It has become evident that the secrecy surrounding the blacklisting can be counter-productive. In particular, additional information can be required as regards blacklisted entities in order to better allow states implementing the resolution to avoid the entity circumventing the freezing/financing ban orders. The Security Council has responded to criticism concerning this and Resolution 1617 now provides in para. 6 for release of information on a case by case basis with the prior consent of the designating State.

Although the Security Council as a whole has so far not been prepared to accept that individuals' legal rights under national or international law invalidate or even affect the authority of the Council to order such sanctions, it has, after considerable pressure exerted

⁴ I do not consider that an arms embargo as such violates any human rights. Arms sales are typically subject to stringent licencing requirements. Any "right" to sell weapons is thus severely circumscribed in national law. Adding conditions to a licence regarding future sales, to the effect that arms merchants may not sell to named governments or named individuals may not even be regarded as an interference at all with a property right. Even if this is an interference, it will be justified as a "control on use". See further below on property rights.

⁵ Travel sanctions do not raise major human rights problems which cannot be solved by dispensations (see below). See Cameron 2003, pp. 168-188. The points made on effective remedies are applicable mutatis mutandis to possible infringements these involve of Article 8 and Protocol 2, Article 4.

⁶ See Cameron 2003, pp. 190, 196-200

by certain states, provided for some political safeguards in the system.⁷ As consensus is the basis of the operation of the sanctions committees, all fifteen members, not just the permanent members, have a veto on names being put on the list.

As regards obtaining information as to why a person is on a list at all, after a great deal of discussion and criticism, the Resolution 1267 committee has adopted guidelines for its work, providing both for criteria for listing and delisting. States proposing names for inclusion must identify these people and entities and their assets as much as possible.⁸ Resolutions 1526, para. 17 and 1617 para. 2 and 4 require further identifying information and provide a non-exhaustive definition of “association with” Al-Qaida. The improved criteria on listing will hopefully have the indirect effect of reducing erroneous blacklisting, with all the suffering this involves for innocent parties, even if the main focus of these improvements is increased effectiveness.⁹

As regards *delisting*, this involves the government of a targeted individual’s citizenship or residence submitting a petition to the designating government, noting additional information, seeking information and seeking consultations. Names have been removed after having been placed on lists as a result of new information.¹⁰ Any state may request the sanctions committee to remove a particular individual from the list. If no state objects, the name is removed. No reasons need be given for either requesting removal, or opposing it. Measures have also been taken to ameliorate the negative effects of sanctions for individuals. The Security Council has provided for humanitarian exceptions delegating to states the power to release funds so as to permit the target to pay specified exceptions, buy food, pay rent etc.¹¹ A state’s unfreezing for such purposes needs to be notified to the sanctions committee. Unfreezing may also be allowed even for other, extraordinary, expenses, as long as this is notified to, and approved by, the committee.

Still, from the individual’s perspective these safeguards and discretionary “benefits” are obviously unsatisfactory. The procedure for ending up on the list, and getting off the list, contains no legal safeguards for individuals. The listing criteria are interpreted and applied by the political body which devised them, the sanctions committee. There is no body which reviews its decision. The delisting procedure is similarly a purely political mechanism. The delisting procedure can, so far (see below) not be initiated by the individual. The individual is not a party to the proceedings and has no right of appearance, representation or even of leading written evidence. The procedure instead relies on the right of diplomatic protection of nationals (slightly expanded to include residents). But the state(s) of nationality/residence may not be interested in intervening. And the delisting procedure contains no possibility for the petitioning state to *compel* the production of sufficient information, or any information whatsoever, justifying the blacklisting of one of its nationals or residents. The designating state can refuse to provide any information, and continue to block the removal from the list and the petitioning state cannot force a determination of the issue before some objective body. The right of consultation would appear, in the circumstances, to be of little concrete value. The Committee recently revised its guidelines on listing and delisting, but no

⁷ Some 50 states have complained about the lack of transparency and due process in the present system. S/2005/572, para. 37.

⁸ See p. 6 of the Guidelines adopted 7 November 2002, available at www.un.org/Docs/sc/committees.

⁹ See below as regards the ECHR requirement of “prescribed by law”.

¹⁰ To date, seven individuals and 3 entities have been removed from the Al-Qaida list. See the respective consolidated lists at www.un.org/Docs/sc/committees.

¹¹ Resolution 1452, 20 December 2002.

agreement could be reached between states wishing to improve (from the individual's perspective) the present system and those states which did not wish changes.¹²

The Monitoring Team, so far, considers that any due process problems are limited to erroneous blacklisting because of mistaken identity or a state failure to protect its nationals or residents. The first problem will hopefully be dealt with by better statements of case. As regards the second problem the Monitoring Team considers that this can be solved by requiring states to forward complaints made by individuals within their jurisdiction.¹³

Finally, as regards background, there have been very few challenges before national courts of the constitutionality of UN freezing measures.¹⁴ So far, the only legal challenge which has been made before an international court of these specific UN sanctions is the case of Ahmed Ali Yusuf and Al Barakaat International Foundation v. Council and Commission.¹⁵ The case was before the Court of First Instance (CFI) of the European Court of Justice (ECJ) and concerned the EC implementation of Resolutions 1267 and 1390 (originally in Regulation 467/2001, now incorporated in Council Regulation 881/2002). The CFI ruled that the regulation was within EC competence (para. 160). It further ruled that EC member states granting of competence to the EC had been conditional: they had already agreed to abide by Security Council resolutions adopted under Chapter VII (para. 245). The competence of the EC must be interpreted in accordance with international law and EC institutions were therefore bound under EC law to comply with these resolutions (para. 254). Despite the fact that the EC is built upon the principle of legality, and a possibility must therefore exist to review the lawfulness of EC norms, the situation was different as regards obligations under the UNC. The CFI considered that EC human rights, including the ECHR, could not therefore affect the duty to obey Security Council resolutions, and it therefore lacked jurisdiction to question these, even indirectly (para. 276). The only exception to this was the power it had to review these resolutions in relation to jus cogens norms. However, the CFI considered that the human rights norms under EC law which were relevant in the case – protection of property, right to an effective defence and access to court (effective remedies) – did not have jus cogens status. It accordingly concluded that no ground for annulling the disputed EC regulations existed. The case has been appealed to the ECJ. If the applicant fails to achieve success there, the main avenue of legal challenge still remaining is the ECtHR.

Due Process, the ECHR and Blacklisting in general

The Convention is built on what can be called the traditional idea of due process. Simply put, in criminal matters, this means that there are laws criminalizing, in general but relatively clear terms, certain conduct, as well as laws setting out relatively precise powers and procedures by which the state can respond to such criminalized conduct. A decision is made in an individual case by the police or the prosecutor to launch a criminal investigation. This can often involve the use of coercive measures (secret surveillance, search and interim seizure of assets or the instruments of crime, arrest and detention of the accused). These coercive measures are followed by a trial which leads to the conviction or acquittal of the accused. In the case of conviction, there can be a further stage – forfeiture of assets or the instruments of or proceeds of crime (assessed on either a criminal law or civil law burden of proof). The process follows a sequence and the focus is on drawing an adequate balance

¹² See SC/8602, 23 December 2005. Under para. 18 of Resolution 1617, the Committee will “continue its work” on the matter.

¹³ S/2005/572, paras 31 and 55.

¹⁴ A summary of cases is set out in S/2005/572, annex II.

¹⁵ T-306/01, 21 september 2005 (hereinafter Yusuf case).

between the interests of the individual in freedom, his/her personal integrity and the need for a fair trial with the interests of the state in dealing effectively with criminality. In civil matters, the issues are more simply providing access to court for individuals bringing claims against one another and against the state (where this has acted in some way affecting individuals' civil rights) and ensuring that the resulting trial is fair. In both civil and criminal matters, the "centerpiece" could be said to be the fair trial. This involves inter alia an open leading of evidence, an impartial, independent and competent court, the equality of arms of the parties and, in criminal cases, the presumption of innocence of the accused. Secret investigative measures which do not lead to trial have been dealt with under the protection of the home and private life. Where such measures are part of the evidence lead in a criminal trial, the issue which tends to arise is not so much admissibility of evidence, because the ECtHR tends to leave this to national courts, but equality of arms (fair trial).

The possibility of proscribing organizations which engage in criminal conduct (e.g. attempted overthrow of the democratic order) exists in a number of Council of Europe states. There is usually a special procedure for this before a court, often a special court, whereby the executive has to satisfy certain conditions, and the organization is given certain rights of due process. If the organization is proscribed, membership can become a criminal offence, its assets can be frozen or seized etc. Depending upon how national law is framed, it may or may not be possible for an individual subsequently charged with membership of a proscribed organization to plead that the decision to proscribe was incorrect or unlawful. Although proscription can give rise to special human rights difficulties, proscription tends to be conditioned on a criminal offence and as such, the traditional principles of due process can be adapted to fit it.¹⁶

UN blacklisting does not fit into this more traditional pattern of due process. It bears a superficial similarity to interim seizure of assets pending a trial, but it is in fact entirely different. The fact that even a national judicial investigation into, e.g. terrorist financing may be started on rather thin evidence is not really a problem in ordinary criminal investigations, even when accompanied by interim executive or judicially ordered freezing of assets. This is because such measures can later be challenged at the national level, either in separate civil proceedings, or in the subsequent criminal trial itself. Where there is a criminal trial, then either the state is found to have been justified in the interim seizure through the conviction of the accused, or it is not, and the measures are lifted, if necessary after the affected person has challenged them before a court. But at the UN level, the freezing measures are *alternatives* to criminal investigations, not adjuncts. And, at least where these have been properly implemented at the national level, there are major problems involved in challenging sanctions. Thus, in practice it is very difficult for him or her to get them lifted by court order.

Nor does blacklisting fit into the pattern of the legislature proscribing conduct in general terms which is then applied by the executive (police or prosecutor) in a specific case (a decision to order a criminal investigation or to bring criminal charge). This is in one sense very unsatisfactory. From the perspective of legal theory, the regulations violate the principle of the separation of powers, a fundamental element of the *Rechtsstaat*. In "legislating by list", the Security Council acts as legislature, judiciary and executive.¹⁷ And even if one can

¹⁶ There can be due process difficulties where the proscription is administrative in character (admissibility of evidence, fair hearing etc.), and any subsequent court review is of limited scope (e.g. only of "arbitrary" decisions, but not of the merits). These difficulties are compounded when, as mentioned above, a person subsequently tried for membership is not permitted to challenge the basis of the proscription of the organisation. For a US district court case which found a US blacklisting to be unconstitutional for precisely these reasons see *US v. Rahmani*, 209 F. Supp 2d 1045 (C.D. Cal. 2002), discussed in E Broxmeyer, *The Problems of Security and Freedom: Procedural Due Process and the Designation of Foreign Terrorist Organisations under the Anti-Terrorist and Effective Death Penalty Act*, 22 *Berkley JIL* 439-488 (2004).

¹⁷ The ECtHR has several times found violations of the right of access to court where the legislature has

argue that the Convention does not as such require a separation of powers, it is fundamental to the concept of the “prescribed by law” – central to the Convention – that there be effective independent controls on executive discretion. As the Court put it in *Maestri v. Italy*, “The law should be accessible to the persons concerned and formulated with sufficient precision to enable them – if need be, with appropriate advice – to foresee, to a degree that is reasonable in the circumstances, the consequences which a given action may entail ... For domestic law to meet these requirements, it must afford a measure of legal protection against arbitrary interferences by public authorities with the rights guaranteed by the Convention. In matters affecting fundamental rights it would be contrary to the rule of law, one of the basic principles of a democratic society enshrined in the Convention, for a legal discretion granted to the executive to be expressed in terms of an unfettered power. Consequently, the law must indicate with sufficient clarity the scope of any such discretion and the manner of its exercise”¹⁸

While international human rights presuppose a separation of powers, and *meaningful* independent judicial control, the international legal system as a whole is instead based on a monolith, the state. This is the argument which one occasionally comes across from people who reject the view that the Security Council should voluntarily restrict its power to act as a combined legislature, executive and judiciary. For opponents of the measures as they are at present constructed, the mere fact that the Security Council has branched into an area of activity previously reserved for states should not mean that the dearly won due process safeguards which apply at national law should disappear. The advent of blacklisting without meaningful appeal indeed calls into question cherished concepts of national law. As such it creates a “dissonance” between our conception of the law, and its reality.¹⁹ Without wanting to exaggerate, I would say that, for a lawyer trained in the idea of the *Rechtsstaat*, blacklisting strikes at such a basic level of his or her understanding of what *is* law that it calls into question why it should be obeyed. And at a time of an alleged “clash of civilizations”, if European states wish to avoid this, then it is all the more important for them to adhere to their own professed basic values, especially when targeted sanctions can particularly affect people from immigrant groups in their own territories.²⁰

I can now turn to a detailed examination of the substantive rights and remedies under the ECHR which are relevant to targeted sanctions. These are: Article 6, 8, Protocol 1, Article 1 and Article 13. Article 8 includes a specific national security “accommodation clause”, as does Article 6 (but only as regards the exclusion of the press and public from a trial). However, the Convention organs have held that where there is an exceptional situation threatening public order, such as a wave of terrorist violence, then this background can be taken into account in determining the legitimacy of measures taken which allegedly infringe those Convention rights which are not framed in absolute terms.²¹

interfered with the judicial function. See, e.g. *Anagnostopoulos and others v. Greece*, No. 39374/98, 7 November 2000 and *Kutic v. Croatia*, No. 48778/99, 1 March 2002.

¹⁸ No. 39748/98, 17 February 2004, para. 30. See also Parliamentary Assembly, Combating terrorism and respect for human rights Resolution 1271 (2002).

¹⁹ For discussion of the “dissonance” problem in another context, see M. Reisman, *Unilateral Action and the Transformations of the World Constitutive Process: The Special Problem of Humanitarian Intervention*, 11 EJIL 7-15 (2000).

²⁰ Thanks to Jonas Christoffersen for useful comments on this last point.

²¹ E.g. *Brogan and Others v. UK*, 29 Nov. 1988, A/145-B, para. 48, *Zana v. Turkey*, 19 December 1997, paras 59 and 60. See further the Guidelines on Human Rights and the fight against terrorism, March 2005, Council of Europe publishing.

Article 6: Criminal Charge

The concept of a criminal charge is autonomous. It is not decisive how national law defines the proceedings. The criteria which the ECtHR applies are the nature and severity of the penalty, the character of the act/offence and how the proceedings are classified under national law. The first of these criteria is most important.²² Loss of remission²³ or of a driving licence²⁴ has been treated as a “criminal charge”. The 1267 Sanctions Committee and Monitoring Team have repeatedly stressed that sanctions are administrative in character, and criticized states which have insisted on the national criminal requirements being fulfilled before assets can be frozen. According to the Monitoring Team, the reasons for not regarding blacklisting as a criminal charge are that many States have not criminalized relevant acts of international terrorism, the evidence or testimony against terrorists is classified or otherwise unavailable and because the procedure does not involve criminal punishment or criminal procedure.²⁵

The first argument is not convincing in view of the duty of criminalization contained in Security Council resolution 1373, and does not in any event, mean that the Security Council should not provide for a criminal-type procedure before one of its subordinate bodies. The second argument appears to begin from the idea that the need not to reveal intelligence material is overriding. As this supposedly makes a fair trial in the criminal sense impossible, the proceedings *must* be classified as administrative. This argument is not convincing either, as shown below when I discuss the ECtHR’s case law on fair trial. The third argument is not an argument, but an assertion.

Nonetheless, it cannot be denied that in one sense, blacklisting is a strange type of criminal charge. The Security Council decrees lay down no prohibited activity against which the named individuals’ actions or omissions are to be measured. And where there is no norm laid down, the individual cannot breach it. Thus, the right to a fair hearing as regards a criminal charge in the circumstances can be meaningless.

In *Phillips v. UK*²⁶ the ECtHR ruled that proceedings for the confiscation of the assets of a convicted criminal (as presumed earnings from drug trafficking) was not the “determination of a criminal charge”. One can argue thus that as freezing, being a lesser measure than confiscation, should not be covered either. However, in the *Phillips* case there had already been a criminal conviction – established on an evidential standard of “beyond reasonable doubt”. If the measure is seen as a criminal charge then the safeguards of Article 6(2), the presumption of innocence, and the procedural safeguards of Article 6(3) will apply. An issue under Article 7 might also arise (foreseeability/non-retroactivity of criminal law) in those cases where the conditions applicable in national criminal law for freezing assets are not satisfied.

Article 6: Reputation, Property and Access to Court

If blacklisting is not the determination of a criminal charge, then blacklisting fits into the Convention framework of disputes over “civil rights”, private life, property and effective

²² See, e.g. *Lauko v. Slovakia and Kadubec v. Slovakia*, 2 September 1998.

²³ *Campbell and Fell v. UK*, 28 June 1984, A/80.

²⁴ *Malige v. France*, 28 September 1998.

²⁵ See S/2005/572, paras 40-41.

²⁶ No. 41087/98, 5 July 2001.

remedies. The right to reputation is a civil right.²⁷ Identification of a named individual as a terrorist suspect and/or as assisting terrorists is an attack on a person's reputation, thus triggering a right of access to court to determine the issue, irrespective of whether the alleged assistance is witting or unwitting. In both cases, the person is being held up for the disapproval of others. One might argue that the Security Council resolutions do not actually state that the named individuals are engaged in criminal activity, let alone constitute an assessment of "evidence" of their complicity in crime.²⁸ But it is evident from the Monitoring Team reports, and the new definition of "association" that the individuals are suspected of involvement in terrorism or financing terrorism.

Normally, a national court's decision to implement an asset freeze of, or travel ban on, a suspect would not in itself be defamation, but this is because such a measure is short-term. The issue of guilt or innocence of the suspect in a criminal case will soon be determined in a court, and so there is no need to take an extensive interpretation of defamation. The situation is different here, as the person can be on a blacklist for a considerable time and the blacklisting is not an interim stage in a criminal process, but an alternative to this.

The only ECtHR case so far (of which I am aware) on the issue of blacklisting and reputation is *Zollmann v. UK*.²⁹ This concerned two Belgian diamond merchants who were alleged in the UK parliament by a government minister to be smuggling diamonds out of the area of Angola controlled by UNITA and thus breaching the UN targeted sanctions against UNITA. They were unable to sue for defamation in the English courts because of parliamentary immunity. The ECtHR has previously stated that absolute parliamentary immunity is a legitimate implied limit to access to court under Article 6³⁰ and it reiterated this in the *Zollman* case. If this limit had not existed, it is evident that the ECtHR would have considered the blacklisting to be an attack on one's reputation.

This is not to say that the ECtHR considers that the persons have been defamed. This is not its function. It simply means that, normally, an accusation that a person is assisting terrorism should allow the person in question to bring defamation proceedings in a national court. This national court would then normally require some sort of evidence to be produced before the court that there are grounds for the accusation, although the standards will vary according to the national law on defamation (truth, reasonable grounds for believing etc.). In many conceivable cases, public sources would presumably suffice to show that such grounds exist. Conceivably even special in camera procedures could apply where the evidence was secret intelligence material. It may seem strange to someone involved in counter-terrorism that an individual cannot even be accused of terrorism without triggering a civil right to vindicate his/her reputation. But in a *Rechtsstaat*, the fundamental principle is that where there is sufficient evidence that an individual is engaged in crime, then that individual can be prosecuted under the criminal law. In some states, there might be insufficient evidence for a criminal conviction, but still strong enough evidence to avoid liability under applicable tort law (where the issue of defamation is dealt as by a tort). It is the UN Security Council which is attacking the individuals' reputation, but, problematically, the UN as an organization is entitled to immunity.

²⁷ See e.g. *Golder v. UK*, 21 February 1975, A/ 18, *Rotaru v Romania*, No. 28341/95, 4 May 2000, *Niemietz v. Germany*, 16 December 1992, A/251-B, para. 37. The right to reputation is not as such protected by Article 8, see *Gunnarsson v. Iceland*, No. 4591/04, 20 October 2005, however, where this right is recognized by national law it will fall under the scope of Article 6.

²⁸ Although the Monitoring Team itself uses the word "evidence" for blacklisting (see S/2005/572 paras 43 and 48).

²⁹ No. 62902/00, 27 November 2003 decision inadmissible,

³⁰ *A v. UK*, No. 35373/97, 17 December 2002.

Lastly on this point, the right to inherit, own or use property is a “civil right” within the meaning of Article 6, triggering a right of access to court.³¹ The ECtHR further requires that the proceedings must be “decisive” for a civil right.³² This means that interim measures will not usually qualify, unless these partially determine the case.³³ Such an approach is understandable, as it is inappropriate that the full battery of Article 6 safeguards (oral hearings etc.) apply to all aspects, even minor, of an ongoing case. However, freezing sanctions cannot be regarded as being “interim” in the sense of being a short-term measure pending a final judicial determination of the issue. Instead, they are a total bar on access to court/judicial remedies for an unlimited period of time, as well as a total bar on subsequent damages claims if the measure is ever lifted.

There is thus a right of access to court under Article 6. Having said this, there is room for inherent limitations, as long as these pursue a legitimate aim and there is a reasonable relationship of proportionality between the means employed and the aim sought to be achieved.³⁴

Access to Court and Fair Trial: restrictions for national security reasons

Having settled the applicability of Article 6, the next issue which arises is whether access to court can be blocked for reasons of national security. The short answer to this is no. There are several cases in which the ECtHR has refused to accept that access can be totally blocked for national security reasons or that the court is, for national security reasons, not capable of determining the disputes on the merits.

The leading case is *Tinnelly and Sons Ltd and Others and McElduff and Others v. UK*.³⁵ This involved UK blocking of access to Northern Ireland tribunals by means executive certificates in disputes concerning failure to obtain a public procurement contract. The context was terrorist violence and information allegedly behind the certificate (if it existed at all) was presumably intelligence material (informers’ testimony, electronic surveillance etc.). The Court stated that the “right guaranteed under Article 6(1) of the Convention to submit a dispute to a court or tribunal in order to have a determination on questions of both fact and law cannot be displaced by the ipse dixit of the executive”³⁶ The respondent government had argued, relying on case law dealing with Article 13 and the importance of maintaining the confidentiality of national security information that the access was as effective as it could be in the circumstances.³⁷ The Court, however, rejected this. It pointed out that the test for Article 6 was stiffer than the test for Article 13. The (minimal) controls which operate in

³¹ See, e.g. *Sporrong and Lönnroth v. Sweden*, 23 September 1982, A/52. Disputes over the capacity of a person to administer property are also disputes over civil rights. See *Winterwerp v. Netherlands*, 24 October 1979, A/33.

³² See, e.g., *Ringeisen v. Austria*, 16 July 1971, A/13.

³³ See, e.g. *Markass Care Hire Ltd v. Cyprus*, No. 51591/99, 23 October 2001.

³⁴ See, e.g., *Fayed v. UK*, 21 September 1994, A/294, *Stubbings and others v. UK*, 22 October 1996 and *Brumarescu v. Romania*, 28 October 1999. Note that where the substantive right which allegedly exists is not recognized at national law, there is no right of access to court. See *Roche v. UK*, No. 32555/96, 19 October 2005.

³⁵ 10 July 1998.

³⁶ At para. 77, referring to *Chahal v. UK*, 15 November 1996, at para. 131. See also *Devenney v. UK*, No. 24265/94, 19 March 2002 and *Beaumartin v. France*, 24 November 1994, A/296-B

³⁷ In particular, *Leander v. Sweden*, 27 March 1987 A/116.

general on collection and transmission of security information³⁸ could not compensate for the total absence of effective judicial remedies in this area.

The fact that there is a right of access to court does not mean that national security considerations are thereafter irrelevant. Obviously, there can be a need to maintain the safety of judges and preserve the identity of informers and the secrecy of intelligence methods. The ECtHR has accepted the idea of special courts in anti-terrorism matters. However, there are important conditions to be fulfilled if the court is to be regarded as independent and impartial. In the leading case of *Incal v. Turkey*, the Court examined the compatibility of the Turkish National Security Courts with the Convention.³⁹ It stated that “regard must be had inter alia to the manner of appointment of its members and their term of office, the existence of safeguards against outside pressures and the question whether it presents an appearance of independence”.⁴⁰

As regards maintaining secrecy, the variations in rules regarding the admissibility of evidence mean that the Convention organs have taken the position that this is primarily a matter for the contracting parties.⁴¹ As regards litigation involving opposing private interests, equality of arms implies that each party must be afforded a reasonable opportunity to present his/her case - including his/her evidence - under conditions that do not place him/her at a substantial disadvantage *vis-à-vis* his/her opponent.⁴² Most of the relevant case law on secrecy deals with criminal cases. However, secrecy for reasons of national security is also relevant in administrative and civil cases, as shown by *Chahal and Wierzbicki v Poland*.⁴³ The following points taken from the Court’s case law in criminal cases I would submit are applicable *mutatis mutandis* to civil cases on the basis that, if such restrictions are permissible in a case where a person can be imprisoned, such restrictions should also be permissible in freezing cases.

As regards procedural safeguards, the ECtHR has held that the right to be presumed innocent and to require the prosecution to bear the onus of proving the allegations against him or her forms part of the general notion of a fair hearing under Article 6(1).⁴⁴ The general rule as regards equality of arms laid down by the Convention is that all *material* evidence *for or against* the accused must be disclosed to the defence.⁴⁵ However this does not mean that *any* omissions, or restrictions on access to, the prosecution’s material will render the trial unfair.⁴⁶ The important questions are whether the trial court based any of its findings on material which was not disclosed to the defence, whether non-disclosure of material actually put the defence at a significant disadvantage and if so, whether there existed some form of compensatory mechanism. The Court in *van Mechelen v. Netherlands* applied a demanding test of proportionality, holding that any measures restricting the rights of the defence must be

³⁸ See below, on effective remedies.

³⁹ 9 June 1998. See also *Ocalan v. Turkey*, No. 46221/99, 12 May 2005, paras 112-118.

⁴⁰ At para 65. See also the *Campbell and Fell* case.

⁴¹ See D. J. Harris, M. O’Boyle and C. Warbrick, *Law of the European Convention on Human Rights*, Butterworths, London, 1995, p. 164.

⁴² *Dombo Beheer v. Netherlands*, 27 October 1993, A/274, paras 31-33.

⁴³ No. 24541/94, 18 June 2002.

⁴⁴ *Phillips v. UK*, para. 40.

⁴⁵ *Edwards v. UK*, 16 December 1992, A/247-B, para. 36.

⁴⁶ See e.g. *Bendenoun v. France*, 24 February 1994, A/284, *Miaihle v. France* (no. 2), 26 September 1996 and *Lamy v. Belgium*, 30 March 1989, A/151, para. 29.

strictly necessary: “if a less restrictive measure can suffice then that measure should be employed.”⁴⁷ The case leaves open the possibility of allowing anonymous police or security witnesses, particularly when investigations are ongoing (which will be the case here) but only when this has been shown by objective evidence to be strictly necessary, and only when compensatory safeguards exist (e.g. security-screened advocates or special duties on the court itself to weigh evidence).

In the recent case of *Haas v. Germany*,⁴⁸ the Court accepted, when dealing with an active and dangerous terrorist organisation, the need to keep the identity of informers and intelligence operatives secret, especially when these informers and operatives are situated outside of the territory of the state in question (and thus beyond the power of the state physically to protect). However, it reiterated that such evidence must not form the sole basis of the conviction, must be carefully evaluated by the court and any disadvantages which the defence suffers, e.g. due to the lack of possibility of cross-examination, must be counterbalanced by the court acting on its own motion.

Lastly on judicial controls, I should add that the fact that special judicial compositions and special procedures might apply for terrorist cases should not necessarily be seen as negative for human rights. It is crucial, in security matters, that an independent body charged with monitoring activity, be it court, quasi-judicial or parliamentary body has the powers and competence to provide an effective safeguard. There are unfortunately many examples of purely formal mechanisms of challenge as far as security matters are concerned.⁴⁹ A court's jurisdiction may be limited by standing requirements, or it may only be able to review the legality of the measure, and not its merits. Or the judges may have no expertise in security matters, or they may be unable in practice to look at *all* the intelligence material in question. Or there may be a tradition that the judicial branch defers to the executive in matters of foreign policy and/or national security. In such cases, a right of appeal, or review, can be worse than useless, as it gives the impression of just procedures, without the reality.

Access to court: restrictions for reasons of fulfilling international law obligations

Can access to court be blocked because a state is obliged to do so, in order to fulfill another international obligation, in particular, to uphold state, diplomatic or international organization immunity? This issue should be distinguished from the issue of the extent to which acts within the contracting parties “jurisdiction” under Article 1 includes a residual responsibility for implementing the acts of an international organization to which they are party. However, the two issues are closely linked.

As far as concerns the issue of immunity of suit of international organisations, the Court has taken the view in *Waite and Kennedy v. Germany* and *Beer and Regan v. Germany*, concerning the European Space Agency (ESA)⁵⁰ that this immunity is an essential means of ensuring the proper functioning of such organisations free from unilateral interference by individual governments. However, it would be incompatible with the purpose and object of the Convention if the Contracting States were *absolved* from their responsibility under the Convention by granting competence to an international organisation in a particular field.

⁴⁷ *van Mechelen and Others v. Netherlands*, 23 April 1997, at para. 58. See also *Doorson v. Netherlands* 26 March 1996, S.E. v. Switzerland, No. 28994/95, 25 EHRR CD 127.

⁴⁸ No. 73047/01, 17 November 2005.

⁴⁹ For an examination of these issues from the perspective of the ECHR, see I. Cameron, *National Security and the ECHR*, *Iustus/Kluwer*, 2000, at pp. 157-161, and *passim*.

⁵⁰ *Waite and Kennedy v. Germany* and *Beer and Regan v. Germany*, Nos 26083/94 and 28934/95, 18 February 1999.

Thus, the question became whether the applicants had available to them *reasonable alternative means to protect effectively* their rights under the Convention. The Court concluded that, since the applicants had claimed the existence of an employment relationship with ESA, they could and should have had recourse to the ESA Appeals Board, which is "independent of the Agency", and has jurisdiction "to hear disputes relating to any explicit or implicit decision taken by the Agency and arising between it and a staff member".⁵¹ The Court found that, in giving effect to the immunity from jurisdiction of ESA, the German courts did not exceed their margin of appreciation.⁵²

In *Prince Hans-Adam II of Liechtenstein v. Germany*⁵³ in circumstances which the Court described as "unique" (para. 59), the ECtHR found that the right of access to a court can be totally barred by an international obligation. Similar reasoning was applied in *Al-Adsani v. UK*, and *McElhinney v. Ireland*, which both concerned respondent states which had applied the rules of state immunity and blocked claims for damages brought against third states for acts allegedly in violation of international law.⁵⁴

However, the *Prince Adam*, *Al Adsani* and *McElhinney* cases are different from *Waite and Kennedy* and *Beer and Regan* cases. Should, for example, an attempt be made by a blacklisted person to sue the UN before national courts, then these cases might allow a state party to the ECHR to refuse to grant access to court, or otherwise bar the execution of the claim due to the immunity of the UN from suit. They are *not* authority for finding that contracting states have no residual responsibility under the Convention for adopting and/or implementing actions of international organizations violating Convention rights.

Article 8: Private and family life

Those property rights which are necessary for the realization of private and family life will raise an issue under Article 8. In some cases, the freezing of a *private* bank account may be justified to prevent, e.g. financing of terrorism, but in most conceivable situations this will not be the case. It is thus difficult to see how long-term freezing *all* of a person's assets can be justified as "necessary in a democratic society" under Article 8(2). The amendment to Resolutions 1267 concerning humanitarian exceptions for personal costs which has now been adopted by the Security Council will probably remove this potential conflict with Article 8, at least as far as the Afghanistan/Al-Qaida sanctions are concerned.

However, the ban on paying money to blacklisted persons obviously means in practice an employment ban. A right to employment in the *public* sector was deliberately excluded from the Convention, however, a far reaching employment ban in private employment has also been found to breach Article 8 in conjunction with Article 14 in *Sidabras and Džiautas v. Lithuania*.⁵⁵ This case concerned employment restrictions imposed on former employees of the KGB. The Court concluded that a far-reaching ban on taking up private sector employment does affect private life.⁵⁶ The majority of the Court considered that "the

⁵¹ At paras 30 and 59.

⁵² See also *A.L. v. Italy*, No. 41387/98, 11 May 2000, regarding an employment dispute before the NATO Appeals Board.

⁵³ No. 42527/98, 12 July 2001.

⁵⁴ Respectively, No. 35763/97, and No. 31253/96, 21 November 2001. See also a communicated decision regarding state immunity and the possibility for victims of terrorism to obtain compensation, *Association sos attentats and Béatrice de Boëry v. France*, No. 76642/01, communicated October 2004.

⁵⁵ Nos 55480/00 and 59330/00, 27 July 2004.

⁵⁶ At para 47. The Court referred to the fact that "there is no watertight division separating the sphere of social and economic rights from the field covered by the Convention" and referred to *Airey v. Ireland*, 9 October 1979,

legislative scheme must be considered to lack the necessary safeguards for avoiding discrimination and for guaranteeing an adequate and appropriate judicial control of the imposition of such restrictions” (para. 59). I consider that this case is applicable *mutatis mutandis* to blacklisting. It may be, however, that even this human rights problem can be solved in appropriate cases by the Sanctions Committee issuing a dispensation under Resolution 1452.

Article 1, Protocol 1: Property rights

As regards the issue of protection of property in general (including business accounts etc) this falls under Article 1, Protocol 1. The content of the property right is relatively weak. Whether or not a state measure, or combination of measures, controlling the use of property is regarded as being sufficiently serious to constitute a denial of peaceful enjoyment of possessions or a deprivation of property is a matter of degree.⁵⁷ Where it falls short of a denial or deprivation the measure is judged under the looser requirements of paragraph (2).

The second sentence of paragraph (1) allows the state to deprive a person of property “in the public interest”. In practice, the ECtHR will accept the state’s explanations that a particular measure was motivated by the “public interest” unless the reasons advanced are “manifestly without reasonable foundation”.⁵⁸ Nonetheless, it has made it clear that it is possible to violate the article when there is no reasonable proportion or fair balance between interference with the individual’s rights and the objectives of the public interest.⁵⁹ As regards controls on the use of property, read literally, paragraph (2) appears to grant states almost unlimited discretion as to what measures they might wish to take, both in the “general interest” and to “secure ... other contributions or penalties”. But the Court nonetheless reviews both the lawfulness and legitimate purpose of the measure (i.e. whether it is motivated by the “general interest”) as well as its proportionality.⁶⁰

The ECtHR has specified that a confiscation of property used in crime, even when this belongs to a third party, is not a denial/deprivation of property but rather a “control on use”.⁶¹ So a simple freezing will not likely be seen as a deprivation either. Having said this, there is no time limit on Resolution 1390. Thus, freezing can be of unlimited duration, and probably will be. Thus, even if it is not seen as a denial/deprivation at the present time, the longer the freezing continues, the more the measure should be seen as a denial/deprivation of property which has not, however, been done, formally speaking, as a consequence of the commission of a criminal offence.⁶² It should also be noted in this respect that the Security Council is considering the forfeiture of seized assets and their use in a fund to compensate the victims of terrorism.⁶³

A/32, para. 26.

⁵⁷ E.g. *Sporrong and Lönnroth case*.

⁵⁸ See *James v. UK*, 8 July 1986, A/98, para. 46.

⁵⁹ See, e.g. the *James case*, para. 50 and *Stran Greek Refineries and Statis Andreadis v. Greece*, 9 December 1994, A/301-B, paras 68–75.

⁶⁰ *James case*, para. 46, although see *Jahn and others v. Germany*, Nos 46720/99, 72203/01 and 72552/01, 30 June, 2005.

⁶¹ *AGOSI v. UK*, 24 October 1986, A/108. One question is whether tougher standards ought nonetheless to apply as regards freezing the property of family members: is this property being frozen because it is suspected that the main target could otherwise easily circumvent the sanctions, or is this property being frozen to punish the family member for being a family member?

⁶² Cf. *Sporrong and Lönnroth case*, paras 72-73.

⁶³ The Monitoring Team has been asked to consider this under Resolution 1566, para. 10.

Assuming that the measure is not extended too much in time, the test of compliance with Article 1 will be the “general interest” criterion in the third sentence of the article. The Court has made it clear that the general test of proportionality between infringement and goal is in any event applicable.⁶⁴ Proportionality in ECtHR (and ECJ) case law means a test of both necessity and a reasonable relationship between the measure and the aim to be achieved. If the issue is simply to balance the threat to international peace and security in the *abstract* with the infringement of the civil right of property a temporary freezing entails, then the scales can invariably be assumed to come down on the side of maintaining international peace and security.

In the *Bosphorus* case⁶⁵ the ECJ engaged in only abstract balancing, finding the sanctions against the FRY, which led to the seizure of the aircraft not to be disproportionate. But the situation regulated in the *Bosphorus* case can be distinguished from freezing of the assets of individuals. First the measure is *directed* against individuals. These are not the *indirect* victims of *general* sanctions directed against a foreign government. The necessity for such a general measure is a political decision *par excellence*, and judicial review of such a measure is inappropriate. Secondly, it is individuals who are affected, not simply companies. And they are affected long-term and drastically, not peripherally.

After the applicants lost in the *Bosphorus* case, they applied to the ECtHR. In *Bosphorus Airways v. Ireland*⁶⁶ the ECtHR found that the EC protection of property rights in the case was not “manifestly deficient”. It did not therefore proceed to examine in detail whether the requirements of Article 1, Protocol 1 were satisfied. The implications of the *Bosphorus* case relate to residual state responsibility for the acts of an international organization and are examined in detail below.

Finally, as already mentioned, the issue of protection of property was raised in the *Yusuf* case. However, the substance of the issue was not dealt with; only the question as to whether protection of property was a *jus cogens* norm.

It seems clear that, the margin of appreciation being wide as regards controls on use of property, and national security being a pressing need, the possibility exists under the ECHR to take fairly drastic measures against property in the name of anti-terrorism. However, the room for error exists in this field as in any other. Indeed, it probably is even more likely in a field where enforcement agencies are required to act on limited intelligence material, under political pressure to show results quickly. The ECtHR has tended to take into account the availability of safeguards, particularly judicial safeguards, against wrongful, arbitrary controls on use. In e.g. *Air Canada v. UK*,⁶⁷ the possibility of judicial review of the confiscation order was an important factor in the judgment that the confiscation did not violate Article 1, Protocol 1, even if the scope of the judicial review was limited. A similar position was taken in *Allan Jacobsson v. Sweden*,⁶⁸ where the need to retain the restrictions was re-examined periodically.

As the sanction is, at least, *quasi-criminal* in nature, then it would seem logical to examine whether there is sufficient proof of involvement in terrorism justifying the measure. This demands some form of independent body applying a specific, concrete test of

⁶⁴ See *James* case, para. 46.

⁶⁵ Case C-84/95, *Bosphorus Hava Yollari ve Ticaret AS v. Minister for Transport, Energy and Communications, Ireland and the Attorney General*, European Court of Justice, [1996] ECR 3953.

⁶⁶ *Bosphorus Hava Yollari Turizm ve Ticaret AS, v. Ireland* No. 45036/98, 30 June 2005.

⁶⁷ 5 May 1995, A/316-A.

⁶⁸ 25 October 1989, A/163. See also *Capital Bank AD v. Bulgaria*, No. 49429/99, 24 November 2005.

proportionality. This means in turn examining whether *the specific measures* directed against *the specific individuals* are necessary in the circumstances to advance international peace and security, and if so, whether the *gain* to international peace and security by freezing *these particular persons' assets* is proportionate to the infringement of their property rights. This would not involve questioning the determination of the Security Council that there is a threat to international peace and security: only the proportionality and necessity of a measure adopted by a subordinate body, the Sanctions Committee, against a particular individual.

Having to satisfy a proportionality test also requires posing the questions as to whether the means chosen (sanctions) are *capable* of achieving the goal (cutting off, or making more difficult terrorist financing) as well as whether these means are *proportional* to the end to be achieved. The ECtHR has not been very strict in such matters, accepting plausible if not convincing arguments from states. Having said this, there is a great deal of doubt as to whether the sanctions have *any* significant effect on terrorist financing. The Resolution 1267 Sanctions Committee is ambiguous on the point.⁶⁹ Even the Resolution 1267 Monitoring Team is ambiguous.⁷⁰ The team refers to the “difficulty in quantifying its effect” but still concludes that it is an “essential element” of the fight against Al-Qaida, partly because of its “significant symbolic value”.⁷¹ Independent commentators, by contrast, regard the blacklisting method as a form of diplomacy, ineffective in terms of stopping terrorist attacks.⁷² Long term, this can only be done by identifying the participants in terrorist networks which in turn requires monitoring of financial flows. Terrorist outrages are relatively cheap to perpetrate. However, money is undoubtedly needed for training camps and maintaining terrorist groups. But blacklisting will not facilitate the identification of the networks financing such groups and the means by which this is done. On the contrary, blacklisting will usually make the process of *detection* much more difficult.

Bearing in mind the small sums which are needed, even small money flows siphoned from, e.g. wealthy Islamic charities, will be enough to finance considerable terrorism. Without a lasting peace in the middle east, large sums of money will (naturally enough) be given for charitable purposes of which some will undoubtedly make its way to terrorist groups. But for political and technical (competence, capacity) reasons no strong action has yet been taken by the states where the money for Islamic charities originates, or is processed. In the absence of meaningful implementation by certain states against certain Islamic charities, one can argue that the UN sanctions are hardly “value for money”.⁷³

⁶⁹ In its report from 2004, S/2004/1039, the Sanctions Committee stated that the freezing sanctions have only had a “limited impact” because of the constantly changing nature of Al-Qaida and the rigidity of the list and the travel ban has had “little or no effect” (at para. 24). The Committee still considers that it has made a “tangible contribution to the fight against terrorism in the past two years through the tool of sanctions implementation” (at para. 31).

⁷⁰ The latest Monitoring Team assessment, S/2005/761, suggests that “sanctions are having an effect” they “may have forced Al-Qaida to rely more heavily on local criminal activity” that “large sums while not critical to the success of an attack, are now *less likely* to be available” (para. 18, my emphasis). Later, however, the Monitoring Group states that “it seems clear that the listed terrorists are still managing to raise and receive funds” (para. 61)

⁷¹ S/2005/572, para. 38.

⁷² See e.g. National Commission on Terrorist Attacks on the US (the “9/11 Commission”) (available at <http://www.9-11commission.gov/report/911Report.pdf>) p. 382 and M. Raphael, Sanctions and Freezing of Funds as a Counter Terrorism Measure, lecture delivered at Human Rights Forum, Stockholm, 17th November 2005, law@petersandpeters.co.uk (on file with author). Raphael is Head of Fraud and Regulatory in the London firm of Peters and Peters.

⁷³ J.D.G. Waszak, The Obstacles To Suppressing Radical Islamic Terrorist Financing, 36 Case W. Res. JIL, 673-710 (2004). See also 9/11 Report, pp. 169-173.

Effective Remedies

Article 13 ECHR requires the provision of effective remedies for alleged convention violations at a national level. It is thus necessary to allege a violation of a material right before Article 13 is applicable. However, in most cases, the rights under Article 13 are subsidiary to those of Article 6 which I consider is the main right at issue. I consider that, as blacklisting affects civil rights, the main remedy is a judicial remedy under Article 6. The following discussion should thus be seen as an alternative argument, only to be advanced if for some reason the ECtHR would consider Article 6 not to be applicable to blacklisting.

The Court decided in *Klass and others v. FRG* in 1978 that where a national authority does not take sufficiently into account, or is not capable of taking into account, the substance of an individual's arguable *claim* that his or her Convention rights have been breached then there has been a breach of Article 13.⁷⁴ The Convention organs have, subsequent to *Klass v. FRG*, also confirmed that a remedy under Article 13 must be available to the applicant personally.⁷⁵ However, in *Klass* the ECtHR also stated that Article 13 has a subsidiary character in that an effective remedy means only a remedy which is as effective as can be having regard to the circumstances.⁷⁶ Of particular relevance to the present case of anti-terrorist sanctions is the fact that the *Klass* case also concerned measures taken in the name of national security. States have a margin of appreciation as to how they interpret their obligations under the article.⁷⁷

The emphasis on the margin of appreciation meant that Court's case law on Article 13 was underdeveloped and unpredictable for a long time and this related to fact that the Court's views were heavily dependent on the facts of the particular case, which in turn related to the Court's conception of its role as an international rather than constitutional law remedy. However, with the incorporation of the Convention into the national legal orders of all the contracting states, the growing number of these states and the vast expansion in complaints to the Court, the Court's international law approach has gradually changed in favour of a more "constitutional" approach. In 1996 the Court found for the first time a breach of Article 13 where it had not ruled that breaches of other articles had occurred.⁷⁸ Moreover, without departing from its case law that states have a margin of appreciation in how they apply Article 13, the Court also began stressing that more "important" rights, e.g. Article 3, require stronger remedies.⁷⁹

Traditionally, the margin of appreciation has tended to be strong in the area of national security. However, it is now clear that the breadth of the margin, even in national security matters, varies from right to right. An important recent case dealing with Article 13 and national security is *Al-Nashif v. Bulgaria*.⁸⁰ Here, the applicant had been detained and deported on national security grounds without being able to challenge the reason for his

⁷⁴ 6 September 1978, A/28.

⁷⁵ See, e.g. *Plattform "Ärzte für das Leben" v. Austria*, No. 10126/82, report of 12 March 1987 at paras 97-98.

⁷⁶ *Ibid*, para. 69. The Court considered that the aggregate of a number of remedies ineffective in themselves could nonetheless constitute an "effective remedy". Such a view is only possible to accept where the ineffective remedies act to complement each other, so as to allow *some* form of redress, in practice, and not simply in theory. Where, on the other hand, the individual effect of every supposed remedy is zero in practice, it is difficult to see how five, or ten, times zero is anything other than zero.

⁷⁷ See, e.g. *Kaya v. Turkey*, No. 22729/93, 19 February 1998, para. 106

⁷⁸ *Valsamis v. Greece*, No. 21787/93, 18 December 1996.

⁷⁹ See e.g. *Chahal v. UK*, No. 22414/93, 15 November 1996.

⁸⁰ No. 50963/99, 20 June 2002.

detention. The Court found this to be a violation of Article 5(4). As regards Article 13, the respondent state had argued on the basis of the *Klass and Leander* cases that Article 13 only requires a remedy "as effective as it can be", having regard to the fact that it is inherent in any system of secret surveillance or secret checks. However, the Court stressed that "the remedy required by Article 13 *must be effective in practice as well as in law* and noted that in the *Klass and Leander* cases, the applicants had possibilities of recourse with certain procedural guarantees and independent review."⁸¹ The Court added that "Where no such review process was available, as in the case of *Rotaru v. Romania* the Court had found a violation of Article 13 of the Convention". Moreover, the Court drew an important distinction between *secret* measures on national security grounds, which can only function effectively if the individual remains unaware of the measures affecting him or her, and other measures motivated by national security considerations such as, in the present case, deportation. The Court stated that in the latter cases, "reconciling the interest of preserving sensitive information with the individual's right to an effective remedy is obviously less difficult ... Even where an allegation of a threat to national security is made, the guarantee of an effective remedy requires as a minimum that the competent independent appeals authority must be informed of the reasons grounding the deportation decision, even if such reasons are not publicly available. The authority must be competent to reject the executive's assertion that there is a threat to national security where it finds it arbitrary or unreasonable. There must be some form of adversarial proceedings, if need be through a special representative after a security clearance. Furthermore, the question whether the impugned measure would interfere with the individual's right to respect for family life and, if so, whether a fair balance is struck between the public interest involved and the individual's rights must be examined".⁸²

This reasoning would seem to be applicable *mutatis mutandis* in a blacklisting case which is, obviously, the opposite of "secret".

Derogation

Human rights treaties accept that rights can be derogated from in public emergencies. Just as states party are entitled to derogate from their obligations under the ECHR (or ICCPR), arguably so too must states bound by these treaties by able to do so acting collectively in the Security Council.⁸³ Arguably, when the Security Council determines that there is a threat to international peace and security it is, by analogy, declaring the existence of a public emergency. Two points must be made in reply. First, as pointed out, the war against terrorism is an eternal war: the "emergency" and the freezing measures taken are likely to be permanent. Second, the acceptance of the notion of derogation in human rights treaties is conditioned on substantive and procedural limitations on the derogation power. States making derogations have a reporting duty. The ECtHR will not apply the derogation clause in the absence of an official notice of derogation.⁸⁴ Moreover, derogation is only permissible to the extent "strictly required by the exigencies of the situation" (Article 15 ECHR).⁸⁵ Thus, while states, and *ipso facto*, the Security Council must be left a considerable margin of appreciation in determining the existence of a public emergency, and the measures required

⁸¹ At para. 136, my emphasis. See also *Brinks v. Netherlands*, No. 9940/04 5 April 2005 (decision inadmissible because adequate system of review existed) and *Segerstedt-Wiberg and others v. Sweden*, No. 62332/00, 6 June 2006 (violation because of lack of effective independent review mechanism).

⁸² *Ibid.*

⁸³ Cf. E. de Wet, *The Chapter VII Powers of the UN Security Council*, Hart Publishing, Oxford and Portland, 2004, p. 344.

⁸⁴ *Isayeva v. Russia*, No. 57950/00, 24 February 2005

⁸⁵ See, e.g. *Aksoy v. Turkey*, 18 December 1996 (pre-trial detention of 14 days was disproportionate).

to deal with the situation, the notion of a totally unsupervised power to derogate is contrary to human rights treaties. The Security Council cannot both have the power to take measures to deal with a public emergency and have the final word on whether these measures are strictly required. While Article 6 (and ICCPR Article 14) are derogable, the core content of the right of fair trial is not.⁸⁶ Besides, if the creation of *some* form of judicial or quasi-judicial review body at the Security Council is feasible, or if the same objective can be achieved without promulgating a list at the level of the Security Council, then the *total* elimination of judicial/quasi-judicial remedies can, ipso facto, not be “strictly required”.

General Principles?

A part of this study is devoted to the issue of to what extent the above principles derived from the case law of the ECtHR can be said to be general principles of human rights law. The ECHR is the most developed system for the international protection of civil and political rights, not necessarily in the sense of being the best devised, or having a supervisory body with the most sophisticated reasoning, but as having the most extensive interpretative case law. Many issues relevant to the subject of blacklisting have arisen before the ECtHR, but have not (yet – and to my knowledge) arisen in the other systems. Having said this, it is possible to derive material relevant to targeted sanctions by analysing the wording of these other treaties, their travaux préparatoires and reason more generally from country reports, general comments, and case law on individual applications. The present study is simply one of a series of studies of the regional and universal systems as regards targeted sanctions, and so there is no need in the present study to analyse these systems in detail.⁸⁷ However, a few points can be made based particularly on the ICCPR.

I will not go into how the Security Council as such (as opposed to members of the Security Council) might be bound by human rights.⁸⁸ The Security Council has implicitly, at any rate, recognised this when it stated that “states must ensure that any measure taken to combat terrorism comply with all their obligations under international law, and should adopt such measures in accordance with international law, in particular international human rights, refugee, and humanitarian law”.⁸⁹ In any event, the Security Council as such is only bound by those rights which have passed into general international law, and those rights which can be seen as authoritative interpretations of the human rights obligations in the UNC, which circumscribe the powers of the Security Council. In both cases, one looks in particular to the Universal Declaration on Human Rights (UDHR).⁹⁰ Arguably, the *core contents* of the two covenants on human rights, the ICESCR⁹¹ and the ICCPR,⁹² are authoritative interpretations of the UNC and are in effect binding on the Security Council as such.

The rights to an effective remedy, to access to court/fair trial, to fair trial in criminal matters, to reputation, to freedom of movement and to property are all contained in the UDHR (Articles 8, 10, 11, 12, 13 and 17 respectively). The ICCPR contains the right of freedom of

⁸⁶ See HR Committee, General Comment No. 29, States of Emergency (2001), para. 11, de Wet 2004, pp. 344-345.

⁸⁷ See in particular B. Fassbinder, Targeted Sanctions and Due Process, Study commissioned by the UN Office of Legal Affairs, 18 February 2006.

⁸⁸ See generally de Wet, 2004, chapters 5, 6 and 9.

⁸⁹ My emphasis. Resolution 1456, 20 January 2003, Annex, para. 6 and Resolution 1624, 14 September 2005, para. 4.

⁹⁰ The customary law nature of the UDHR was stressed by the Vienna Declaration of the World Conference on Human Rights, 1993, endorsed by the General Assembly in Res. 48/121 (1993).

⁹¹ 993 UNTS 3 (1966).

⁹² 999 UNTS 71 (1966).

movement (Article 12). Article 14 sets out rights and obligations in a suit at law and Article 17 protects against interferences in a person's "privacy, honour and reputation". There is no protection of property rights as such. However, Article 14 ICCPR requires access to court to determine a person's "rights and obligations at a suit at law"⁹³. Disputes over the right to dispose of possessions, bank accounts etc. undoubtedly concern rights or obligations at a suit of law.⁹⁴

The Human Rights Committee may consider actions of international organizations exercising public power in a state party to be outside the jurisdiction. There is an indication to this effect in the case of *H. v. d. P. v. Netherlands*.⁹⁵ On the other hand, it may be simply that it accepts that immunity of suit of international organizations is a legitimate reason for restricting access to court.⁹⁶ This decision might have some relevance to a state which is not in the Security Council which has nonetheless been obliged to implement a targeted sanction which affects the human rights of a person within its jurisdiction. However, the case is not authority for regarding a decision taken by a state acting *within* the Security Council as outside that state's jurisdiction under the ICCPR. Such a view is also supported by the opinion of the CESCR which considers that the provisions of the ICESCR "cannot be considered to be inoperative ... solely because a decision has been taken that considerations of international peace and security warrant the imposition of sanctions".⁹⁷

While there have been, to my knowledge, no individual applications to the Human Rights Committee which are directly on point, the Committee's collected jurisprudence on national security issues generally repeatedly emphasizes the need for tightly drafted provisions and proper independent controls to prevent abuse of power.⁹⁸ Even in cases where a derogation is possible, the Human Rights Committee has found violations of the fair trial provisions, where these have not been "strictly required".⁹⁹

Moreover, the general points made above about due process and the Rechtsstaat are obviously relevant even for the UDHR and ICCPR.¹⁰⁰ These too are based, implicitly, on the separation of powers and the idea that the legislature should legislate, the executive should apply the law in specific cases and there should be independent judicial control on the legality and proportionality of executive action. And, as de Wet points out, the Security Council itself supported the argument that the fundamental aspects of a fair trial (equality of

⁹³ See e.g. *Apirana Mahuika et al. v. New Zealand*, 547/1993, views of 20 October 2000, Angel N. Olo Bahamonde v. Equatorial Guinea, 468/91, views of 20 October, 1993.

⁹⁴ See, e.g. *Simunek et al. v. Czech Republic*, 516/92, views of 19 July 1995 and *D. Weissbrodt*, *The right to a fair trial: Articles 8, 10 and 11 of the Universal Declaration of Human Rights*, Nijhoff, the Hague, 2001, p. 139.

⁹⁵ 217/1986, views of 8 April 1987 at para. 3.2.

⁹⁶ Cf. T. Schilling, *Is the United States bound by the International Covenant on Civil and Political Rights in Relation to Occupied Territories?* NYU School of Law Global Law Working Paper 08/04, who considers that the relevance of this decision is doubtful because it concerned a measure taken by the administration of the international organization without the direct participation of its member states (p. 28).

⁹⁷ CESCR, *The relationship between economic sanctions and respect for economic, social and cultural rights: 12/12/1997.E/C/12/1997/8* and CESCR General Comment 8, para. 7.

⁹⁸ See e.g. *Hammel v. Madagascar*, No. 155/83, GAOR A/43/40 p. 130, and *V.M.R.B. v. Canada*, No. 236/1987, GAOR A/44/40 p. 258 (deportation on security grounds) *Tae-Hoon Park v. Korea*, No. 628/1995, 6 IHRR 623 (1999) and *Keun-Tae Kim v. Korea*, No. 574/1994, 6 IHRR 930 (1999) (restrictions on freedom of association and expression on national security grounds). See generally on the ICCPR, M. Nowak, *UN Covenant on civil and political rights: CCPR commentary*, 2nd ed., Kehl, Engel, 2005, pp. 302-357.

⁹⁹ *Lanza v. Uruguay*, GAOR A/35/40 p.111, *Carmargo v. Colombia*, GAOR A/37/40 p.137, *Weissbrodt*, p. 140.

¹⁰⁰ Here one can recall that the contracting states intended the ECHR as the "first steps for the collective enforcement of certain of the Rights stated in the Universal Declaration" (preamble to the ECHR).

arms, the presumption of innocence and judicial independence) are binding upon it by writing in these requirements into the statutes and rules of procedure of the ICTFY and the ICTR.¹⁰¹

The remaining issue to be discussed, albeit briefly, is how the ECHR standards affect certain Security Council members.

State Responsibility under the ECHR

The UN Security Council, obviously has, and must have, very wide discretion, in determining threats to international peace and security, and it is true that this power of determination cannot be delegated.¹⁰² But this is not the issue: the issue is whether *having made* such a determination, the Security Council is *bound by any legal norms* in exercising coercive measures as a consequence of the determination.¹⁰³ Like every other organ of an international organisation, the Security Council is bound by its mandate, and by general international law, in particular humanitarian law and human rights law. The arguments in relation to this point have been set out well several times and I will not rehearse them here.¹⁰⁴ Simply put, the approach that *nothing* should stand in the way of the maintenance of international peace and security is untenable. I have attempted to show above that the ECtHR case law reflects general principles of fair hearing. But even if this is not the case, constitutionally speaking (and, as shown below, from the perspective of the ECtHR) the question is whether it is possible for states to *avoid* constitutional/international human rights obligations by creating an international body and delegating to it the power to do something they are unable to do by themselves.

There is now a fair amount of case law of the ECtHR on the extent of the duties contracting states have under Article 1 to secure Convention rights “within their jurisdiction”. There is no need to go into this general case law in any detail.¹⁰⁵ The Court considers that jurisdiction has to be interpreted in accordance with its meaning under public international law as a whole.¹⁰⁶

Of more relevance are the cases before the ECtHR dealing with the question of responsibility for the acts of an international organization. The earliest case in which the issue arose was *Ilse Hess v. UK*¹⁰⁷ where the Commission on Human Rights rejected a claim that the UK bore responsibility for the treatment of a prisoner in Spandau prison, governed by an agreement between the wartime allies. However, the Court soon departed from this restrictive approach. The leading cases of *Beer and Regan* and *Waites and*

¹⁰¹ de Wet, 2004, p. 346.

¹⁰² D. Sarooshi, *The United Nations and the Development of Collective Security. The Delegation by the UN Security Council of its Chapter VII Powers*, Clarendon Press, Oxford, 1999, p. 33.

¹⁰³ A. Reinisch, *Developing Human Rights and Humanitarian Law Accountability for the Imposition of Economic Sanctions*, 95 AJIL 851-872 (2001) at p. 856 and references therein. The subject of accountability of international organisations is many faceted. See generally A. Reinisch, *International Organisations before National Courts*, Cambridge, CUP, 2000 and K. Wellens, *Remedies against International Organisations*, Cambridge, CUP 2002.

¹⁰⁴ I will not go into this point. See de Wet 2004 and Cameron, 2003 p. 178 and references therein.

¹⁰⁵ See in particular *Bankovic and others v. Belgium and others* No. 52207/99, 12 December 2001. *Ilaşcu and others v. Moldova and Russia* No. 48787/99, 8 July 2004, *Assanidzé v. Georgia* No 71503/01, 8 April 2004, *Issa and others v. Turkey* No. 31821/96, 16 November 2004. The *Bankovic* formulation restricting the application of the ECHR to a form of “European legal space” can be explained by the special circumstances of the case.

¹⁰⁶ See *Loizidou v. Turkey (Preliminary Objections)* 23 March 1995, A/ 310, and *Cyprus v. Turkey*, No.25781/94, ECHR 2001-IV, paras 76-80.

¹⁰⁷ No. 6231/73, 2 DR 72 (1975).

Kennedy have already been examined.¹⁰⁸ The other leading cases are *Matthews v. UK* and *Bosphorus Airways*.

The *Mathews* case concerned the right to vote of the people of Gibraltar in elections to the European Parliament. The UK had not provided for this, something the ECtHR found to violate Article 3 of Protocol 1. The interesting aspect for the present case is the fact that the ECtHR considered that the decision-making procedure which had deliberately not provided for the right to vote for the people of Gibraltar was a matter “within the jurisdiction” of the UK. The UK had first assented to a decision of the Council of the EC, which had to make a proposal by unanimous vote, and then along with the other EC member states, adopted the proposal in accordance with its constitutional requirements.¹⁰⁹ The Court stated that the “Convention does not exclude the transfer of competences to international organisations provided that Convention rights continue to be ‘secured’. Member States’ responsibility therefore continues even after such a transfer ... the suggestion that the United Kingdom may not have effective control over the state of affairs complained of cannot affect the position”.¹¹⁰

Bosphorus Airways v. Ireland concerned EC implementation of UN sanctions, although not targeted sanctions. The Court in this case examined what has been called the “equivalent protection” test formulated by the former Commission on Human Rights in *M. v. Germany*.¹¹¹ Under this test, the Commission accepted that it is sufficient that the EC provided a general level of human rights protection more or less equivalent to that provided for by the ECHR and that, so long as the general level is adequate, the Commission would refrain from taking up cases directed against EC member states for their residual responsibility for EC acts. The EC/EU is not as such party to the ECHR and cannot be directly sued before the ECtHR.

The subject is complicated, and it is easy to misunderstand the implications of the case. However, the Court has *not* followed *M. v. Germany*. The Court in *Bosphorus* accepted that the level of protection need not be exactly the same “By ‘equivalent’ the Court means ‘comparable’: any requirement that the organisation’s protection be ‘identical’ could run counter to the interest of international co-operation pursued” (para. 155). But it added “However, any such finding of equivalence could not be final and would be susceptible to review in the light of any relevant change in fundamental rights’ protection. If such equivalent protection is considered to be provided by the organisation, the presumption will be that a State has not departed from the requirements of the Convention when it does no more than implement legal obligations flowing from its membership of the organisation. However, any such presumption can be rebutted if, in the circumstances of a particular case, it is considered that the protection of Convention rights was manifestly deficient. In such cases, the interest of international co-operation would be outweighed by the Convention’s role as a ‘constitutional instrument of European public order’ in the field of human rights” (para. 156).

¹⁰⁸ See also *T. I. v. UK*, No. 43844/98, 7 March 2000, *Manfred, Erika and Volker Lenz v. Germany and the Other States of the European Communities*, No. 38837/97, struck from the register in July 2005, *Naletilic v. Croatia*, No. 51891/99, 4 May 2000, *Senator Lines GmbH v. 15 member States of the EU*, No. 56672/00, 10 March 2004.

¹⁰⁹ “The UK, together with all other parties of the *Maastricht Treaty*, is responsible *ratione materiae* under Article 1...for the consequences of that Treaty” (para. 33, my emphasis). See also Schilling, p. 29.

¹¹⁰ See *Mathews v. UK*, at paras 32 and 34.

¹¹¹ No. 13258/87, 64 DR 138 (1990). On the “equivalent protection test” see e.g. A. Clapham, “The European Union before the European Court of Human Rights” in L. Boisson de Chazournes, Cesare P. R. Romano and R. Mackenzie (eds) *International Organizations and International Dispute Settlement: Trends and prospects*, New York 2002, pp. 73-88.

The Court did not say exactly what is meant by “manifestly deficient”. But one judge, Ress dealt with it in his separate opinion. He stated that “The protection was manifestly deficient when there has, in procedural terms, been no adequate review in the particular case such as: when the ECJ lacks competence (as in the case of *Segi and Gestoras Pro-Amnistía and Others v. Austria, Belgium, Denmark, Finland, France, Germany, Greece, Ireland, Italy, Luxembourg, the Netherlands, Portugal, Spain, Sweden and the United Kingdom* ((dec.), nos. 6422/02 and 9916/02, ECHR 2002-V); when the ECJ has been too restrictive in its interpretation of individual access to it; or indeed where there has been an obvious misinterpretation or misapplication by the ECJ of the guarantees of the Convention rights. Even if the level of protection must only be ‘comparable’ and not ‘identical’, the *result* of the protection of the Convention rights should be the same”.

Very significantly for present purposes is the fact that the Segi case concerned targeted sanctions, although this time EU sanctions, not EU implementation of the Resolution 1267 sanctions. Ress used the targeted sanctions case as an example of a case falling outside of ECJ jurisdiction. Here, one should remember what the CFI stated in the Yusuf case: legal review of Security Council sanctions fell outside of its jurisdiction. Ress is not necessarily speaking for the whole Court and predicting judgments is a risky business. However, the Bosphorus case indicates that the Court, albeit reluctantly, will feel impelled to intervene to uphold minimum standards for the contracting states.

How minimum should these standards be? One can argue that the ECtHR should accept the same degree of control over the Security Council as did the CFI, namely jus cogens norms.¹¹² Here, the idea of jus cogens – that some rights are more important than others - becomes an excuse for not intervening to protect “less” important rights. But these “lesser” rights are the rights which the Security Council is likely to violate, not jus cogens norms. *All* the rights in the ECHR, and the ICCPR, are minimum rights. Setting the standard at jus cogens means, in practice, no control at all.

One can argue that any assertion of ECtHR control, even indirect, over Security Council measures is a “usurpation” of jurisdiction over matters which were presumably originally regarded by the contracting parties as outside of the intended scope of the treaty regime. It can also be seen as another expression of “fragmentation” of international law, with proliferating dispute settlement mechanisms risking coming to different conclusions on basic issues. If the UNC is seen as a form of constitution for the international community¹¹³ then it may indeed be seen as undesirable that an instrument lower down in the legal hierarchy influences the interpretation of the UNC. But I would argue that the UNC is, at most, only a part of the “constitution” of the international community. The Security Council undoubtedly lacks the features which legitimize domestic law-making – accountability to the electorate and a transparent, wide-ranging debate preceding legislation. The Security Council nonetheless asserts that it has power to override national law, national constitutions as well as regional and universal human rights obligations, solemnly undertaken by states. A useful analogy can be drawn with another body, the European Court of Justice (ECJ), which initially baldly asserted that EC norms are hierarchically superior to national norms. The ECJ, under pressure from national constitutional courts, modified its stance so as to build in national constitutional human rights standards (and the ECHR) to EC law, whereupon national courts, in practice, accepted the ECJ’s assertion – so long (Solange) as the EC protection

¹¹² Some distinguished international lawyers appear to accept this. See e.g. K. Doehring, *Unlawful Resolutions of the Security Council and their Legal Consequences*, 1 Max Planck Yearbook of United Nations Law (1998). C. Tomuschat, *Ahmed Ali Yusuf and Al Barakaat International Foundation v. Council and Commission: Case Note*, 43 CMLR 537-551 (2006).

¹¹³ Cf. B. Fassbender, *the UN Charter as Constitution of the International Community*, 36 Col JTS 531-619 (1998). Cf. E. de Wet, *the International Constitutional Order*, 55 ICLQ 51-76 (2006).

was equivalent to that of national law. A synthesis of EC law with human rights law thus came about as a result of a form of dialogue between national constitutional courts and the ECJ. From this perspective, all the ECtHR would be doing is providing a – much needed – reminder to ECHR contracting parties of their treaty obligations – obligations, moreover, which correspond to obligations flowing from UN human rights instruments. Nor can it be asserted that it is inappropriate to remind member states of the Security Council of their regional human rights obligations because when acting on a “higher” plane they serve only the interests of the international community in maintaining peace and security. Obviously, in acting in the Security Council, states are guided by their national interests. This is shown *inter alia* by the fact that permanent members have a power of veto.¹¹⁴ Compliance with one’s human rights obligations is – or should be – an important national interest.

It should also be noted that the problem of unreviewable acts based on Security Council resolutions is not unique to the Resolution 1267 sanctions. Legal challenges to Resolution 1483 (2003) on Iraq have been made or are contemplated in a number of states. The Venice Commission has criticized the invocation of Security Council resolutions to justify a lack of safeguards for human rights and insisted on residual state responsibility for this, and failing this, action by the UN to correct the procedural gap.¹¹⁵ Sooner or later the issue is bound to come before the ECtHR.

I should stress that the issue is not the responsibility of the UN, but the state responsibility of ECHR contracting parties. The ECtHR can be assumed to be sensitive to the criticism that, as a regional judicial dispute mechanism, it is imposing its own form of “constitutionalism”.¹¹⁶ The ECtHR would undoubtedly accept the immunity of the UN as a legitimate restriction on access to court under Article 6. Similarly, the other requirements of Article 6, of Article 8, Article 1 of Protocol 1 and Article 13 would be relatively easy to satisfy by the creation of a minimum degree of procedural safeguards and independent, external and objective controls. As pointed out above, the ECtHR case law on the variable nature of “court” and the possibility of special procedures to maintain the secrecy of intelligence material allow for a considerable degree of flexibility. If an adequate mechanism is established at the UN level, the ECtHR in a possible future challenge brought by an affected individual or entity would almost certainly accept the immunity of the UN as a legitimate restriction on access to court under Article 6, and not find a violation of the other relevant ECHR articles. The fact that protection need only be equivalent to, and not identical with, ECHR protection is also important to stress. This counters any argument that might be made that it is unworkable to impose regional human rights standards on the Security Council, as this would mean potentially that several different types of standard (as well as no standards at all) would be applicable on different members of the Security Council. However, by wholly failing to provide an equivalent level of protection for targeted sanctions, some, or all, the Council of Europe states would seem to have incurred residual responsibility under the ECHR.

One question which nonetheless arises here is whether the ECtHR should place the main focus of its residual control on the ECHR states which adopt and maintain these targeted sanctions in the Security Council, or whether the control should instead be focused on the states implementing these sanctions in their territories. Arguably, the Mathews and

¹¹⁴ Schilling, p. 31. See also de Wet, 2004 pp. 378-386.

¹¹⁵ Opinion on a possible solution to the issue of decertification of police officers in Bosnia and Herzegovina, Opinion no. 326 /2004, adopted 30 September 2005 and Commission Opinion on Human Rights in Kosovo : possible establishment of review mechanisms, CDL-AD(2004)033. The latter problem has been solved by the voluntary – after Council of Europe pressure – establishment by UNMIK of a Human Rights Advisory Panel, UNMIK/PR/1525, 5 April 2006.

¹¹⁶ E.g. J. Klabbers, *Constitutionalism Lite*, 1 Int. Org. LR, 31-58 (2004)

Bosphorus cases indicate that the ECtHR considers that the European members of the Security Council, sitting in New York, are performing acts within their jurisdiction within the meaning of Article 1.117 Having said this, the actual act of voting in the Security Council does not create a legal obligation. This is instead created by the promulgation of the *result* of the voting. There are other reasons for preferring to place the focus on the implementing states. States are in control of their territories. They must legislate to implement the targeted sanctions, or at the very least, to penalize breach of them. It is this national legislation which conflicts with human rights (if it does).¹¹⁸ Finally, a German case can be mentioned.¹¹⁹ The *länder* in this case attempted, by means of a constitutional challenge, to block the federal government from adopting in the EC Council, a directive which they argued would, if implemented, infringe on their legislative powers under the constitution. The constitutional court considered that the federal government must be relied upon to negotiate to reach a result which would not violate the German constitution. If a problem nonetheless arose, then the correct time for the *Länder* to challenge this was at the moment of implementation into national law.

As against these points, I think there are good arguments for placing focus on the states acting together in the Security Council, rather than the implementing states. There is a policy distinction between the constitutional (separation of powers) arguments applicable in the above German case, and the present case. The international obligation to obey human rights applies all the time, even when the state is voting, and *vis a vis* other sovereign states. The constitutional obligation is more a question of division of competences - the government is "better placed" to negotiate without its hands being tied and must be relied upon to negotiate so that the end result is acceptable to the division of legislative etc. competences in the constitution. The analogy is moreover questionable here as only 15 states, of ca. 200 in the world, act together to adopt blacklists. Other states at best may be informed beforehand, but do not have the possibility of participating in the decision-making. It is only the states involved in the decision-making which are in a position to formulate the targeted sanctions, and so build in the necessary safeguards. Moreover, the idea that safeguards can come in at the time of implementation is wrong in the present case. The nature of a blacklist (as opposed to the duty of criminalization involved in Resolution 1373) leaves no discretion to an implementing state as regards the targets or the criminalized conduct. The discretion which exists is at the level of the penalty. Thus, if one is to stop a decision which allegedly violates human rights, then it is either at the voting stage or not at all. It seems like only formalism to divide the issue into voting or promulgation.

But what of Articles 25 and 103 UNC?¹²⁰ There is undoubtedly an obligation to carry out Security Council decisions under Article 25. However, what gives this article precedence over other treaty obligations is Article 103. Article 103 only comes into operation when a state's obligations under other treaties conflicts with its obligations under the UNC. It is a conflicts rule. It does not act to invalidate other, conflicting, treaty obligations.¹²¹ These

¹¹⁷ Cf. Schilling, p. 32-33 The obligation in Article 1 "amounts to a kind of guarantor position for the integrity of treaty observation; if a State party can prevent a treaty violation, simply by the way it decides or votes within an international body, or if its participation in the adoption of a decision by that body is necessary to remedy such a violation, it must act accordingly even if such violation concerns the territory of another State."

¹¹⁸ Cf. the *Segi and Gestoras Pro-Amnistía* case, *op. cit.*

¹¹⁹ 2 BvG 1/89, BVerfGE 80, 74 II. I am indebted to Frank Hoffmeister for drawing my attention to this case.

¹²⁰ Article 25 provides that "the Members of the UN member agree to accept and carry out the decisions of the Security Council in accordance with the present Charter". Article 103 reads "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."

¹²¹ See R. Bernhardt, Article 103 at p. 1298 in B. Simma, (ed.) *The Charter Of The United Nations. A Commentary*, 2nd ed., Oxford UP, Oxford 2002.

continue to apply. It is thus possible for a state to be in breach of its treaty obligations under the ECHR, but not capable of acting in compliance with the ECHR because of a Security Council resolution. As regards the Council of Europe members which have positively voted in favour and maintain in force the Al-Qaida Security Council resolutions, there are two important points here. The first is that a decision to find something (in this case financing of Al-Qaida) as a threat to international peace and security is a discretionary decision. It is not an obligation under the UNC. The Security Council is not entitled, under Chapter VII, to determine that there *is* a threat to the peace if objectively there is none, but it is *not* bound to determine that there is such a threat if objectively there is one.¹²² Secondly, the *way* in which the Al-Qaida targeted sanctions are at present formulated is not the *only* way in which such sanctions can be formulated. Creating meaningful due process safeguards involves extra work admittedly, as the decision being reviewed, and the material on which the decision is taken, raise legitimate security concerns. However, an important factor to bear in mind is that the number of people likely to apply to a review body is likely to be very limited. Experience shows that only a small number of people will go to the trouble of hiring a lawyer to secure removal from the list and these will usually be people who feel strongly that the decision is erroneous in some way. I have earlier sketched out a number of different methods in which an equivalent protection to the ECHR can be obtained while addressing security concerns. I will not repeat these here.¹²³ Suffice to say that *if* a system of legal safeguards can be devised to reconcile UN and regional human rights norms with targeted sanctions norms, then there *is* no conflict between these two sets of norms. The lack of safeguards built into the UN system is *not inherent, or unavoidable*. Thus, there is no *logical incompatibility* between the requirements of human rights and the obligations flowing from the UNC. The whole purpose of human rights is to place reasonable limits on absolute power. If states' obligations to comply with human rights are to have any significance, then it must mean that these states bound by human rights, when acting together in the Security Council must design targeted sanctions, and other states must implement them, so as not to violate human rights.¹²⁴ For all the actors involved – the ECJ, the ECtHR, the European members of the Security Council and the Security Council itself - it would presumably be greatly preferable if the necessary equivalent standards were put in place at the UN level, thus avoiding the risk of a confrontation.

¹²² See e.g. V. Gowlland-Debbas, The Functions of the United Nations Security Council in the International Legal System, in M. Byers (ed.) *The Role Of Law In International Politics* (2001) at 288 and Schilling, p. 38.

¹²³ See Cameron 2003, pp. 196-213. See also Watson Institute, Brown University, *Strengthening Targeted Sanctions through Fair and Clear Procedures*, 2006, www.watsoninstitute.org.

¹²⁴ Cf. Schilling p. 37 who refers to the principle that no State should benefit from its own wrongdoing. Article 103 does not specifically envisage the case of Security Council members using resolutions to dispense themselves of treaty obligations, and so the principle of good faith rules out interpreting it in such a way as to facilitate this.