WHEN A PERSON LOSES THE FREEDOM IN FRONT OF AN INTERNATIONAL ORGANIZATION. WHAT TO DO?

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Abstract: What happens when a person is unfairly accused of terrorism by an international organization against which you cannot defend yourself? What mechanisms exist when there are no defense procedures against an organization consisting only of states? If the UN is a state and nation-oriented organization, how can a person be accused of terrorism? How is humanitarian law activated? Is there freedom in such cases?

Keywords: Security Council; sanctions; resolutions; United Nations; terrorism; Blacklisting; European Court of Justice; International Law; European Law; Kadi case

Introduction

The death toll among the civilian population caused by the near-total financial and trade embargo imposed by the Security Council (hereinafter the SC or 'the Council') on Ba'athist Iraq on 6th of August 1990 - which was about to last until the 2003 invasion of Iraq by the USA – raised some serious concerns among policy makers and international legal practitioners alike.1 In light of the dreary situation in Iraq in the first years after the sanctions, legal practitioners have started to advocate and pressure the SC and policy makers to make sanctions more targeted rather than comprehensive to reduce as much as possible the collateral damage.

1 See UN Doc. S/RES/661, 6 August 1990. See also Graefrath, B., 'Iraqi Reparations and the Security Council', *Heidelberg Journal of International Law*, Vol. 55, Issue 1, 1995.

The subsequent sanctions imposed on UNITA[2] in Angola, in 1997 and 1998 were the first targeted sanctions imposed by the Council. Up to 157 individuals, among the members and elite of the UNITA front, were subject to travel bans and asset freeze.[3] The blatant disregard for any fundamental rights of those sanctioned and the lack of a documented reasoning for blacklisting those individuals really inflamed the discussions on respect for fundamental human rights in the practice of sanctions as well as on the need to ensure proper legal safeguards in the administration of the sanctions regimes.[4]

Both issues gained momentum when the first civilians lost their life in Iraq, mostly through starvation, but there were not enough sanctions regimes at that time to properly inform the discussions. Angola, and then later Sierra Leone and Liberia, were to offer plenty of examples of blacklisting done with no legal justification. A number of complaints to the relevant sanctions committees have brought the discussions in the SC at the turn of the millennium.[5] Although the targets of the sanctions were known rebel leaders or government officials, there were no legal instruments to advice on how large or small the circle of government officials/rebels can be. Moreover, there were no rules to help determine what links with the government or rebels could constitute a reasonable basis for placing an individual to a sanctions list.

Although the effects of sanctions, comprehensive or targeted, were visible since the very first instances these were imposed (*i.e.* Southern Rhodesia), there was no serious discussions on the fundamental rights affected or the legal safeguards needed, until the last decade of the 20th century. Human rights, such as the right to life, liberty, health, the right to property, freedom to move and the right to a family life, were always at risk when SC sanctions were imposed. The SC has been designed to be a forum for states and to address issues where states are the main

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2 União Nacional para a Independência Total de Angola (English: *National Front for the Total Independence of Angola*). Today is the second largest political party in Angola.

3 *UN Arms Embargo on UNITA*, Stockholm International Peace Research Institute (SIPRI), Arms Embargoes. Article available at https://www.sipri.org/databases/embargoes/un_arms_embargoes/angola, accessed on 3 November 2018.

4 See UN Doc. S/RES/1127, 28 August 1997, UN Doc. S/RES/1173, 12 June 1998 and UN Doc. S/RES/1176, 24 June 1998. The first one was imposing travel bans and asset freeze on UNITA leaders and immediate family members while the last two were imposing financial sanctions on UNITA members.

5 See UN Security Council Press Release 608, 1 February 2002.

actors. The system of sanctions has also been designed to be directed at states thus leaving "*no room for problems in relation to other actors of international law*".[6] When the Council switched from a state-centred institution to a hybrid mechanism, addressing issues both at state level as well as at individual level, it entered an uncharted area. When sanctions imposed under Article 41 of the UN Charter were targeting individuals, there was no possibility for the people to defend themselves before the Security Council.

When sanctions are imposed upon a state, the Council usually demands a certain behaviour from the state. The latter has, thus, the possibility to decide if it will comply or not with the decision(s) of the Council in order to have the sanctions lifted. In the case of persons – specifically in the case of the listings under the 1267/1373 Al Qaeda Sanctions Committee – there is only a designation made by the Council with no demand or expectation in the change of behaviour and with no 'sunset clause'[7] clearly limiting the conditions under which the sanctions regime can be lifted. The blacklisted persons are only considered to pose a threat to international peace and security and action have to be taken against them. They do not have the possibility to defend themselves and they will not be heard by the Security Council. That is a privilege reserved only for states.[8]

Since persons cannot address the SC and have no other venue for remedying their situation, procedural rights such as the right to a fair trial and the presumption of innocence might be blatantly infringed upon. Under these circumstances, some actors have turned towards national or regional, European courts to seek relief. Since Article 103 of the UN Charter states that "*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*", the cases brought by those blacklisted

6 See Birkhäuser, N., 'Sanctions of the Security Council Against Individuals – Some Human Rights Problems', *European Society of International Law (ESIL)*, Geneva, May 2005, p.1.

7 A time frame for implementation and termination of the restrictive measures imposed, that would be provided in the SC resolutions authorizing the sanctions. Opposite of an open-ended system of sanctions, such as the current one.

8 See Birkhäuser at *supra note* 6, pp.1-2. Some changes have been implemented after the *Kadi II* judgement in terms of allowing relief from sanctions. See Margulies, P., 'Aftermath of an Unwise Decision: The U.N. Terrorist Sanctions Regime after Kadi II', *Amsterdam Law Forum*, Vol 6, Spring 2014.

before the EU courts also brought the Security Council and the judiciary system in the EU at odds. Two landmark cases – Kadi I and Kadi II - will serve as examples of this conflict.

Blacklisting

The practice of sanctions were to gain new momentum in Europe at the turn of the millennium, when the SC adopted resolutions 1267(1999)[9] and 1333 (2000)[10] officially imposing sanctions on the Taliban regime in Afghanistan for its encouragement of opium growing and, subsequently, its refusal of extraditing Usama Bin Laden. The two resolutions were obliging states to freeze all funds controlled directly or indirectly by the Taliban, Usama Bin Laden and his Al Qaeda associates. The 1333(2000) resolution was among the first SC resolution to impose sanctions on the members of a terrorist network.

The failure of the Taliban led Afghanistan to extradite Bin Laden and the World Trade Center attack of 11 September 2001, were to mark a new era in the evolution of counter-terrorism sanctions. The issues of the fundamental rights and legal safeguards in the practice of sanctions were to take a back seat and states were given a blank check by the SC to blacklist anybody with only the presumption of a link to a terrorist organization. On 28 September 2001, in the wake of the terrorist attack on the twin towers, the SC adopted resolution 1373(2001) which imposed - and still imposes - obligations on all states "*inter alia to criminalize acts of financing of international terrorism and to freeze and seize funds used for terrorism*".[11]

Unlike the previous resolutions, where there was a time limit and the sanctions were directed at individuals which had some connection to a state or territory, the 1373(2001) resolution had no time limit and was open-ended, which meant that the targets of the sanctions were not linked to any territory or state.[12] As such, by way of resolution

9 See UN Doc. S/RES/1267, 15 October 1999.

10 See UN Doc. S/RES/1333, 19 December 2000.

11 See Cameron, I., 'Targeted Sanctions and Legal Safeguards', Report for the Swedish Foreign Office, March 2002, p.8. Available at http://pcr.uu.se/digitalAssets/165/165536_1sanctions.pdf, accessed on 3 November 2018.

12 *Ibid.*

1373(2001), the SC managed to criminalize individuals or groups based on geopolitical, diplomatic or foreign policy interests.[13]

To further enforce the sanctions imposed on individuals by way of the 1333(2000) and 1373(2001) resolutions, a third resolution was adopted by the SC shortly thereafter, on 16 January 2002, which extended an arms embargo and travel bans to those listed under the previous two resolutions as having - or being suspected to have - ties with terrorist organizations. This was the first Chapter VII resolution adopted by the Council with no territorial connection.[14]

What followed was a wave of names being submitted by states (especially the US) to the 1267/1373 Al Qaeda Sanctions Committee for blacklisting. Since there was no provision in the texts of the resolutions for submitting a justification for listing as well as the source of the information, any single person could have been subject to a blacklisting procedure.[15]

Challenges in Court – the role of the European Court of Justice (ECJ)

Although the discussion on protection of fundamental human rights and ensuring legal safeguards/remedies in the practice of sanctions has taken a back seat shortly after the 9/11 terrorist attack, it did not disappear completely. The blatant disregard for human rights was to determine the blacklisted to challenge their listing in court.

The first to challenge it was Yassin Abdullah Kadi and the Al Barakaat International Foundation of Sweden, component of the Hawala system used by Somali citizens to transfer money from diaspora.[16] On 19 October 2001, they were listed by the 1267 Al Qaeda Committee as having ties with Usama Bin Laden and the Al Qaeda and, consequently,

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13 Sullivan, G., 'Rethinking terrorist blacklisting', The Guardian, 10 December 2010. The article is available at https://www.theguardian.com/commentisfree/libertycentral/2010/dec/10/terrorist-blacklisting-un-report-human-rights, accessed on 3 November 2018.

14 See Cameron, *supra note 8*, p. 9

15 See Cameron, *supra note 8*, p. 10. See also van der Broek, M. and Hazelhorst, M., 'Asset Freezing: Smart Sanctions or Criminal Charge?, *Merkourios Utrecht Journal of International and European Law*, Vol. 27, Issue 72, pp. 18-27.

16 Sullivan, G and Hayes, B., 'Blacklisted: Targeted Sanctions, Pre-emptive Security and Fundamental Rights', *European Centre for Constitutional and Human Rights*, November 2010.

they became subject to an asset freeze. They were first listed by the US on their national blacklist and the SC just picked up the US listing and subjected it to its own sanctions without seeking any proof or justification on the opportunity or legality of the listing.

In December 2001, Kadi decided to challenge, before the European Court of First Instance (CFI), the European Commission's Regulation[17] implementing the 1267 Committee's sanctions in the European Union on grounds that it breaches their fundamental rights, such as the right to judicial review, the right to be heard and the right to property.[18]

After four years, in September 2005, the CFI issued its decision, holding that it had no jurisdiction to review a SC resolution and that both the European Council and the European Commission had no "*autonomous discretion*" in giving effect in the EU law to the 1267(1999) resolution or any of the other subsequent resolutions. Furthermore, it invoked Article 103 of the UN Charter in order to underline the primacy of the SC resolutions and the lack of jurisdiction of the courts to review such decisions.[19] CFI only acknowledged its jurisdiction to assess the compliance of SC resolutions with pre-emptory norms of *jus cogens* which are binding on all international actors and from which no derogation is possible. Having determined that none of the allegations brought forth by Kadi would amount to breaches of *jus cogens*, the CFI availed itself of the opportunity to dismiss the case.[20]

Despite the setback, Kadi did not quit. Thus, in November 2005, Kadi and the Al Barakaat International Foundation of Sweden filled an appeal with the European Court of Justice (ECJ). In January 2008, the Advocate General of the ECJ, M. Poiares Maduro, in his opinion

17 Council Regulation (EC) 467/2001, 6 March 2001, "*prohibiting the export of certain goods and services to Afghanistan, strengthening the flight ban and extending the freeze of funds and other financial resources in respect of the Taliban of Afghanistan, and repealing Regulation (EC) No 337/2000*".

18 See *Kadi v. Council and Commission*, Judgement of the Court of First Instance (Second Chamber), case T-315/01, 21 September 2005, para.59.

19 Macovei, A., *Between the Scylla of Legal Accountability and Charybdis of Political Discretion. The UN Security Council Targeted Sanctions and Human Rights Paradox*, Master Thesis, University of Southern Denmark, 2015, p. 44.

20 See Kadi v. Council and Commission, at *supra note* 18, ECR II-3742, 3743. Worth mentioning is the difference outlined by the Court – in regards to the right to respect for property - between freezing and confiscation, implying that while the latter could be considered as being contrary to *jus cogens* the former is only a "*precautionary measure*" which does not qualify as such. (para. 248)

presented to the Court, rejected the limited jurisdiction argument set forth by the CFI and stated that EU courts have the jurisdiction to review any contested regulation to determine if there is a breach of fundamental human rights. Furthermore, it requested that the Court should reverse the judgement issued by the CFI in 2005.[21]

The ECJ followed the opinion of Adv. General Poiares Maduro and issued its decision on 3 September 2008. By emphasizing the existence of and elaborating on the dualist relationship between the UN and the EU, the ECJ stated that insofar the hierarchy established by Article 103 of the UN Charter refers to states that are member of the UN, any entity that is not a state cannot be bound by the same provisions. Thus, the hierarchical provisions of the said Article do not bind the EU, as an international organization, which has not signed the Charter.[22] Reviewing the three counts of the Kadi appeal, the Court decided that "*the rights of the defence, in particular the right to be heard, and the right to effective judicial review of those rights, were patently not respected*".[23]

As a result, shortly thereafter, Kadi and Al Barakaat were presented by the Commission with a narrative summary of the reasons for their listing. The Commission has determined the measure to be sufficient to ensure the respect of their human rights but determined that their answers to the reasons outlined are insufficient to justify their de-listing. Consequently, on 28 November 2008, the Commission renewed their listing on the EU sanctions list.[24]

Following the re-listing, Kadi and Al Barakaat filled another suit against the Commission before the General Court of the EU (former

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21 See Macovei at *supra note* 18, p. 45. See also *Yassin Abdullah Kadi v. Council of the European Union and Commission of the European Communities*, Opinion of the Advocate-General Poiares Maduro, Case C-402/05 P, 16 January 2008. "[…] *the Community Courts determine the effect of international obligations within the Community legal order by reference to conditions set by Community law*"

22 See Macovei at *supra note* 18, p.45. See also Arcari, M., 'Forgetting Article 103 of the UN Charter? Some perplexities on 'equivalent protection' after Al-Dulimi', *Questions of International Law*, 16 November 2014, available at http://www.qil-qdi.org/forgetting-article-103-of-the-un-charter-some-perplexities-on-equivalent-protection-after-al-dulimi/, accessed on 3 November 2018.

23 See *Yussuf Abdullah Kadi v. Council of the European Union and Commission of the European* Communities, Judgement (Grand Chamber) of the ECJ, Joined Cases 402/05 P and C-415/05 P, 3 September 2008, para. 334.

24 See European Council Regulation (EC) No.1190/2008, 28 November 2008, paras. 6 and 7.

CFI) in January 2009. Soon afterwards, the Commission de-listed the Al Barakaat Foundation but Kadi was to remain on the List[25] until 2010 when the GC issued its judgement.[26] As such, the GC found the listing of Kadi to be unlawful and the review of the Commission to be inadequate and "*superficial*".[27] Following the judgement, the GC annulled the decision of the Commission to subject Kadi to SC targeted sanctions.[28]

This was not the end of troubles for Kadi. Shortly after the GC annulled the re-listing of Kadi in the fall of 2010, the UK, the European Commission and the European Council filled an appeal on the decision of the GC. Even though different EU courts had different takes in the Kadi case over the years, the UN Security Council has noticed the complaints put forward by Kadi, and other blacklisted individuals and entities who brought legal actions in national courts, and greatly improved due process for those subjected to sanctions.[29] Furthermore, on 5 October 2012, following a request with the Office of the Ombudsperson, the sanctions review mechanism created at the SC level, Kadi was de-listed. Shortly thereafter, many of the countries, which had Kadi on their blacklists, have also de-listed him. In spite of this, the ECJ, in its judgement on 18 July 2013, has ignored almost completely all realities. Unsurprisingly, it upheld the annulment of the EC regulation giving effect to Kadi's re-listing but also determined that EU courts have the jurisdiction to

25 Consolidated Sanctions List where all individuals and entities subject to Security Council sanctions are listed. See the *United Nations Security Council Subsidiary Organs*, Sanctions, Consolidated United Nations Security Council Sanctions List at https://www.un.org/sc/suborg/en/sanctions/un-sc-consolidated-list, accessed on 3 November 2018.

26 See *Kadi v. Council and* Commission, Judgment (Grand Chamber) of the ECJ, case no. T-85/09, 30 September 2010. Also, see the summary of the meeting of the Committee of the Legal Advisers on Public International Law (CAHDI), 'UN Sanctions and Respect for Human Rights', March 2010, available at http://www.coe.int/t/dlapil/cahdi/Source/un_sanctions/EU%20update%20UN%20Sanctions%20March%202010%20E.pdf , accessed on 3 November 2018.

27 *Ibid.*, para. 171.

28 *Ibid.*, para. 194.

29 The Office of the Ombudsperson was created by the Security Council in 2009 through the 1904(2009) resolution. This mechanism was to offer "*an independent recourse to individuals and entities on the 1267 Sanctions list*." Since then, the Council has significantly strengthened the Office's mandate. Resolution 1989(2011) has widened the authority of the Ombudsperson and made its recommendations (*i.e.* to de-list an individual or entity) definitive if there was no (justified) opposition over a period of 30 days from the 1267/1989 Committee or the SC.

review EU regulations implementing resolutions of the SC as long as a mechanism of review will not exist at UN level.[30]

Undermining Security Council's authority?

Through its last decision in the Kadi II case, the ECJ has completely ignored the progress done by the UN SC in addressing due process concerns in the practice of sanctions. Why has it done that, it is a question still up for speculative answers. Sure-enough is the fact that by doing this it has greatly undermined the legitimacy and the effectiveness of the Office of the Ombudsperson, a mechanism created only four years before to be just that – a mechanism of review at UN level. Oddly enough, it has mentioned the creation of the Office but has deemed it an un-sufficient guarantee of effective remedy.[31] Moreover, the Court has also ignored the fact that Kadi has been de-listed a year before its judgement, following a petition he filled with the Ombudsperson.[32] However, what is more significant about this judgement is the fact that it introduced a very rigid standard of review, which basically implies "*that nothing short of a full-blown court procedure will be enough to solicit the EU courts' deference in favour of review at UN level*".[33]

In order to achieve this standard of review, the Court also underlined that a "*disclosure of information, or evidence, confidential or not* [...] *in the spirit of cooperation*" would be necessary in some cases.[34] However, it never clarified what would be the incentive for a non-EU entity/ state actor to share confidential information with the EU courts/authorities.

30 See *European Commission and others v. Yassin Abdullah Kadi*, Appeal, Judgement (Grand Chamber) of the ECJ, Case C-584-10 P, 18 July 2013. The ECtHR, in a judgement issued several months later in another blacklisting case, also upheld the 'mechanism of review' argument. This time it was formulated as a mechanism of 'equivalent control'. See *Al-Dulimi and Montana INC. v. Switzerland*, Judgement of the ECtHR (Second Section), Strasbourg, 26 November 2013.

31 See *European Commission and others v. Yassin Abdullah Kadi* at *supra note* 29, paras. 13, 95, 96.

32 *Ibid.*

33 See Tzanakopoulos, A., '*Kadi* Showdown: Substantive Review of (UN) Sanctions by the ECJ', *EJIL:Talk!*, 19 July 2013, available at http://www.ejiltalk.org/kadi-showdown/, accessed on 3 November 2018.

34 See *European Commission and others v. Yassin Abdullah Kadi* at *supra note* 29, para. 115.

The judgement of the ECJ caused some tensions between the EU courts and the Security Council, which brought forth Article 103 of the UN Charter. This provoked a lot of debate among legal practitioners on the hierarchical order set by the UN Charter and the precedent that the ECJ was creating by allowing EU courts to review measures implementing Security Council's resolutions. This situation was creating a certain degree of confusion on the international arena, which was not going to provide any effective remedy to those blacklisted.

Sue Eckert and Thomas Biersteker best described this situation: "*Just as non-compliance with norms of due process has undermined the effectiveness of UN targeted sanctions, an excessively narrow and rigid institutional framework of formal judicial review could impair the ability of the 1267 Committee to take effective decisions in the collective interest.*"[35]

Luckily enough, another EU Court provided a measure of relief from this rigid institutional framework a few years later, by acknowledging the role of the SC Ombudsperson as a mechanism of effective remedy. On 13 December 2016, the General Court of the EU has issued another landmark judgement in the case of *Mohammed Al-Ghabra v. the Commission*.[36] By way of this judgement, the GC sets a hierarchy of solutions providing effective remedy to those subject to sanctions by the Security Council. As such, individuals or entities wishing to challenge their listing by the Council have to exhaust first the Office of the Ombudsperson before going to an EU Court. Although the GC has dismissed Al Ghabra's request for annulment, it gave proper consideration to the fact that he had arguments in favour of having his name removed from the sanctions List. However, it has underlined the fact that he did not seek de-listing through the Ombudsperson before challenging the sanctions in court.[37]

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35 See Eckert, E.S. and Biersteker, T.J., 'Due Process and Targeted Sanctions; An Update of the 'Watson Report'', *Watson Institute for International Studies*, December 2012.

36 Judgment of the General Court (Third Chamber) of 13 December 2016, Mohammed Al-Ghabra vs. European Commission, Case T248/13, ECLI:EU:T:2016:721.

37 See 'Open Briefing to Member States', 8 May 2017, p.1. The paper is available at https://www.un.org/sc/suborg/sites/www.un.org.sc.suborg/files/20170508_open_briefing_to_ms_8_may_2017_check_against_delivery.pdf, accessed on 3 November 2018. See also a presentation made by Natascha Wexels-Riser, Legal Officer supporting the Office of the Ombudsperson: Wexels-Riser, N., *The Security Council's ISIL (Da'esh) and Al Qaeda Sanctions Regime: The Human Dimension*, Max Planck Institute for Foreign and International Criminal Law, Freiburg, 2 December 2017, p.3.

Conclusion

Although Kadi I and II are widely considered to be landmark judgements which have helped shape the due process and effective review mechanisms and procedures at UN level, the rigid institutional framework they outlined through the last judgement of the ECJ was in danger to undermine the whole progress made by the Security Council in shaping its sanctions policy. The Al Ghabra case hopefully set things straight again but given the fact that legal instruments regulating the practice of sanctions are rather new, we could expect other developments in this regard in the years to come.

What is important to stress out is that although challenges brought in European courts by those blacklisted by the Security Council were fundamental in ensuring a degree of respect for human rights, the decisions of the EU Courts were, in most cases, ignoring the need to keep sanctions effective. Finding the balance between effectiveness and compliance to legal standards will continue to be a challenge on which we might see the Security Council and the EU judiciary finding themselves at odds again.

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