INDIVIDUAL REMEDIES
AGAINST SECURITY COUNCIL TARGETED SANCTIONS

ANNALISA CIAMPI*

1. INTRODUCTION

The recent practice followed by the UN Security Council (UNSC) of targeting sanctions against individuals and entities has raised the question of the adequate level of protection – both substantive and procedural – to be afforded to listed individuals and entities.

While “targeted sanctions” are not a totally new phenomenon – the first sanctions decided by the Security Council were directed against the leadership of Southern Rhodesia, at the time a British colony, not a sovereign State1 – there is no doubt that it is only within the framework of the fight against international terrorism (and – later – against the proliferation of nuclear weapons)2 that they have become an ordinary, if not the usual, measure not involving the use of armed force employed by the Security Council to give effect to its decisions.

The most well known and, to date, far-reaching list of individuals and entities targeted by UN sanctions is the consolidated list administered by the so-called 1267 Committee – also known as the Al-Qaida and Taliban Sanctions Committee – established by Security Council Resolution 1267 (1999), adopted on 15 October 1999, with the task of monitoring the implementation of measures decided against the Taliban (a flight embargo, the freezing of funds, and other financial resources). These sanctions were strengthened and further extended by Resolutions 1333 (2000) and 1390 (2002) – and a series of subsequent resolutions – to apply to Osama bin Laden and individuals and entities associated with him,3 so that the sanctions now include freezing of assets, a travel ban, and an arms embargo, and

---

* JD Florence and LL.M. Harvard; Professor of EU Law, University of Verona.
1 See Resolution 232 (1966) adopted on 16 December 1966. See also Resolution 1127 (1997), adopted on 23 August 1997, concerning Angola, which imposed sanctions against “all senior officials of UNITA [Uniao Nacional para a Independencia Total de Angola] and […] adult members of their immediate family”, and Resolution 1137 (1997), adopted on 12 November 1997, targeting “all Iraqi officials and members of the Iraqi armed forces who were responsible for or participated in the instances of non-compliance […]”.
cover individuals and entities associated with Al-Qaida, Osama bin Laden and/or the Taliban wherever located.\footnote{The current Consolidated List consists of a list of 142 individuals belonging to or associated with the Taliban; a list of 228 individuals belonging to or associated with the Al-Qaida organisation; a list of 112 entities belonging to or associated with the Al-Qaida organisation. 11 individuals and 24 entities have been removed from the List pursuant to a decision by the Al-Qaida and Taliban Sanctions Committee.}

While the Committee originally proceeded in the absence of rules governing the conduct of its work, guidelines were adopted in 2002 and subsequently amended. They were lastly updated at the beginning of 2007, following the adoption of Security Council Resolutions 1730 (2006) and 1735 (2006).\footnote{See \textit{Guidelines of the Committee for the Conduct of Its Work} (adopted on 7 November 2002, as amended on 10 April 2003, 21 December 2005, 29 November 2006 and 12 February 2007), available at: <http://www.un.org/sc/committees/1267/pdf/1267_guidelines.pdf> (last visited on 28 May 2008).} Major developments concern the procedure for updating information on the Consolidated List, in particular with a view to the “listing” of further individuals and entities and “de-listing”, that is, the procedure by which a petitioner may submit a request for review of his/her case and obtain the cancellation of his/her name from the list. These developments followed intense criticism within and outside the UN, all aimed at emphasising the need to reconcile the effectiveness of the fight against international terrorism with the essential guarantees of due process and the principle of respect of fundamental human rights of listed entities and individuals. Suffice here to recall the 2005 World Summit Outcome Document, adopted on 24 October 2005, in which the Heads of State and Government of the States member of the UN “call[ed] upon the Security Council with the support of the Secretary General to ensure that fair and clear procedures exist for placing individuals and entities on sanctions lists and for removing them, as well as for granting humanitarian exceptions”\footnote{A/RES/60/1, 24 October 2005.}

As we shall see,\footnote{See infra section 2.} current procedures remain far from satisfactory. This perception continues to be shared by large sectors of the international community. The Parliamentary Assembly of the Council of Europe, for example, at its January session of 2008, found “that the procedural and substantive standards currently applied by the UNSC and by the Council of the European Union, despite some recent improvements, in no way fulfil the minimum standards […] and violate the fundamental principles of human rights and the rule of law”.\footnote{Parliamentary Assembly of the Council of Europe, Resolution 1597 (2008), adopted on 23 January 2008, para. 6.} Accordingly, the Parliamentary Assembly invited the UN, the EU, and the Member States of the Council of Europe to ensure the necessary improvements to procedures governing targeted sanctions regimes at the level of the UN and the EU and, so long as these...
shortcomings persist, to procedures for implementing sanctions at the national level.9

Before we turn to the analysis of remedies actually available to an individual or entity claiming to be a “victim” of targeted sanctions, two points need to be clarified.

First of all, the analysis will proceed on the basis of the assumption that human rights should be respected at the stage of both the imposition and the implementation of UN sanctions. This assumption stems from the principle that States parties to a human rights treaty requiring respect for certain minimum standards of procedural protection and legal certainty, have committed themselves to uphold these standards. This principle applies irrespective of the question as to whether and to what extent the Security Council is itself bound to respect human rights under the UN Charter or the norms of general international law. In our perspective, therefore, not only the Contracting States of the European Convention on Human Rights (ECHR), that is, the 47 States Members of the Council of Europe, which include the 27 EU Member States, but all States that have ratified the International Covenant on Civil and Political Rights (ICCPR) are included. Moreover, the requirement to respect minimum procedural standards under the rule of law also applies in relation to States which are not bound by any human rights treaties and therefore to the international community as a whole, to the extent that such minimum standards have become part of general international law.

Second, targeted sanctions (such as freezing of assets) have a direct impact on substantive rights (such as the right to property). Our analysis, however, will be exclusively focused on the issue of remedies, for without adequate procedural guarantees no substantive right (e.g. the right to the peaceful enjoyment of one’s possessions) can be adequately protected.10


10 The need of adequate procedural remedies also arises in relation to the possibility for one to avail his/herself of the exceptions in the application and/or implementation of sanctions provided for under all sanctions regimes, for the purpose of safeguarding the most vital humanitarian needs of the targeted individuals.
2. SEEKING JUSTICE IN NEW YORK THROUGH THE UNITED NATIONS FOCAL POINT

While the larger question of judicial review of Security Council resolutions within the UN system has been discussed elsewhere, the analysis here will focus on the specific mechanisms put into place in relation to blacklisting by the Security Council and the sanctions committees instituted under the relevant resolutions. As already mentioned, the situation has evolved from one where procedures for placing individuals and entities on sanctions lists, as well as de-listing them, lacked any kind of formalisation, and were, therefore, entirely dependent on each sanctions committee’s discretion, to one in which procedures are largely regulated. Notwithstanding changes brought about by Security Council Resolutions 1730 and 1735 mentioned above, however, blacklisting ultimately retains its quintessential nature of a political process. This is clearly expressed by the rule of consensus which continues to apply to all deliberations by sanctions committees.

Major changes were expected, but failed to be achieved, from the adoption on 19 December 2006 of Resolution 1730 (2006), by which the Security Council requested the Secretary General to establish within the Secretariat (Security Council Subsidiary Organs Branch) “a focal point to receive de-listing requests and to perform the tasks described in the attached annex”. Petitioners seeking to submit a request for de-listing can do so either through the focal point or through their State(s) of residence or citizenship. To date, France is the only State that availed itself of the possibility to decide that as a rule its citizens or residents should address their de-listing requests directly to the focal point. Submitting a de-listing

---

11 CIAMPI, Sanzioni del Consiglio di sicurezza e diritti umani, Milano, 2007, pp. 163-173, and references therein, discussing, in particular, the possibility of judicial review of Security Council Resolutions by the International Court of Justice.
12 Most importantly, specific requirements now apply to the information to be provided in support of a listing request and there exists a general obligation to state reasons in the event the designating State refuses to disclose the sources of this information.
13 Resolution 1730 (2006), adopted on 19 December 2006, para. 2. Resolution 1735 (2006), adopted on 22 December 2006, mainly focused on the requirements for listing (see the preceding note) and the obligation to make available to the interested individual or entity the file concerning his/her listing as well as to inform him/her of existing procedures for de-listing and of humanitarian exceptions. These changes have been incorporated in the latest versions of the Guidelines of the 1267 Committee (cit. supra note 5). For an overall examination of developments brought about by Security Council Resolutions 1730 (2006) and 1735 (2006), see ARCARI, “Sviluppi in tema di tutela dei diritti di individui iscritti nelle liste dei comitati delle sanzioni del Consiglio di sicurezza”, RDI, 2007, p. 657 ff.
14 Pursuant to footnote 1 of the Annex to Resolution 1730 (2006), which stipulates that “[a] State can decide that, as a rule, its citizens or residents should address their de-listing requests directly to the focal point” and that “[t]he State will do so by a declaration addressed to the Chairman of the Committee that will be published on the Committee’s website”. This as well as the postal and e-mail addresses and all other relevant documentation and information are available on the official website of the “Focal Point for De-listing established pursuant to Security
request to the focal point, however, does not automatically entail that the petition will be considered, let alone granted, by the competent sanctions committee (the composition of which coincides with that of the Security Council).

The request will be placed on the Sanctions Committee’s agenda only upon a recommendation by the designating government(s) and/or the government(s) of citizenship or residence (or by any Committee’s member, in the case none of the said States recommends de-listing). Therefore, while the designating State no longer has the power to block a de-listing request because any of these governments may recommend de-listing in order to place the issue on the Committee’s agenda, if “no Committee member recommends de-listing, then it shall be deemed rejected”.15 Moreover, once a request is placed on the Committee’s agenda, de-listing will only follow a Committee’s deliberation taken by consensus. In fact, the consensus rule still applies. Accordingly, an opposition from any one member of the Committee – in other words, a member of the Security Council – would be decisive.

Therefore, not only the focal point process does not even provide listed individuals with a way to bring their claims directly to the attention of the Sanctions Committee, but the composition as well as the deliberative procedure of the latter remain unchanged. It follows that petitioners still do not dispose of a true right of access to the body responsible to hear their claim. Moreover, the decision to grant de-listing retains a purely political character.

This character greatly diminishes the relevance – if any, in the perspective of affected individuals and entities – of the question as to whether States have a simple right to bring to the attention of the Sanctions Committee their citizens’ (or residents’) petition for de-listing, or are under an international obligation to do so. This conclusion is valid irrespective of the possibility of actually qualifying a State activity for the purpose of de-listing of one of its nationals (or residents) as an exercise of diplomatic protection. As is well known, diplomatic protection consists of the invocation by a State of the responsibility of another State and therefore presupposes the alleged commission of an internationally wrongful act of that State.16 The first problem therefore concerns the possibility of actually identifying the unlawful act of which one (or more) State(s) member(s) of the Sanctions Committee would be internationally responsible. Moreover, even if one succeeded in proving the existence of a duty to exercise “diplomatic protection” on the basis of general international law or human rights norms pertaining to a special conventional re-

---

15 Para. 6 (c) of the Annex to Resolution 1730 (2006).
16 See Art. 1 of the Draft Articles on Diplomatic Protection adopted by the International Law Commission at its Fifty-eighth session, 2006, and submitted to the General Assembly as a part of the Commission’s report covering the work of that session (Official Records of the General Assembly, Sixty-first session, Supplement No. 10 (A/61/10)).
gime such as the European Community, compliance with it would merely result in the initiation of a de-listing procedure the final outcome of which would rest on political considerations.

In light thereof, general features of the Security Council’s sanctions regimes such as their temporary character and the general availability of humanitarian exceptions also appear clearly insufficient to provide listed individuals and entities with an effective remedy. Periodic reviews do not rule out that persons remain on the blacklist for years. Nor can the application of humanitarian exemptions or exceptions be considered equivalent to, or an adequate substitute of, the removal from a list of an individual or entity in relation to whom sanctions are, or have become, unjustified.

For all the above considerations one cannot but conclude that notwithstanding the Security Council’s expressed commitment to ensuring that fair and clear procedures exist for placing individuals and entities on sanctions lists and for removing them, such procedures still have to be instituted. Persistent criticism therefore appears entirely justified.

3. THE SEARCH FOR REDRESS BEFORE THE STRASBOURG AND LUXEMBOURG COURTS

In the absence of adequate remedies at the level of the UN, at least individuals and entities falling within the jurisdiction of the Member States of the European Union and/or the Contracting Parties to the European Convention on Human Rights (ECHR) should be able to bring their claim before the Luxembourg and/or the Strasbourg courts in order to seek protection of the alleged infringement of their rights flowing from the implementation of Security Council targeted sanctions.

---

17 This is the view of the Court of First Instance of the European Communities, on which see infra sub-section 3.4. See also Third Report of the Analytical Support and Sanctions Monitoring Team Established Pursuant to Resolution 1526 (2004), 9 September 2005, for the suggestion that “the Committee could require in its guidelines that States forward petitions for de-listing to the Committee. […] The Team believes that, after the requisite consultations between the State of residence and/or citizenship and the original designating State, in accordance with the guidelines, the State of residence and/or citizenship could be required to submit the de-listing petition to the Committee along with an approval, objection or neutral position. In this manner, the Committee would be the body to make the final decision, and listed individuals and entities would receive additional procedural protection” (UN Doc. S/2005/572, para. 55). Irrespective of its legal soundness, this suggestion – already contained in the Second Report of the Analytical Support and Sanctions Monitoring Team Established Pursuant to Resolution 1526 (2004), 15 February 2005, UN Doc. S/2005/83, para. 56 – has had no follow-up in the Sanctions Committee’s practice.

18 See the last considerandum of the Preamble of Resolution 1730 (2006) and supra note 6.

19 See supra notes 8 and 9 and corresponding text.
To date, however, solutions retained by these international tribunals under their respective constituent instruments have fallen short of providing claimant individuals with the remedy sought.

As the survey of judgments and decisions hereby reviewed will show, neither the European Convention on Human Rights nor the EU Treaties have been interpreted or applied so as to afford an effective judicial protection to applicants seeking redress for and/or against the inclusion of their name in the list of individuals and entities targeted by UN sanctions. Nor does a remedy in the near future seem likely for those who find themselves in the European judicial space.

3.1. The European Court of Human Rights Equivalent Protection Approach in Relation to State Conduct Taken in the Execution of Community Measures

In Bosphorus, the European Court of Human Rights unanimously – albeit with two concurring opinions, signed by 7 out of the 17 judges composing the Grand Chamber, closely resembling a dissent from the majority’s findings – rejected the claim that the manner in which Ireland implemented the sanctions regime to impound an aircraft operated by Bosphorus was a reviewable exercise of discretion within the meaning of Article 1 of the Convention and a violation of Article 1 of Protocol No. 1. The Court found, instead, that “the impugned interference was not the result of an exercise of discretion by the Irish authorities, either under EC or Irish law, but rather amounted to compliance by the Irish State with its legal obligations flowing from EC law and, in particular, Article 8 of EC Regulation 990/93”.

In other words, Ireland had done nothing but complying with a Community measure (Art. 8 of Regulation No. 990 of 1993) which left no discretion as to the impoundment and seizure of Bosphorus aircraft, when this occurred to be on its soil and thus within its jurisdiction. Therefore, the impugned act constituted solely compliance by Ireland with its legal obligations flowing from membership of the EC.

The Court stressed the benefit of international cooperation (as opposed to mere coexistence) among States, in particular when it takes the form of participation to an international organization, and the need further to enhance its development as well as compliance by States with obligations arising from their membership of the organization. However, the Court did not limit itself to recognizing “the growing importance of international co-operation and of the consequent need to secure the proper functioning of international organisations”, in particular of “a supranational organisation such as the EC”, but made the enhancement of international cooperation through compliance with obligations flowing from a State participation to an international organization a criterion relevant to the interpretation of the ECHR.

---

20 European Court of Human Rights (Grand Chamber), Bosphorus Hava Yolları Turizm ve Ticaret Anonim Şirketi v. Ireland, Application No. 45036/98, Judgment of 30 June 2005.
21 Ibid., para. 148.
in accordance with Article 31, para. 3(c), of the Vienna Convention on the Law of Treaties (“The Convention has to be interpreted in the light of any relevant rules and principles of international law applicable in relations between the Contracting Parties […], which principles include that of pacta sunt servanda”). The Court went on to say that when an international organization offers a protection of human rights which is “equivalent”, i.e. “comparable”, to the one afforded under the European Convention, a State’s conduct taken in implementation of an obligation flowing from its membership of the organisation should in turn be presumed to be in compliance with the Convention. This presumption is not absolute, but would only be rebuttable where a dysfunction of the mechanisms of control of the observance of the Convention resulted in a “manifestly deficient” protection of the applicant’s rights. In the words of the Court, “if, in the circumstances of a particular case, it is considered that the protection of Convention rights was manifestly deficient”.

The reasoning of the Court leading to the determination that the EC – although not the EU – protects fundamental human rights in a manner that is at least equivalent to that for which the ECHR provides, has been the object of extensive comment and criticism, which do not need to be restated. Suffice here to underline that under the principles expressed in Bosphorus, a State action giving effect to UN targeted sanctions can be justified by its compliance with obligations flowing from its membership of the EC, to which it has transferred part of its sovereignty.

22 Ibid., para. 150.
23 “In the Court’s view, State action taken in compliance with such legal obligations is justified as long as the relevant organisation is considered to protect fundamental rights, as regards both the substantive guarantees offered and the mechanisms controlling their observance, in a manner which can be considered at least equivalent to that for which the Convention provides” (ibid., para. 155).
24 Ibid., para. 156.
The *Bosphorus* rationale, which referred to the impoundment of an aircraft as part of a general flight embargo against the Former Yugoslavia, would *a fortiori* apply to measures of implementation of targeted sanctions, in relation to which – by definition – any State discretion even as to the determination of the individuals and entities to be affected is eliminated.

Indeed, this implication of the *Bosphorus* judgment is extremely significant for the protection of individuals targeted by Security Council sanctions. All the more so, when one considers that in the EU economic and financial sanctions are invariably implemented through Community measures and that only sanctions involving a travel ban or an arms embargo fall outside the exclusive competence of the Community.26


The previous remarks do not necessarily imply that individuals or entities affected by sanctions not implemented through Community measures (that is, essentially, outside the EU) are better off, should they decide to bring their claim before the European Court of Human Rights. One could think for example of the situation of *Bosphorus* Airline, had its aircraft been found and impounded in Norway, instead of Ireland. Although no such case has yet been brought to Strasbourg, the Court case-law gives grounds to doubt that the application of an individual targeted outside the EU and therefore outside an international organization, which offers in principle a protection of human rights equivalent to the ECHR, would ever be successful.

In the cases of *Behrami and Behrami v. France* and *Saramati v. France, Germany and Norway,*27 the Grand Chamber of the Court dealt with the issue of the respondent States’ responsibility under the ECHR, in relation to acts carried out by their military personnel on behalf of the UN and, more generally, of the relationship between the European Convention and the UN acting under Chapter VII of its Charter. According to the Court, the impugned action of KFOR (the detention of Mr. Saramati) and inaction of UNMIK (the alleged failure to de-mine

---

26 On the scope and nature of the EC competences to implement UN sanctions in accordance with Articles 60 and 310 of the EC Treaty, and their relationship with the provisions on Common Foreign and Security Policy in the EU Treaty, see CIAMPI, *cit. supra* nota 11, p. 175 ff.

in the Behrami case)\textsuperscript{28} were in principle “attributable” – “[t]he Court has used the
term 'attribution' in the same way as the ILC in Article 3 of its Draft Articles on
the Responsibility of International Organizations”\textsuperscript{29} – to the UN, which “has a legal
personality separate from that of its member States” and “is not a Contracting Party
to the Convention”.\textsuperscript{30}

More generally, however, the Court stressed “the imperative nature of the prin-
ciple aim of the UN and, consequently, of the powers accorded to the UNSC under
Chapter VII to fulfil that aim”, and held that “the Convention cannot be interpreted
in a manner which would subject the acts and omission of Contracting Parties which
are covered by UNSC Resolutions […] to the scrutiny of the Court”.\textsuperscript{31} The Court
therefore found that it was not necessary to determine whether the substantive and
procedural protection of fundamental rights provided by the UN was equivalent to
that under the Convention within the meaning of the Bosphorus judgment.\textsuperscript{32}

The Court expressly considered that the circumstances of the cases were es-
sentially different from those with which the Court was concerned in the Bosphorus
case: in the latter, “the impugned act (seizure of the applicant’s leased aircraft) had
been carried out by the respondent State authorities, on its territory and following
a decision by one of its Ministers”, while “the impugned acts and omissions of
KFOR and UNMIK cannot be attributed to the respondent States and, moreover,
did not take place on the territory of those States or by virtue of a decision of their
authorities”. However, notwithstanding the Court’s express statement that the cases
are “clearly distinguishable from the Bosphorus case in terms both of the responsi-
bility of the respondent States under Article 1 and of the Court’s competence
ratione personae”,\textsuperscript{33} the limit to the Court’s competence ratione personae affirmed in
relation to Resolution 1244 (1999), which falls under Article 42 of the UN Charter,
could be extended to the issue of State responsibility in relation to decisions taken
under Article 41, such as resolutions imposing targeted sanctions.

Should the same reasoning apply in relation to State acts implementing UN tar-
targeted sanctions as provided for under the relevant Security Council resolutions, an
application to the Court would be inadmissible. This although the presumption of

\textsuperscript{28} KFOR is the international security force presence in Kosovo, mandated by Security
Council Resolution 1244 (1999); the same resolution mandated the UNMIK, the UN interim
Administration for Kosovo.

\textsuperscript{29} European Court of Human Rights, Behrami v. France, \textit{cit. supra} note 27, para. 121.

\textsuperscript{30} \textit{Ibid.}, para 144.

\textsuperscript{31} \textit{Ibid.}, paras. 148 and 149.

\textsuperscript{32} For a critical appraisal of each of these two grounds of inadmissibility in the light of
the general rules on attribution of conduct to an international organization and the principle of
primacy enshrined in Art. 103 of the UN Charter, see PALCHETTI, “Azioni di forze istituite o
autorizzate dalla Nazioni Unite davanti alla Corte europea dei diritti dell’uomo: i casi Behrami e

\textsuperscript{33} European Court of Human Rights, Decision on admissibility, \textit{cit. supra} note 27, para
151.
compliance with the ECHR could not apply in the absence of equivalent protection of human rights within the UN system.

3.3. The New Segi Case before the European Court of Human Rights

The determination of equivalent protection within the EC (with the presumption of compliance with the Convention arising therefrom) as well as the imperative nature of the powers of the Security Council under the UN Charter when international peace and security are at stake, are both likely to be discussed again by the European Court of Human Rights in a new case introduced by Segi against the 27 States Member of the EU.

Segi and Gestoras pro Amnistía are two Basque youth organizations which are described in Common Position 2001/930/CFSP “on combating terrorism” and Common Position 2001/931/CFSP “on the application of specific measures to combat terrorism” as being part of ETA and marked as EU terrorist organisations. They first lodged a complaint with the European Court of Human Rights against their inclusion on the CFSP Common Position 931.34 They complained that they had been described by the fifteen Member States of the European Union as a terrorist organisation. Their right to the presumption of innocence had been infringed; their assets and the use of them were under threat; their right to freedom of expression had been curtailed; their freedom of action as an association had been directly challenged; their right to a hearing by a tribunal and to a fair trial had been denied; their right to an effective remedy did not exist. Lastly, they were unable to obtain compensation for the very serious damage that they had suffered on account of the Common Positions adopted by the Member States on 27 December 2001. They asked the Court to find violations by fifteen Member States of the EU of Articles 6, 10, 11 and 13 of the Convention and Article 1 of Protocol No. 1, as a result of their inclusion in the EU terrorist list.

The application was declared inadmissible under Article 35 of the European Convention with decision of 23 May 2002,35 because the applicants did not possess the status of victims. The Court held with regard to Common Position 2001/930/CFSP “that this contains measures of principle to be taken by the European Union


and its Member States to combat terrorism [...] [and] that this common position is not directly applicable in the Member States and cannot form the direct basis for any criminal or administrative proceedings against individuals, especially as it does not mention any particular organisation or person. As such, therefore, it does not give rise to legally binding obligations for the applicants”. As regards Common Position 2001/931/CFSP, the applicants, according to the list in the annex thereto, were subject only to Article 4, relating to police and judicial cooperation in criminal matters. 36 The Court acknowledged that this provision “might be used as the legal basis for concrete measures which could affect the applicants, particularly in the context of police cooperation between States mediated through Community organs such as Europol”, but held that it “does not add any new powers which could be exercised against the applicants. It contains only an obligation for Member States to afford each other police and judicial cooperation, a form of cooperation which, as such, is not directed at individuals and does not affect them directly”.

The Court concluded that “the applicant associations are only concerned by the improved cooperation between Member States on the basis of their existing powers and they must accordingly be distinguished from the persons presumed to be actually involved in terrorism who are referred to in Articles 2 and 3 of the common position”.

The act at the origin of the new application is Council Regulation (EC) No. 2580/2001 of 27 December 2001, which implemented Articles 2 and 3 of the Common Position 2001/930/CFSP as regards their provisions on the freezing of funds; decisions adopted in relation thereto includes Segi and Gestoras among the listed entities. The situation is thus analogous to the one in Bosphorus, except that the measure complained of by the applicant organizations is one of implementation not of a general regime, but of targeted sanctions.

It seems most likely that the Court will confirm its previous finding that the EC protects human rights in a manner equivalent to that provided for under the ECHR. This notwithstanding the outcome in Yusuf and Kadi – decided by the Court of First Instance after the Bosphorus judgment 37 – supposing that the Court of Justice would apply a different test.

36 Article 4 of Common Position 2001/931/CFSP provides: “Member States shall, through police and judicial cooperation in criminal matters within the framework of Title VI of the Treaty on European Union, afford each other the widest possible assistance in preventing and combating terrorist acts. To that end they shall, with respect to enquiries and proceedings conducted by their authorities in respect of any of the persons, groups and entities listed in the Annex, fully exploit, upon request, their existing powers in accordance with acts of the European Union and other international agreements, arrangements and conventions which are binding upon member States”.

confirms that it lacks full power of review of Community measures of implementation of Security Council resolutions under Chapter VII of the UN Charter. This would still reflect a part of the political reasons which form the background of the Bosphorus outcome, such as the need for the European Court of Human Rights to avoid openly confronting the Luxembourg Courts as well as creating obstacles to the fulfilment by the Contracting States of the European Convention of their obligations under the UN Charter. In this latter respect, the European Court could even be tempted to resort to the newly created limitation to its competence ratione personae drawn from the imperative nature of the principle aim of the Security Council’s powers under Chapter VII of the Charter to maintain peace and security and, to this ultimate end, to fight against international terrorism.

3.4. The Jurisdiction of the Community Courts to Review Community Measures of Implementation of Security Council Sanctions

The protection against alleged breaches of fundamental rights flowing from the implementation of sanctions within the EU is not homogenous but varies in relation to form or legal basis of the impugned measure. On the one hand, we have the situation of individuals and entities targeted in conformity with a Security Council resolution and the list adopted by the relevant sanctions committee pursuant thereto. On the other hand, there are persons affected by the implementation of sanctions imposed by the EU either independently from a resolution of the Security Council under Chapter VII of the UN Charter or pursuant to a decision of the Security Council leaving discretion as to the kind of measures to be taken and/or the individuals to be targeted. While the Community courts recognize that the principle of full judicial protection of fundamental rights (both procedural and substantive) applies in the latter situation, they allow themselves only a limited power of review in relation to the first type of situation. This brings about a sort of double standard of review which can be hardly justified in the perspective of individuals and entities invoking an infringement of their fundamental rights.

In the OMPI case,38 the Court of First Instance examined, together, the pleas alleging infringement of the right to a fair hearing, infringement of the obligation to state reasons and infringement of the right to effective judicial protection, and eventually annulled, in so far as it concerned the applicant organization, Council Decision 2005/930/EC of 21 December 2005 implementing Article 2(3) of Regulation (EC) No. 2580/2001 on specific restrictive measures directed against certain persons and entities with a view to combating terrorism.

---

The Court distinguished this outcome from the solution given in *Yusuf* and *Kadi*, which concerned the adoption and implementation of a similar measure freezing the funds of persons and entities linked to Osama bin Laden, Al-Qaeda and the Taleban, by stating that in those cases “the Community institutions had merely transposed into the Community legal order, as they were required to do, resolutions of the Security Council and decisions of its Sanctions Committee that imposed the freezing of the funds of the parties concerned, designated by name, without in any way authorising those institutions, at the time of actual implementation, to provide for any Community mechanism whatsoever for the examination or re-examination of individual situations”. In the *OMPI* case, by contrast, the impugned measures had been adopted pursuant to Security Council Resolution 1373 (2001), which provides *inter alia* in para. 1(c) that all States must freeze without delay funds and other financial assets or economic resources of persons who commit, or attempt to commit, terrorist acts or participate in or facilitate the commission of terrorist acts, of entities owned or controlled directly or indirectly by such persons, and of persons and entities acting on behalf of, or at the direction of, such persons and entities, but it does not specify individually the persons, groups and entities who are to be the subjects of those measures. Nor did the Security Council establish specific legal rules concerning the procedure for freezing funds, or the safeguards or judicial remedies ensuring that the persons or entities affected by such a procedure would have a genuine opportunity to challenge the measures adopted by the States in respect of them. “Thus, in the context of Resolution 1373 (2001), it is for the Member States of the United Nations (UN) – and, in this case, the Community, through which its Member States have decided to act – to identify specifically the persons, groups and entities whose funds are to be frozen pursuant to that resolution, in accordance with the rules in their own legal order”. Therefore, it is only because “the identification of the persons, groups and entities contemplated in Security Council Resolution 1373 (2001), and the adoption of the ensuing measure of freezing funds, involve the exercise of the Community’s own powers, entailing a discretionary appreciation by the Community”, that “the Community institutions concerned, in this case the Council, are in principle bound to observe the right to a fair hearing of the parties concerned when they act with a view to giving effect to that resolution”.

---

41 *Ibid.*, para. 107. See also Court of First Instance of the European Communities, Case T-327/03, *Stichting Al-Aqsa v. Council of the European Union*, Judgment of 11 July 2007, not yet reported, which annulled Council Decision 2006/379/EC of 29 May 2006 implementing Article 2(3) of Regulation (EC) No. 2580/2001 on specific restrictive measures directed against certain persons and entities with a view to combating terrorism in so far as it concerned the applicant, because: “In the absence of any indication, in the contested decision, of the actual and specific reasons justifying it, the applicant has not been placed in a position to avail itself of its right of action before the Court, given the connection between the safeguarding of the obligation to state reasons
Following the OMPI judgment, the Council adopted a document which introduces procedures for the protection of individuals and entities targeted by Community measures of freezing of assets not only ex post but also ex ante. The document provides for an obligation to transmit to suspected terrorists a letter of notification, confirming the decision to maintain the restrictive measures, stating the reasons thereof and expressly conferring the right of the persons concerned to present, within a month from receipt of the letter, documents and observations in order to obtain a revision of the restrictive measures. There is also the recommendation that a notice be published on the Official Journal of the EU, stating the intention to maintain the suspected terrorist in the lists and the restrictive measures flowing therefrom, with the indication that the interested parties may present a request to the Council for the purpose of obtaining the reasons which justify their continued inclusion in the list (unless the reasons have already been communicated to them).

The grounds upon which the Court of First Instance founded its limited protection approach in relation to individuals and entities listed by the Security Council are of a twofold nature. At a formal level, the Court found that the UN Charter prevails over Community law and held therefore that its jurisdiction to review Community measures taken pursuant to a Security Council’s resolution leaving no discretion as to its implementation could merely assess their conformity to jus cogens. On substance, the Court considered only the very core of fundamental rights (such as the prohibition of torture and the arbitrary deprivation of property) as forming part of jus cogens, so that a finding of a violation thereof becomes highly improbable. This reminds of the purely theoretical possibility of “manipulating the right to an effective legal remedy” (para. 64); and Case T-47/03, José Maria Sison v. Council of the European Union, Judgment of 11 July 2007, not yet reported, which affirms the same principle in para. 137, and also annuls Council Decision 2006/379/EC, in so far as it refers to the applicant, because: “[...] in the context of Resolution 1373 (2001), it is for the Member States of the United Nations (UN) – and, in this case, the Community, through which its Member States have decided to act – to identify specifically the persons, groups and entities whose funds are to be frozen pursuant to that resolution, in accordance with the rules in their own legal order” (para. 150). See BARONI, “Le ‘liste antiterrorismo’: riflessioni sull’accesso ai documenti, l’obbligo di motivazione ed il diritto alla difesa nella recente giurisprudenza comunitaria”, Rivista italiana di diritto pubblico comunitario, 2007, p. 1015 ff.

42 Document 7719/1/07 REV 1, adopted by the COREPER on 23 March 2007 as restricted and then declassified on 6 June 2007.

43 The two cases were joined in the oral phase and settled on 21 September 2005 by two judgments which, with identical reasoning, rejected the applicants’ action of annulment. The same solution was later confirmed by Court of First Instance of the European Communities, Case T-253/02, Chaïq Ayadi v. Council of the European Union, Judgment of 12 July 2006, ECR, 2006, p. II-2139 ff.

44 On the one hand, “the reservation regarding human rights demanding respect as jus cogens deserves full approval. Realistically speaking, however, this reservation is devoid of any actual substance”. On the other hand, “it is certainly not too bold to claim that the right to property has evolved as a right under customary international law, in any event as far as ratione personae in-
festly deficient” protection that would rebut the presumption of compliance with the ECHR under the equivalence protection approach of the European Court of Human Rights.

This sort of implied presumption that UN resolutions comply with human rights standards is supported, on the one hand, by the power of the Security Council to review its sanctions regimes periodically and, on the other hand, by the alleged existence under Community law of an obligation of States Members of the EU to exercise their right to diplomatic protection in favour of their nationals.

None of these propositions is convincing. Both the Yusuf and the Kadi judgments were appealed by the applicants and await to be confirmed or denied by the Court of Justice. Indeed, the issues at stake are very sensitive for the legal and political implications of any solution given. In this respect, one should not forget that the scope of judicial review by the Community Courts is but one aspect of the larger question of how to ensure effective legal protection to individuals and entities targeted by UN sanctions. Already in 1996, in its Bosphorus decision given on a preliminary reference by the Irish Supreme Court, the Court of Justice


45 See section 2 above, in fine.

46 The appeal against the Yusuf judgment is registered with the Court as Case C-415/05 P. On the Kadi appeal (Case C-402/05 P, Yassin Abdullah Kadi v. Council of the European Union and Commission of the European Communities) see the Opinion of Advocate General Poiares Maduro delivered on 16 January 2008 launching a thorough critique of the Court of First Instance’s various arguments. See, in particular, paras. 21-40 on the question of the relationship between international law and the Community legal system and the appropriate standards of review, which are – correctly – identified with the fundamental rights that are a part of the general principles of Community law. On these bases, the Advocate General proposes that the Court annul, in so far as the appellant is concerned, the contested regulation. See also CIAMPI, cit. supra note 11, – which predates the Advocate General’s Opinion –, p. 295 ff. (on the limitation of the power of judicial review) and p. 301 ff. (on the question of the standard of review), as well as our concluding remarks, ibidem, p. 330 ff.

47 A sensitiveness that is clearly shown by the number of governments which requested to intervene in the appeal: Spain, France and the Netherlands, in addition to the United Kingdom, which was already a party in the proceedings before the Court of First Instance.

of European Communities held that the impoundment of an aircraft operated by Bosphorus Airways did not amount to an interference with the right to property in violation of the general principle of proportionality, notwithstanding the fact that a different subject, namely the Federal Republic of Yugoslavia (Serbia and Montenegro), was the actual “target” of the embargo decided by the Security Council.  

While allowing in principle full judicial review of the contested measure, the Court refrained from assessing the true proportionality of the contested measure by reference to the specific circumstances of the case. The Court held that fundamental rights such as the right to peaceful enjoyment of property and the freedom to pursue a commercial activity are not absolute and their exercise may be subject to restrictions justified by objectives of general interest pursued by the Community and that those restrictions may be substantial where the aims pursued are of substantial importance themselves. That was precisely the case as regards Regulation No. 990/93, the aim of which was to contribute at the European Community level to the implementation of the sanctions against the Federal Republic of Yugoslavia adopted by the Security Council, since that regulation pursued an objective of general interest fundamental for the international community, namely to put an end to the state of war in the region and to the massive violations of human rights and humanitarian international law in the Republic of Bosnia-Herzegovina. It thus found that the impoundment was not disproportionate and that the contested regulation was valid.

The reasoning of the Court of Justice closely resembles that of the European Court of Human Rights in the same – Bosphorus – case. In a sense, the Court of Justice anticipated the latter judgment, which nearly 10 years later will go even further by comparing the interference with human rights complained of with an objective of an even more general scope than the achievement of peace and security: that is the benefit of international cooperation – as opposed to mere coexistence – among States, in particular when it takes the form of the participation to an international organization. It is obvious that balanced against those general and abstract interests any individual right – no matter how fundamental the right and how serious the interference with it – can hardly prevail. Finally, it is worth mentioning that

---


49 The impounding concerned an aircraft which was owned by an undertaking – Yugoslavia Airlines – based in the Federal Republic of Yugoslavia, but had been leased for four years to another undertaking – Bosphorus Airways – neither based in nor operating from that Republic and in which no person or undertaking based in or operating from that Republic had a majority or controlling interest.

50 See supra note 20.
a preliminary reference procedure or an action of annulment – even if successful – do not necessarily result in the remedy sought by the claimant.

In the OMPI case, for example, a Community measure was set aside in so far as it concerned the applicant. However, the judicial pronouncement was not followed by the cancellation of OMPI from the list. As mentioned above, the Council took note of the annulment but maintained the applicant’s name on the list, while providing for the necessary adjustment of blacklisting procedures. This notwithstanding the annulment had produced its effects ex tunc, in the absence of any statement by the Court to the effect that the regulation declared void continued to produce effect.51

One cannot exclude that a similar course of conduct would be followed by a national court acting upon a Court of Justice preliminary ruling resolving in the affirmative its doubt as to the validity of the Community measure complained of in the national proceedings: this notwithstanding the obligation under Community law to follow the Court’s ruling.

This does not diminish the value of judicial review in general or, in particular, of review of the legality of Community acts. The annulment of the act at the origin of (or at least contributing to) the violation of fundamental rights complained of is the only remedy which allows restitutio in integrum, that is the re-establishment of the situation which would have existed had the violation not been committed. This would conform with the general principle of full reparation, according to which restitution is due wherever possible and not disproportionally burdensome.52

Art. 288 of the EC Treaty provides that in case of non-contractual liability, the Community shall, in accordance with the general principles common to the laws of the Member States, make good any damage caused by its institutions. The Court’s case law under this provision, however, is very rigorous, and particularly so in disputes relating to compensation for damages sought as a consequences of the implementation by Community measures of UN sanctions. Suffice here to recall the case of Dorsch Consult,53 where the Community Courts held that the damage arising from a Community measure adopted for the purpose of implementing a binding resolution of the Security Council imposing sanctions is not attributable to the Community and therefore no claim for damages can be addressed to the latter.

---

51 The Court has the power to do so, “if it considers this necessary”, under Art. 231, para. 2, of the EC Treaty.
52 See Art. 35 of the ILC Draft Articles on Responsibility of States for Internationally Wrongful Acts, which can be considered as the expression of a more general principle: “A State responsible for an internationally wrongful act is under an obligation to make restitution, that is, to re-establish the situation which existed before the wrongful act was committed, provided and to the extent that restitution: (a) Is not materially impossible; (b) Does not involve a burden out of all proportion to the benefit deriving from restitution instead of compensation”.
It follows from the above that not only annulment is to be preferred in principle to compensation, but compensation seems hardly, if at all, obtainable under the current rules on non-contractual liability of the Community in relation to alleged breaches of fundamental rights flowing from the implementation in the EU of UN sanctions.

4. APPLYING TO NATIONAL COURTS AS COURTS OF LAST RESORT

It has been suggested that in the absence of a true protection of individual rights by the European Court of Human Rights and the Community Courts (or elsewhere), it should be up to national courts to uphold the principle of effective judicial protection. At least in so far as national courts of EU Member States are concerned, insufficient protection by the European institutions could provide grounds for resorting to national judicial review as indicated by various constitutional courts (among which the German and the Italian Constitutional Courts as well as the French Conseil d’Etat), notwithstanding the supremacy of EC law over national law. This eventuality is however rather unlikely.

A study on UN sanctions and human rights recently conducted within the Committee of Experts of Public International law of the Council of Europe (CAHDI) shows that few decisions exist at the national level on the matter, even in States where the principle of judicial review also applies in relation to UN resolutions and domestic measures adopted in execution thereof. Similarly scant results have been ascertained – on a world-wide basis – in relation to national proceedings initiated by individuals and entities listed by the 1267 Committee concerning Al-Qaida, the Talibans and associated individuals and entities. These are periodically reported to the Committee in annex to the Monitoring Team’s annual reports.


56 The replies – given by approximately two-thirds of the Member States of the Council of Europe – to a questionnaire focusing in particular on national practice concerning the relationship between targeted sanctions and human rights have not been made public, although access has been granted to the 1267 Committee.

Moreover, national courts will tend to uphold the validity of national measures as shown by the Swiss Federal Court’s dismissal of a claim filed by Youssef Nada in order to be removed along with several entities from the Swiss decree of 2 October 2000, implementing UN sanctions against individuals and entities associated with Osama bin Laden, Al-Qaida and the Taliban. Referring to previous judgments of the Court of Justice of the European Communities, the Federal Court ruled that the Swiss sanctions were not “autonomous”, but the result of the “binding effect” of the decisions of the UN Security Council taken under Chapter VII of the UN Charter, and stated that the binding effect of UNSC decisions could only be limited by a norm of _jus cogens_. Regarding Nada’s claim that UN sanctions were adopted in breach of _jus cogens_ (referring to basic human rights) the Court said that “fundamental rights (such as property rights, the right to a fair trial and the right to an effective judicial protection) are not absolute”. The same Court further stated that the UN sanctions mechanism is limited in its nature and time and provides a de-listing process. The Court concluded that the procedural guarantees considered by the plaintiff as ineffective in the case of UN sanctions (right to a fair trial and right to an effective remedy) did not constitute “core provisions of international human rights conventions”.

If the exiguity of State practice discourages one from trusting national courts to play a significant role in relation to alleged breaches of individuals rights flowing from UN targeted sanctions, further reasons warn against the possibility of filling the gap in the protection of fundamental rights at the international level through domestic courts.

These reasons – which are of a theoretical, rather than of a practical, nature – can easily be summarized by reference to the general principles of equality of citizens and certainty of the law. The principle of certainty of the law expresses the very fundamental need that rights as well as limitations thereto be foreseen or foreseeable. Such requirement can hardly be considered satisfied in relation to individual remedies available to “victims” of targeted sanctions in the UN Member States’ legal systems, as it is clearly shown by the scant results of the inquiry spe-

---


59 One could recall here the whole case-law of the European Court of Human Rights concerning the requirement that the limitations to any given right be provided “by law”.

---

cifically conducted for this purpose even within the inner circle of the Member States of the Council of Europe. Individuals whose names have been “black-listed” are informed at best that they can address a petition for de-listing through the focal point in New York, in addition to (or to the exclusion of, in the case of France) the authorities of their State of nationality or residence. There is no requirement, in the sanctions committees’ guidelines or elsewhere, that the information given to listed individuals includes an indication of which national authorities are responsible for dealing with de-listing requests in the State implementing the measure concerned.

As to the principle of equality, the simple fact that States differ as to the existence and the kind of remedies available to affected individuals excludes compliance with the fundamental guarantee that similar situations receive equal treatment unless a different treatment can be objectively and reasonably justified. It is submitted that although the principle of equality applies across national frontiers only within the EU, this guarantee should be satisfied worldwide for national judicial review to be considered an adequate substitute for fair procedures at the UN level.

A last, but not least important, element to be taken into account is the kind of remedy which may be available before national courts. In order to be effective, a remedy should in principle be such as to put an end to the ascertained violation.

Courts have no power to de-list an individual or an entity from the relevant list, as this can only be done by the competent sanctions committee. A national court could very well order the competent governmental authorities to bring a claim on behalf of the person concerned. As the Sayadi and Vinck case clearly shows, however, such an order is very far from ensuring that the individual will get the remedy sought: on 11 February 2005, the Brussels Tribunal of First Instance sentenced the Belgian State “à demander sous le bénéfice de l’urgence au Comité des sanctions des Nations Unies de radier les noms des demandeurs de la liste et d’en communiquer la preuve aux demandeurs, à peine d’une astreinte de 250 euros par jour de retard, à compter de l’expiration du délai de 30 jours à partir de la signification du présent jugement”.60 Over three years after the judgment, Sayadi and Vinck remain on the list of the 1267 Committee, notwithstanding the efforts to obtain their de-listing by the Belgian Government, because some members in the Sanctions Committee – the United States, in particular – oppose such request.

As a consequence of the purely political nature of black-listing procedures, which is nothing but stressed by the focal point process – in particular, the consensus rule which applies to all deliberations of sanctions committees – chances of success will mostly, if not entirely, depend on the strength and political weight of the government sponsoring the petition and/or the attitude of the designating State (very often a permanent member of the Security Council). This is also a ground for

---

60 Tribunal of First Instance of Brussels, Nabil Sayadi et Patricia Vinck c. l’Etat Belge, Judgment of 18 February 2005.
highlighting a further limit to the intrinsic value of judicial review of measures of implementation of UN sanctions by national courts.

For a national remedy to be effective, therefore, it should consist in the annulment of the national measure implementing the sanction the blacklisting refers to. Thus, while the measure would remain into place at the international level, it would be deprived of practical effect, with the obvious consequence of exposing the forum State to international responsibility. All these reasons contribute to explaining why national courts do not provide the remedies sought.

5. Prospective Remarks

Albeit conducted separately for each level (international/national; universal/regional) at which protection may be sought, the analysis has clearly shown that solutions respectively given are interrelated and, at least to some extent, interdependent one from the other. And paradoxically so.

The Court of First Instance of the European Communities, for example, bases a limitation to its power of judicial review on a sort of implied presumption that UN resolutions comply with their Member States’ obligations concerning human rights. But individuals do not actually dispose of a venue to bring their claim directly before the competent sanctions committee, while de-listing decisions remain entirely dependent on the political will of each and every member of the sanction committee at the time the request is considered.

It follows that one legal system – that of the EU – substantially waives its powers of judicial review, which it would normally exercise to ensure the protection of fundamental rights, in favour of a different legal system – that of the UN – which is clearly inadequate, nor was ever conceived for the purpose of providing individuals with any kind of judicial remedy for the alleged infringement of their rights.

The same – even more – paradoxical interconnection may be shown as regards the approach of the European Court of Human Rights in relation to alleged breaches of human rights flowing from the implementation of UN sanctions within the EU: the European Court founds the presumption that national measures of implementation of sanctions comply in principle with the ECHR on the premise that the legal system of the European Community provides “equivalent protection”. However, the Community legal system relies in turn on the UN system for remedying infringements of human rights arising under Security Council sanctions regimes.

An analogous gap in the protection of human rights may be the result of the interplay between international law and national legal systems, as shown by the judgment of the Swiss Federal Court recalled above, dismissing an individual’s application for removal from a national measure of implementation of the sanctions regime imposed by the Security Council against individuals and entities associated with Osama bin Laden, Al-Qaida and the Taliban.
It is submitted that the interconnection among the various level of protection (or lack thereof) could prove useful, if turned upside-down. One could envisage that a reversal or at least the adoption of a different solution at one level would not only result in an enhanced protection at that very same level, but most probably also entail a positive impact at other levels. The fact that to date such a spill-over effect from one level to another has resulted in a reduction rather than enhancement of individual remedies of protection should not diminish hope for a change of direction.