

Targeted Sanctions and Legal Safeguards

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Summary

The introduction of Security Council targeted financial and travel sanctions against individuals involves a qualitative change in Security Council sanctions policy which has previously been directed against governmental entities. Targeted sanctions can be a useful weapon in the international community's attempts to pressurize repressive regimes into accepting change. Targeted sanctions are also greatly preferable to general economic sanctions. As such, targeted sanctions should be maintained and strengthened. However, there is a problem in using against individuals, a powerful international law mechanism designed for pressurizing states. Individuals' rights under domestic and international law can be severely affected by such sanctions. Targeted sanctions can affect freedom of movement, the right of effective access to court, the right to reputation and property rights. The blacklists created under Resolutions 1333 and 1390 cause particular problems, as these are quasi-criminal in nature and in practice entail an allegation that the targeted persons are terrorists or terrorist associates. However, 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 Security Council is bound by UN human rights norms insofar as these are authoritative interpretations of the UN Charter (UNC) and/or have passed into general international law. Moreover, states implementing Security Council sanctions can be bound by universal and regional human rights treaties, as well as constitutional norms. The implementation against non-governmental or quasi-governmental entities of targeted Security Council sanctions in European states is almost certainly contrary to European human rights norms, in particular, the right of access to court under Article 6 European Convention on Human Rights (ECHR). There is thus a conflict between obligations under the UNC on the one hand and the ECHR (and for EU states, EC law) on the other. Normally, obligations under the UNC take precedence over other international obligations (Article 103 UNC) but this is questionable as regards human rights norms. But, in any event, mechanisms *can* be created at the level of the Security Council which provide a broadly similar level of protection to that provided by Article 6 ECHR while maintaining whatever effectiveness targeted sanctions possess. The process of improving legal safeguards at the level of the Security Council is difficult, inter alia because there are legitimate security interests that have to be protected. Nonetheless, reform is not impossible and so there is no *logical* incompatibility between obligations under the ECHR and Security Council sanctions. As there is no necessary conflict between UN targeted sanctions and the ECHR, Article 103 need not, and cannot, be used to solve the conflict (for members of the Council of Europe) between the ECHR and certain of the present sanctions regimes. Instead, these regimes should be reformulated to comply with applicable human rights standards. This can be done while maintaining their effectiveness. If the present conflict is not corrected, the future of Security Council targeted sanctions is in doubt. Sweden and other EU states should intensify efforts to improve legal safeguards in Security Council targeted sanctions. In the absence of significant reform at the level of the Security Council, Sweden and other EU states must take steps at the EU/EC and national level to ameliorate the negative effects of sanctions on targeted individuals resident in, or nationals of, EU states, who may have been wrongly identified.

1 Purpose of the present report and methods used

The purpose of the present report is to examine the problems involved in the lack of legal safeguards applicable to the process of adopting and implementing UN Security Council targeted sanctions and to suggest solutions. I will not look at as such at the EU and unilateral sanctions programs, such as the US programs, even though these can also be problematic from the perspective of legal guarantees.¹ These sanctions systems can obviously be problematic from the perspective of legal safeguards, and have certain other common features with the UN sanctions system. However, they involve certain special problems of their own, not shared by the UN system, e.g. the complications caused for understanding and reforming EU sanctions, and of EU implementation of UN sanctions, caused by shared EC/member state competence, and pillar structure of the EU, and problems of compatibility with the WTO regime. I refer to the EU and US sanction systems insofar as this contributes to understanding the UN sanction system and possible improvements which might be made in the UN system.

The UN anti-terrorist sanction regime can also be seen in a wider context of national, regional and global action against terrorism following the September 11 attacks. However, the present report is extensive enough as it is without discussing all the human rights implications of all these measures. Moreover, taking into account this wider context would risk distorting the discussion of the legal safeguards problems specific to the UN sanctions regimes.

As regards methods used, in addition to the usual academic analysis of literature, case law, official reports etc. I have interviewed a number of people involved in the implementation of UN sanctions at the national and international level. A hearing was organized on my behalf in August 2002 by the Swedish NGO foundation for human rights, and I was thereby able to obtain the views of a number of Swedish NGO's on the UN sanction system. An early draft of this report was discussed at a seminar in Stockholm in April 2002, which was arranged by the Foreign Office. I am grateful to all the participants in this seminar for valuable comments. I would especially like to thank Peter Wallensteen, Peter Fitzgerald, Martin Björklund, Torbjörn Andersson, Daniel Nord and Fredrik Stenhammar who have all made remarks which have been incorporated into the present report. Small parts of a forthcoming article on EU sanctions which I coauthored with Torbjörn Andersson and Kenneth Nordback have been incorporated in the present report.

The present report is not intended to be the last word on the matter, but to stimulate discussion on finding solutions to the problems identified. This discussion is likely to continue for some time. The research for this report was funded by the Swedish Foreign Ministry. However, the present report does not represent the policy of the Swedish government, or any other government. Points made are not always supported by reference to authorities, which is customary in academic work. A more detailed version of this report will be published next year as an academic study.

2 What are Security Council targeted sanctions?

I will not devote space to introducing the basis for, and UN Security Council experience with, sanctions generally. Suffice it to say that according to Article 24(1) UNC, the Security

¹ Very large numbers of people have appeared on the EU Former Yugoslavian Republic and Burma sanctions – more than on the present UN sanction lists. For a discussion of the special problems of EU sanctions, see Björklund, 2002.

Council has the primary responsibility for the maintenance of international peace and security. After a determination under Article 39 that a situation constitutes a threat to, or breach of the peace, the Security Council can order states to undertake provisional measures under Article 40, non-forcible measures under Article 41 – normally referred to as sanctions – and finally, military action under Article 42, against the entity responsible for the threat or breach.² The Security Council seldom states explicitly on which article it is basing its resolution, but confines itself to saying that it is “acting under Chapter VII of the Charter”.³ Measures not involving the use of armed force can vary considerably, but basically one can distinguish between a general trade, or economic embargo directed against a particular entity, and a range of lesser “targeted” measures. There is no generally accepted definition of “targeted” UN Security Council sanctions, however, the concept is usually assumed to include the following measures: the freezing of financial assets; the suspension of credits and aid; the denial and limitation of access to foreign financial markets; trade embargoes on arms and luxury goods; flight bans and the denial of international travel, visas and educational opportunities.⁴ Targeted sanctions are also sometimes referred to as smart sanctions, or designer sanctions.⁵ These terms would appear to have been used interchangeably.⁶

Not all of these sanctions regimes involved targeting named individuals. The main regimes of interest as far as this is concerned are those concerning Angola, Liberia, Sierra Leone and Afghanistan/Al-Qaida. When sanctions are targeted on individuals, this is primarily done by means of a “blacklist”. The Security Council adopts a resolution and delegates to a sanctions committee,⁷ consisting of all the members of the Security Council, the task of drawing up a list of blacklisted persons. This obviously involves identifying targets. This can be a relatively simple matter as far as governmental officials are concerned. It becomes increasingly difficult however, when the circle of targets is expanded to include, e.g. businessmen involved in supporting the targeted government. As the UN Secretariat, which assists the sanctions committees, lacks both capacity and expertise in identifying persons supporting, or otherwise influential in relation to, a targeted government, the information on which names are produced comes from other sources. These sources are, first, those member states which have both an interest in the matter, and sufficient diplomatic and intelligence gathering capacity, second, expert panels established by sanctions committees to monitor the implementation of sanctions and third, public sources. It is not always clear which states have proposed which individuals.

² See, e.g. Frowein, 1994, Österdahl, 1998.

³ See, e.g., SC Res. 824, 6 May 1993; SC Res. 841, 16 June 1993; SC Res. 917, 6 May 1994; SC Res. 1160, 31 Mar. 1998.

⁴ See e.g. UN Secretary-General, Report to the Security Council on the Protection of Civilians in Armed Conflict, UN Doc. S/1999/957, 8 Sept. para.54, note 11 and Bossuyt, 2000.

⁵ Cortright and Lopez, 2000, p. 240.

⁶ See, e.g. Jeker, R.M., Lessons Learned and Definitions, in Interlaken I, pp. 67-74 at p.72.

⁷ At the time of writing, Sanctions Committees are operational under the following resolutions, 661 (1990) concerning the situation between Iraq and Kuwait, 748 (1992) concerning the Libyan Arab Jamahiriya, 751 (1992) concerning Somalia, 864 (1993) concerning the situation in Angola, 918 (1994) concerning Rwanda, 985 (1995) concerning Liberia, 1132 (1997) concerning Sierra Leone, 1160 concerning Kosovo (1998), 1267 (1999) concerning Afghanistan (and Al-Qaida), 1298 (2000) concerning the situation between Eritrea and Ethiopia and 1343 (2001) concerning Liberia.

It is reasonable to assume that those states with economic and historical (former colonial) interests in particular target states have taken the lead in blacklisting. I have heard from various people that the main source of the names in UNITA travel and financial sanctions was the Angolan government. The sources for the Liberia and Sierra Leone names appear to have varied, with certain states, e.g. the US, the UK and France, suggesting some names, and other names coming from the expert panels' reports on implementation. The main (or exclusive?) source of the names on the Afghanistan/Al-Qaida lists appears to have been the US.

Targeted sanctions have been the subject of diplomatic/ academic/NGO conferences, in particular the Interlaken, Bonn-Berlin and Stockholm "processes" designed to analyse the implementation of targeted sanctions and propose improvements.⁸ At the time of writing, the Stockholm process is ongoing.⁹ There has already been published a relatively large number of books and articles examining different aspects of targeted sanctions, in particular the role of the UN Secretariat in coordinating, monitoring etc. and the (in)effectiveness of the measures. There is no general agreement among writers as to the effectiveness of targeted sanctions.¹⁰ A selection of these books and articles are set out in the bibliography to the present paper.

3 The background to the discussion on legal safeguards and targeted sanctions

General (economic) sanctions obviously affect the lives of a large number of people - many more people than targeted sanctions. The human rights of civilian populations in states subjected to economic embargoes, particularly Iraq, has been the subject of some discussion.¹¹ However, the issue of whether legal safeguards, including human rights standards, apply, or should apply, to *targeted* UN sanctions has arisen only relatively recently.¹² The issue was raised in the Interlaken and Bonn-Berlin processes, but at the time,

⁸ The official reports from, and documents relating to, these processes can be found at www.smartsanctions.ch, www.smartsanctions.de and www.smartsanctions.se.

⁹ The Swedish host government, together with other governments involved in the Stockholm process, considered that this process was eminently suitable for discussion of the issues of legal safeguards. However, a small group of states, in particular the US, disagreed. Faced with this opposition, the Swedish Foreign Office took the decision that the present report should be produced separately. Bearing in mind the special problems which legal sanctions cause European states, I think that this decision, on reflection, was correct. Nonetheless, I can note that the issue has continued to arise in the Stockholm process. See the June 17-18, 2002 meeting of the SPITS Working Group (WG) on Strengthening the Role of the UN in Implementing Targeted Sanctions where the WG held a series of briefings with the Media, NGOs, UN Experts Panels, UN Sanctions Committee Chairs, and relevant officials from the UN Secretariat, funds and programs. Recommendations on improving legal safeguards were made on pp. 2, 3, 4, 6 and 8. (At www.smartsanctions.se).

¹⁰ See, e.g., Wallensteen, 2000, the debate in the journal *International Security* 1997 between Pape, Elliot and Baldwin and below section 5.

¹¹ See e.g. Bossyut, 2000.

¹² The US has employed the blacklist technique for some time, and so there is a certain amount of doctrinal discussion regarding legal guarantees (or rather, the lack of them) in the different US programs. See, in particular, Fitzgerald, 1999 and Judicial Review Commission on Foreign Assets Control, Final Report to Congress, January 2001 (hereinafter, (Judicial Review Commission, 2001), available at www.law.stetson.edu. EU targeted sanctions on

there were few concrete cases to inform the discussion. The problem could be said to have begun with the UNITA sanctions in 1997 and 1998.¹³ In the latest version of the Angola sanctions list, 157 individuals are subjected to assets freezing and travel bans.¹⁴ The latest Sierra Leone list contains 56 individuals subject to travel bans.¹⁵ The “secondary” travel ban sanctions imposed on Liberia as a result of its lack of cooperation in regard to the Sierra Leone sanctions now encompass 144 individuals.¹⁶ The Sierra Leone and Liberia sanctions have given rise to complaints and discussions in the relevant Security Council sanction committees regarding the basis for adding particular people to the blacklists.¹⁷ Still, as the focus of these sanctions was easily identifiable government/rebel leaders, the discussions primarily concerned how to identify reliably the scope of the government/rebel circle, and what links with these circles would justify being placed on the list. Nonetheless, determining such a link could, and did, involve the use of intelligence material.

The issue of legal safeguards arose to greater prominence in European states as a result of the Taliban/Al-Qaida financial sanctions. On 15 October 1999 and 19 December 2000, the Security Council, by means of resolutions 1267 and 1333 respectively, brought in sanctions against the Taliban-regime in Afghanistan. The main reasons for this were the Taliban's encouragement of opium-growing and its refusal to extradite Usama Bin Laden to the USA. Bin Laden was (and is) suspected of having been behind the bombing of the US embassies in Nairobi and Dar-es-Salem. Resolution 1267 inter alia ordered states to freeze funds controlled directly or indirectly by the Taliban. Resolution 1333 inter alia ordered states to freeze funds controlled directly or indirectly by Usama Bin Laden and individuals associated with him. As of 8 July 2002, there were 152 individuals on the Resolution 1267 list and 67 individuals (and 72 entities) on the consolidated Resolution 1333/1390 list. The bulk of money seized/frozen under resolutions 1290 and 1333 is apparently Taliban money (particularly the Afghan central bank's assets, later unfrozen). 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. Resolutions 1333 and 1390 do not involve a much larger circle of people than the Sierra Leone/Liberia resolutions. However, resolution 1390 is "open-ended" and so involves a qualitative difference in that there is no connection between the targeted group/individuals and any territory or state. Although the Security Council has previously adopted resolutions directed against non-state entities (particularly the UNITA

Serbia/Montenegro (Former Yugoslavia) have given rise to academic discussion as well as cases before the ECJ (see e.g. Canor, 1998 and below).

¹³ SC Res. 1127 (1997) imposed travel sanctions on UNITA leaders and their immediate family members. SC Res. 1173 and 1176 (1998) imposed financial sanctions on UNITA members.

¹⁴ See Press Release SC/7162. Two people and their families were later removed from the list Press Release SC/7322. The travel sanctions were suspended on 17 May 2002 by SC Res. 1412.

¹⁵ Press Release SC/608. On 1 February 2002, one person was removed from this list.

¹⁶ See the revised list under SC Res. 1343, 2001, at www.un.org/Docs/sc/committees/Liberia2/1343_list.htm (updated to 5 September 2002).

¹⁷ See, e.g. the replies drafted by the Liberia Sanctions Committee to queries posed by Gambia and Lebanon, S/AC.39/2002/Note. 8 and the Annual Report of the Sierra Leone Sanctions Committee, S/2002/470, p. 35.

resolutions), resolution 1390 is the first, and only so far, example of a Chapter VII resolution without a territorial connection.¹⁸

In the wake of the terrorist attacks of 11 September the Security Council adopted a further resolution, 1373, of 28 September. This resolution imposes obligations on all states *inter alia* to criminalize acts of financing of international terrorism, and to freeze and seize funds used for terrorism. This resolution, amounts, in effect, to an obligation to implement the operative provisions of the Convention on the Financing of International Terrorism. This resolution contains no time limit. There is a reporting obligation, and a monitoring committee (the Counter-terrorism committee, CTC) is established with competence *inter alia* to review the reports submitted. But no blacklists are attached to the resolution.¹⁹

As mentioned, the basis for a blacklisting proposal can vary. Experience from US blacklisting indicates that 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 money laundering.²⁰ And Sanctions Committee Expert Panel reports can also identify individuals. 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 be assumed almost invariably to lie behind the listing. It is clear, at any rate, that the identifier information on the Resolution 1267/1390 list is too limited to have come from bank reporting duties regarding suspicious transactions. 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.

As mentioned, the *scope* of the government circle was discussed in the Liberia sanctions committee, but not the *basis* for the blacklisting. All attempts to obtain the disclosure of the information forming the basis of the Taliban and Al-Qaida blacklisting have met with a negative response. Thus, the sanctions committees have rarely, or ever, evaluated the “evidence” that the named person is engaged in activities involving a threat to international peace and security. Indeed these activities are never defined, and so there are no criteria to measure the “evidence” against, even if it is submitted to the sanctions committee. When the name comes from a state, the sanctions committees are more or less in a position of having to

¹⁸ US move towards less geographically oriented sanctions came as far back as 1995, with the first blacklist of "specially designated terrorists" suspected of hindering the Middle East peace process, Fitzgerald, 1999, p. 90.

¹⁹ Secondary sanctions might conceivably be advocated against states failing to report, or submitting deficient reports, but such sanctions would require a further resolution from the SC. It is not clear whether the committee will use the material submitted to it as the basis for addressing recommendations, or orders under Chapter VII to particular states to take legislative or administrative measures. If it does so, secondary sanctions are conceivable, but again this will require a further resolution.

²⁰ For a general discussion of the apparatus of counter-measures against money laundering, see Gilmore, 1999.

trust it.

But is this problematic? I think so, for four basic reasons. Much can be written about all of these reasons, but at this stage I will simply sketch them out. In the next two sections, I will sketch out certain arguments which might be made by those proponents of the present system, and the counter-arguments to these.

The first reason is that, in any legal system, even the international legal system, a body exercising power should bear the responsibility for the exercise of this power. However, the sanctions committees can be, and have been, put in the position of simply "rubber stamping" individual states' own blacklists, in particular the US anti-terrorist blacklists. The speed of the procedure – notification to the SC members and, occasionally, to the state of nationality, 48 hours before the sanctions are adopted – may well be necessary to retain the element of surprise, but it means that there is very little time for any other state to check if they have any intelligence on the people proposed. If several people are proposed at the same time, which is usually the case, then even states with major intelligence resources have only very limited possibilities for checking the proposed lists against their files. Moreover, the consensus nature of the procedure in sanctions committees means that, once a name is on a list, any Security Council member can block its removal. Once the blacklist has been approved, there is no (or little, see below) basis for challenging it at the national level. The UN has immunity from suit before national courts. Power is thus being exercised without mechanisms for ensuring legal responsibility on either the national or international level.

The second, related, reason is that individual rights under international law are not being respected. Undoubtedly, very much worse abuses of human rights are being justified in the name of anti-terrorist measures in the world today. Nonetheless, the results of an order freezing assets (and, to a lesser extent, imposing travel restrictions) are severe for the individuals affected, and their families. In sections 8 and 9 below I deal in detail with the human rights issues.

The third reason is that by designating individuals subject to coercive measures, the Security Council is now starting to do things which were previously done only by national judges, prosecutors and intelligence officials (and, for that matter, legislators – the CTC is drawing up model laws on terrorism). Long national experience shows that, when using intelligence material, mistakes can easily be made in identifying individuals, particularly in identifying people suspected of involvement in the financing of terrorism. Intelligence material is inherently of limited reliability.²¹ Many examples from national practice show that the intelligence community often, or even invariably, errs on the side of caution in assessing threats.²² That is its job after all. And of course, there is often no alternative but to rely on intelligence material. In countering certain forms of threats, including terrorist threats, democratic states have been forced to accept that compulsory measures, such as opening files on suspects, initiating surveillance of suspects, or employment checks, must use intelligence

²¹ For a discussion, see, e.g. Cameron, 2000, pp. 170-183.

²² It is also naturally capable of misusing its powers. There are very numerous instances of this. For a recent example from the US, concerning judicial criticism of FBI abuse of the Foreign Intelligence Surveillance Act for the purpose of gathering material for criminal prosecutions, see New York Times 26 August 2002.

material. Most of this will be derived from open source information,²³ but informers and technical means (interception of communications, bugging etc.) naturally form part of it. The essence of good intelligence work is putting together the "jigsaw" of material, and providing decision-makers with usable and reliable intelligence. But there is no doubt that mistakes are made in assessing threats. People are wrongly identified. People can have suspicious associates, or are the wrong place at the wrong time, or are simply wrongly determined to be threats on the basis of inadequate or inaccurate material. Even the, by Swedish standards, vast US intelligence community is stretched thin, with coverage often only "one analyst deep".²⁴ At the same time, the pressure is great to get results. At the national level, involvement of judges in approving intelligence operations involving coercive means against individuals is considered an essential safeguard for individuals' rights. The interposition of a judge between the executive and the individual also provides a degree of quality control on the targeting process.²⁵

The fourth reason is that, although even members of governments have human rights (see below, sections 10.1 and 10.5), there are "evidential" differences between, first, identifying the government, second identifying the scope of the circle of "government" (as occurred in the Liberia/Sierra Leone sanctions) and third, identifying a terrorist group, especially a terrorist network (this being the object of resolutions 1267, 1333 and, particularly, 1390). The members of a government are easy to identify. It is more difficult to identify people who are strongly linked to a government, or to a particular governmental activity, believed to be a threat to international peace and security. Naturally, government officials themselves can have considerable business interests, but private individuals can also exercise considerable influence over the government, e.g. as businessmen who support the government in exchange for being the beneficiaries of lucrative licensing agreements. Obviously, where a government is a "bandit" government, the best way to hit it is to cut down, or off, its profits, and it will be artificial to draw distinctions between who in the controlling regime is formally a member of the government and who is not. But the "core" of the target is clearly identified. And the "periphery", the business circles, will usually be acting openly, or relatively openly, because effective business usually demands that people know who is in charge of what. Even where ownership is concealed, where companies are exploiting primary resources (timber, diamonds etc.) the chain of ownership can presumably be traced, beginning with the geographical location of the primary resource. This can also be done, although presumably with more difficulty, where the trade is in manufactured products, import-export licences etc. In any event, the intelligence problem is not so much identifying the periphery, but identifying the influence it has on the core, and determining whether this is sufficient to justify including given individuals on the blacklist. But even here, there is disquiet regarding the inability of the sanctions committees, and the UN secretariat, to exercise any meaningful supervision over the basis for making such an assessment.²⁶

²³ See, e.g., Steele, 1996, p. 215.

²⁴ Betts, 2002, p. 48.

²⁵ As the former general counsel to the NSA, and CIA, Elisabeth Parker, put it in evidence to the US Judicial Review Commission, 2001, "what such [judicial] review insures is that such a designation is done carefully and thoughtfully, with full consideration for legal and constitutional safeguards. It provides an effective test for the thoroughness and adequacy of the government's factual predicate to establish the status of a designated individual or entity" (Judicial Review Commission, 2001, appendix E, p. 252).

²⁶ See above, note 14.

However, the problems are greater as regards a terrorist group, or for that matter, organised criminality, which operates in *secret*. Certain senior members may be well-known, but the rank and file will not. And where it is a terrorist network, the “nodes” may be operating in almost complete isolation from one another. There might not even be a “core“. And, as the Al-Qaida network shows, there may be no connection to a single state or territory, and few, or no, goals shared by the whole network. The very idea of a network is open-ended, both in membership and goals. What is stopping adding, e.g. Chechen fighters to the Al-Qaida network? And what of those who support terrorism in non-financial ways, e.g. in ideological ways?²⁷ With the UNITA and Sierra Leone sanctions the focus of the sanctions was the primary resource earning export money for the targeted groups (oil, diamonds, etc.) But for a terrorist group there may not be a primary resource linked to territory which is being exported. Or the resource may be illegal, such as narcotics. The problem, in other words, is identifying the whole group.

One also can note here that, for the financial community, the problems in ensuring compliance with the lists increase greatly, the vaguer the lists are. Although the focus of this report is legal safeguards, the costs of compliance of the financial community is also a highly relevant factor in designing and implementing sanctions. With common names and insufficient identifier information, the computerized warning systems produce too many “false hits”, entailing considerable human supervision of the lists.

There are also differences between governments and terrorist groups relating to *what change in policy* is sought with sanctions. The purpose of UN sanctions, according to Article 39 UNC, is to maintain or restore international peace and security. UN sanctions should form an incentive for a state or targeted entity to modify its behavior and abide by international law through taking or refraining from certain actions. When the state’s or targeted entity’s compliance has been achieved, or when changed circumstances have rendered the threat obsolete, sanctions should be terminated. In practical terms, the purpose of UN sanctions is then to bring the threat to an end. The particular idea underlying a *targeted* sanction is that the target has some large influence over the activity one wishes to change or stop (oppression of civilian population, dictatorial intervention in the internal affairs of another state, financing of terrorism or a civil war). In other words, the aim should be behavioural modification. A policy can be modified by new directives from the government, or by achieving the resignation, or overthrow, of the government itself. A particular person targeted because of his or her connection to a targeted government can openly sever this connection some way, and secure his or her removal from the blacklist by convincingly demonstrating this.

Similarly, outside pressure can force a terrorist group to change its policies and pursue its objectives by democratic, political means. Or the terrorist group can be destroyed or rendered harmless by physical or legal means. Where the target is a bank, or other financial institution, suspected of money laundering for the group, or holding funds, or facilitating financial transactions, it should be possible for the bank/financial institution to stop these activities. But it will often be much more difficult for a blacklisted terrorist suspect convincingly to demonstrate his or her *severing* of a connection with a terrorist group. The group after all operates in secret. Any contacts with the group, or lack of them, will also be secret.

²⁷ It can be noted here that the Bonn-Berlin process regarded “ideological support” as possibly sufficient grounds for being included in the circle of targets. See Björklund, 2002, p. 87.

One can, of course, argue that the purpose of some sanctions is not, realistically, behavioural modification, but making a political statement.²⁸ Or that the real motive, and this applies to all the sanctions lists, is punishment. Certainly, being put on the list (either travel sanctions or financial sanctions) now involves a social stigma, particularly damaging for businessmen who live on their reputation/cash flow. Bearing in mind the social stigma involved, it is all the more important that the person in question has been correctly identified. For example, few people in Western states at any rate would have any objections to ordering the freezing of Usama Bin Laden's assets, in the hope that this would make his life, or his terrorist enterprise, more difficult, because the evidence in the public domain of his involvement in various terrorist attacks is overwhelming. However, this is certainly not the case for all of the other 67 individuals and 72 entities on the Resolution 1333/1390 list. They may or may not be terrorist sympathizers or financiers, but inclusion on the list certainly implies that they are engaged, wittingly or unwittingly, in criminal activity.²⁹ While this problem is particularly acute for the terrorist list, similar question marks exist surrounding at least some of the people on the Liberia and Sierra Leone lists.

Finally, there can be obvious differences in the *time*-frame between terrorist and government measures. Where the root causes of conflict persist, then the war against terrorism risks being a "forever war".³⁰

For all these reasons, a number of states, independent experts and members of the UN Secretariat have felt for some time that steps should be taken to improve legal safeguards for individuals subjected to UN targeted sanctions. For Sweden, the catalyst for activity came in November 2001 when three Swedish citizens woke up to find that their assets had been frozen as a result of EC Commission regulations, passed to implement Resolution 1267.³¹ The people in question, after 9 months, have now been removed from the list as the result of an agreement between them and the designating state (the US).³² However, as shown below, the problem cannot, by any means, be said to have been solved. Legal proceedings were brought

²⁸ See, e.g. Fitzgerald, 2002, p. 6.

²⁹ Cf. the EU sanctions against FRY which were not coupled to the FATF money laundering guidelines because the targeted assets were not criminal in origin.

³⁰ As one commentator puts it "Wars have generally been fought against proper nouns (Germany, say) for the good reason that proper nouns can surrender and promise not to do it again. Wars against common nouns (poverty, crime, drugs) have been less successful. Such opponents never give up. The war against terrorism, unfortunately, falls into the second category." Byford, 2002. As mentioned, there are no time limits on either Resolution 1373 or 1390.

³¹ In March 2001, resolutions 1267 (1999) and 1333 (2000) and the Common Positions implementing the resolutions, 1999/727/CFSP (15 November 1999), 2001/56/CFSP (22 January 2001) and 2001/154/CFSP (26 February 2001), were followed by Council Regulation 467/2001/EC. This was implemented by Commission regulations 1354/2001 (4 July), 1996/2001 (11 October), 2062/2001 (19 October), 2199/2001 (12 November), 2373/2001 (14 December), 2604/2001 (28 December), 65/2002 (14 January), 105/2002 (18 January) and 362/2001 (27 February). In May 2002, these regulations were replaced by Council Regulation 881/2002.

³² SC/7490, 27 August 2002.

before the EC Court of First Instance by the three Swedes, and another person subjected to sanctions, a Saudi businessman, resident in the UK, and these proceedings may continue.³³ These pending proceedings have the potential to make explicit a serious conflict between European human rights norms and Security Council targeted sanctions and make discussion of the issue of sanctions urgent.³⁴ Moreover, names continue to be added to the various sanctions lists, and a much more active policy has been proposed by the Monitoring Committee established under Resolution 1363/1390 as regards blacklisting.³⁵ And new lists against new countries (Congo-Kinshasa) are being proposed.

4 Arguments for maintaining the present system

There are naturally arguments which can be made for maintaining the present system, or making only minor improvements in it. The first argument relates to the importance of the interests at stake and the UN member states' obligations under the UNC. The primary function of the Security Council, and of international law itself, is the maintenance of international peace and security. Nothing should hinder this overriding objective. No one would dispute the seriousness of the conflicts in Angola and Sierra Leone and the fact that these conflicts are, to a large degree, fuelled by "bandits" after natural resources. No one would dispute that terrorism has shown itself to be capable of threatening international peace and security. And the financing of terrorism can obviously involve transnational financial transactions.³⁶ The terrible terrorist attacks of the 11 September 2001 could not have been carried out without the transfer of funds, estimated to be at least \$200,000, to the US. Moreover, the Hundi/Hawala underground banking system, of which Al-Barakaat network is a part, is believed to be responsible for considerable money laundering (and for financing of terrorism in inter alia the Indian subcontinent). These systems are efficient and very difficult for western agencies to penetrate.³⁷

As regards obligations under the UNC, the only explicit limit on the power of the Security Council is Article 24(2) prescribing that it shall act in accordance with the purposes and principles of the UNC, *i.e.* Article 1.³⁸ While these obviously include the protection and promotion of human rights, it is the Security Council which has kompetenz kompetenz in the matter of compliance: its assessment of whether or not its sanctions violate a human rights norm, either a UN norm, or a norm of general international law, should not be capable of being overruled by a legal body. Human rights treaties accept, for example, that rights can be

³³ See Case T-306/01, Abdirisak Aden and others v. EU Council and EC Commission, Case T-315/01, Yassin Abdullah Khadi v. Council and Commission, Case T-318/01, Omar Mohammed Othman v. Council and Commission. See further below, section 9.9.

³⁴ The EU implementation of Security Council (and EU) blacklisting raises issues of EC/EU competence and gives rise to special problems. See Andersson, T., Cameron, I. and Nordback, K., EU blacklisting: the renaissance of imperial power, but on a global scale, *European Business Law Review* 2003 (forthcoming).

³⁵ See Second Report of the Monitoring Group established pursuant to Security Council resolution 1363 (2000) and extended by resolution 1390 (2002), S/2002/1050, para. 128.

³⁶ See, e.g. Collier, 2000, who identifies diasporas (and the sources of financing they entail) as a prime cause of continuing conflicts.

³⁷ See, e.g. Gilmore, 1999, p. 36.

³⁸ See, e.g. Gasser, 1996 at p. 880 et seq., Österdahl, 1998, p. 24.

derogated from in public emergencies. And 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.

The UN member states have implicitly accepted the supremacy of the Security Council when they created the UN Charter, which does not provide for any body with explicit powers to monitor and control it. And they have also accepted the clear obligation under the UNC to comply with Security Council sanctions adopted under Chapter VII. In general one can say that international law does not accept that national law can be pleaded as an excuse for failure to comply with international obligations.³⁹ This is even stronger as regards obligations under the UNC which are, or purport to be, hierarchically superior to other international law, customary or treaty based (Article 103).⁴⁰

Another argument is discouraging US unilateralism. The US has in the past pursued a largely unilateral approach to economic sanctions, with the consequence that jurisdictional conflicts have arisen with friendly states whose interests, and whose nationals' interests, are indirectly or directly affected by such sanctions. The US acceptance of the desirability of working through multilateral sanctions is thus to be welcomed. But if UN sanctions are undermined, a return to unilateral measures can be guaranteed.

A third argument is that the alternatives to targeted sanctions, general sanctions, or even more drastic, peace enforcement measures, are seldom attractive. General sanctions cause considerable financial strains on specially affected states, their efficacy is highly suspect and they cause, or risk causing, severe suffering for the civilian population in the targeted state or area. Peace enforcement operations obviously risk civilian casualties as well, as well as losses of military personnel and involve considerable expense for states contributing to the operation. As alternatives to such measures, targeted sanctions should be welcomed.

A fourth, related, argument is that at the present time, many states do not implement targeted sanctions properly, or implement them at all. With a varying degrees of lack of enthusiasm for sanctions in practice, the creation of legal mechanisms to challenge them will enable unenthusiastic or directly hostile states to overload or otherwise undermine the system. The lack of enthusiasm is shown inter alia by the huge number of doubtful applications for humanitarian etc. exceptions which certain sanctions committees have received, indicating a lack of seriousness, or even good faith on the part of certain applying states. So the focus should be on strengthening monitoring of sanctions and removing loopholes, rather than encumbering sanctions with safeguards which risk encouraging even more inconsistencies and failures in implementation. Moreover, targeting sanctions against individuals has been something of an uphill struggle for the UN Security Council. A large number of states, for good reasons or bad (mainly bad, I would say) have been against "piercing the state veil". We should be negative to anything which risks undermining the effectiveness of targeted sanctions - or what little effectiveness they may have.

³⁹ See, e.g. the Alabama Claims Arbitration, 1872, Moore, *International Arbitration* vol. 1, 495 and Articles 26 and 47 of the Vienna Convention on the Law of Treaties 1969 (VCLT) 1155 UNTS 31.

⁴⁰ See also Articles 30 VCLT, which governs the application of successive treaties to the same subject matter, and which is made subject to Article 103 UNC.

Another argument, linked to the first, is that legal safeguards are designed for legal processes (the evaluation of evidence, the determination of guilt or innocence etc.) But the Security Council is not even stating that the named individuals are engaged in criminal activity,⁴¹ let alone engaging in an assessment of "evidence" of their complicity in crime. The Security Council is simply stating that the blacklisted individuals' activities threaten international peace and security. Whether freezing of assets would be seen as an administrative, civil or criminal measure at national law is irrelevant.

Moreover there are political safeguards built into the system. Where the members of the Security Council are not confident in each other they will say no to a particular blacklist, or to blacklisting a particular person. In practice, as consensus is the basis of the operation of the sanctions committees, all fifteen members, not just the permanent members, have a veto. And names *have* been removed from *proposed* lists, e.g. as regards the Angola sanctions, the UK, US and France all deleted names from proposed blacklists. All states whose nationals are affected by sanctions have, under Article 50, a right of consultation after the imposition of sanctions. Names have also been removed *after* having been placed on lists as a result of new information, e.g. certain people suspected of involvement in supplying the RUF with arms blacklisted under the Liberia sanctions⁴² and three Swedish citizens on the Al-Qaida list.⁴³ 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. As regards obtaining information as to why a person is on a list at all, the different sanctions committees involving targeted sanctions on individuals have developed different practices. After a great deal of discussion and criticism from states such as Sweden and Canada, the Resolution 1267 committee has adopted a "Delisting procedure". 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. The designating government is also free to request more information. If after reviewing all relevant additional information, the petitioning government considers that it wants to maintain its request for removal, it should "seek to persuade the designating state" to join with it in submitting the request. If consensus is not obtained in the committee, the Chairman will undertake further consultations in order to seek agreement, failing which, the matter may be submitted to the Security Council. So procedures exist. And if the political safeguards are on occasion less than perfect, then this is a small price to pay in the war against terror, especially bearing in mind the alternatives.

A final argument relates to practicalities. If a remedy, or a legal safeguard, is created as regards a Security Council decision to impose targeted sanctions, then surely one must also be created as regards general (economic) sanctions. But it would be totally impracticable to give a legal remedy to everyone affected directly or indirectly by an embargo. Moreover, the Security Council should not create new, expensive, bureaucratic and cumbersome international tribunals, especially not in the sensitive area of security. It is not as if there are

⁴¹ Having said this, as far as funding terrorism is concerned, the acts in question may well be criminal under national law. Bearing in mind the duty of criminalization contained in Resolution 1373, these acts should be criminal in all states in the future. The implications of this are considered below, section 10.

⁴² See the present list at www.un.org/Docs/sc/committees/Liberia2/1343_list.htm.

⁴³ Above note 29. A US and a Canadian citizen were also removed from the Al-Qaida list in July.

many people covered by financial sanctions, and so an expensive tribunal would seem to be a luxury. Finally, it should be remembered that any member state of the UN can become a member of the Security Council. It can include states suspected for good reason as supporting terrorism, or as being conduits for money laundering. Creating a judicial body consisting of representatives of such states and giving it access to security intelligence would be foolish in the extreme.

5 Counter arguments

The first counter argument is that the interests at stake in bringing an end to the Angola and Sierra Leone conflicts, and stopping the Al-Qaida network, are indeed vitally important. But this does not mean that we are free totally to ignore the issues of legal safeguards for targeted individuals in dealing with these problems. The UN Security Council, has, and must have, very wide discretion, in determining threats to international peace and security, and this power of determination cannot be delegated.⁴⁴ But, as Reinisch puts it, 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.⁴⁵ Like every other organ of an international organisation, the Security Council is bound by its mandate, and by general international law, in particular humanitarian law⁴⁶ and human rights law.⁴⁷ The arguments in relation to this point have been set out well several times and I will not rehearse them here.⁴⁸ Simply put, the approach that *nothing* should stand in the way of the maintenance of international peace and security is untenable. The UN has been telling states for fifty years that they must obey human rights. It is bizarre that arguments are being made that the Security Council is not bound by the standards the UN organization has been going on about.

Moreover, and this is a separate argument, constitutionally speaking (and, as noted below, section 9.7, from the perspective of the European Court of Human Rights) it is not possible for states to *avoid* constitutional/international human rights obligations by creating an

⁴⁴ Sarooshi, 1999, p. 33.

⁴⁵ Reinisch, 2001, p. 856. See also, in this regard, Dugard 2001, who makes a distinction between substantive review and incidental review, the former is whether a situation constitutes a threat to international peace and security, the latter being review of the particular sanction selected (at p. 88).

⁴⁶ I will not go into this point. See e.g. Gasser, 1998, Reisman and Stevick, 1998, at p.126 *et seq* Szasz, 1998, at p. 474. Normand, 1999 at p.32.

⁴⁷ See, e.g. Committee on Economic, Social and Cultural Rights, general comment 8, 5 December 1997, Brownlie, 1993, p. 102.

⁴⁸ See, Reinisch, 2001. See further Judge Weeramantry's dissenting opinion in the Case Concerning Questions of Interpretation and Application of the 1971 Montreal Convention Arising from the Aerial Incident at Lockerbie (Libya v. UK, US), Preliminary Objections, ICJ, 27 February 1998, available at <http://www.icj-cij.org> (Lockerbie Case), Judge Fitzmaurice's dissenting opinion in the Namibia Advisory Opinion, ICJ Rep. 1971, para. 116, Judge Eli Lauterpacht, separate opinion in the Application of the Genocide Convention Case (Provisional Measures), ICJ Rep. 1993, p. 440 and the judgment of the appeals chamber of the ICTFY in the Tadic case, 2 October 1995, IT-94-1-AR72. See also Dugard, 2001, "clearly there are limits on the power of the SC" (p. 86) "that judicial review of the SC is theoretically possible seems irrefutable. Whether it is desirable and if so in what circumstances are questions that admit of no easy answer ... " (p. 90).

international body and delegating to it the power to do something they are unable to do by themselves. From the perspective of constitutional law, the authority to enter into a treaty, including the UNC, comes from constitutional law.⁴⁹ States acting together jointly in the Security Council thus continue to bear any responsibility they might have under constitutional or international human rights norms when acting unilaterally. And notwithstanding the clear international law authorities that a state cannot plead national law in avoidance of its international obligations, a final answer does not exist to the question of which system – public international law or constitutional law – is “supreme”. Just as EU states have accepted the supremacy of EC law over national law in practice, states can also accept, in most matters, the supremacy of public international law. But this acceptance is based on the principle of reciprocity, and the perceived legitimacy, and need, for the system of international law as a whole. But when public international law purports to force a state to do something against its own fundamental constitutional principles, then a state’s acceptance of the reasonableness of the international claim is put sorely to the test. It is an open question, when push comes to shove, which will be preferred.

A simple, hypothetical example can illustrate this point.⁵⁰ Say that the Security Council orders states to incarcerate a named person suspected of preparing a terrorist attack “until the danger is over”. This may not (probably will not) satisfy whatever requirements national law places on preventive custody (if this is allowed at all). Or say, even more dramatically, that it orders states to kill a highly dangerous named terrorist. One can argue all one likes that the formal authority exists under international law to do this, and that national legal categorisations (that a person is “arrested” or “dead”) are irrelevant. But as far as national law is concerned, the person *is* nonetheless “arrested” or “dead” and saying that he or she is not is playing with words. These hypothetical examples show that the question is not *whether* human rights should limit the Security Council, but *at what point* an infringement of human rights is seen as so fundamental that some form of limits should be imposed upon the Security Council. Some would place this limit at the right of access to a court, others would wait until arrest/death penalty.⁵¹

As regards the argument in relation to Article 103 UNC, it does not really add anything to the - rejected - point that the Security Council, and states acting to implement Security Council obligations, are not bound by any human rights norms. Article 103 only comes into operation when a state’s obligations under other treaties conflicts with its obligations under the UNC – which as already mentioned include human rights obligations.⁵² Security Council sanctions

⁴⁹ See as regards the US, e.g. *Reid v. Covert*, 354 US 1, 77 (1957), *Diggs v. Schultz*, 470 F. 2d 461, 466-67, (DC Cir. 1976). As regards a European perspective, see the famous cases of *Wünche Handelsgesellschaft (re)* (“Solange II”) and *Brunner v. European Union Treaty*, from the German Constitutional Court, regarding the transfer of legislative powers to the EU (reported in English in 1987 CMLR 225 and 1994 1 CMLR 57).

⁵⁰ I say hypothetical, but proposals have been made that individuals subject to travel sanctions who nonetheless attempt to travel should be detained by the state of entry. See Cortright and Lopez, 2000, p. 245. However, statutory power will presumably exist for immigration authorities in all states to arrest and detain people seeking to enter the state illegally (which will include people subject to travel bans).

⁵¹ See further the derogation issue, examined below section 7.

⁵² Cf. Angelet, 2001, “These obligations are defined elsewhere in the chapter and inter alia depend on its chapters 1 and VII defining the power of the Security Council. This limit to the

are not as such UNC obligations, rather, there is a obligation on states under the UNC to comply with Security Council sanctions which have been promulgated in accordance with the UNC. But *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 whatever human rights norms may be applicable and the UNC. If the Security Council obligation to comply with human rights is to have any significance at all, then it must mean that, where it is *at all* possible, the Security Council must design and implement sanctions so as not to violate human rights. In most conceivable cases – and all conceivable cases of targeted financial and travel sanctions I can think of - there is thus no need, or room, for applying Article 103 to avoid human rights obligations. This is not to say that these sanctions will always *violate* human rights. As shown below in sections 6, 8 and 9, all the rights in question are of a relative nature, and can be limited without actually violating the right in question.

As regards US unilateralism, then the simple counter-argument is that the US already maintains extremely large programs of targeted sanctions in parallel to the UN system. There is no sign as yet of the US dismantling these programs, quite the contrary. And as several of these programs are designed to advance unilateral US policy goals, they cannot easily be fitted into the Security Council mandate of maintaining international peace and security. The potential for jurisdictional conflicts will remain, indeed increase. In particular, with the decline of conventional warfare threats to states, the US focus on terrorism and anti-terrorism measures is likely to grow.

The reply to the third argument is that it is precisely because targeted sanctions are preferable to general sanctions and/or peace enforcement that the issue of legal safeguards must be addressed. It is no exaggeration to say that the very legitimacy of the UN targeted sanction system is at stake. As already mentioned, even before resolution 1333, disquiet has been expressed regarding the basis for the adding people to the Angola, Sierra Leone and Liberia lists. The list of people included in resolution 1333 included people of Canadian, Swiss and Swedish nationality. In both these countries, well known for their staunch support of the international legal system, the lack of their nationals' possibilities of obtaining legal redress has caused a public opinion storm. Other states have also expressed concern.

Similarly, the reply to the fourth argument is also a question of improving legitimacy. But legitimacy and effectiveness are not opposed to each other, but co-dependent. The states most likely to experience difficulties with the lack of legal safeguards in the present system are democratic states which respect human rights, and which faithfully attempt to implement UN sanctions, and do so with a large measure of effectiveness. These states are the mainstay of whatever effectiveness targeted sanctions might have. (Having said this, the legitimacy argument only bites if there is a high degree of acceptance in public opinion that the UN organisation *is* legitimate. Where this is lacking then the argument has little weight.)

As regards the issue of the irrelevance of national legal categorisations, the following must be said. The process of globalisation means that international law in general is increasingly

powers of the SC has important consequences in respect of the appreciation of facts and the rules concerning evidence” (at p. 79). He adds, with particular relevance to the present case, that quasi judicial decisions must be based on the rules of evidence prevailing under international law and many Security Council decisions can be criticized in this respect.

encroaching into the area formerly reserved for national civil law, criminal law, and criminal procedure law. One can of course argue that, formally speaking, national legal categorisations are irrelevant to international law. But for reasons set out in the first counter argument, 200 years of building up safeguards in criminal procedure ought not to be capable of being removed by waving an international law wand. The fight against organised crime has admittedly led many states to introduce preventive measures in the area of money laundering which are classified under national law as administrative or quasi-criminal, and which entitle authorities to freeze assets.⁵³ But it can be assumed in every civilized jurisdiction that some form of judicial mechanism exists for challenging such freezing measures, at least after they have been imposed. And, as indicated in the reply to the first argument, the very concept of international human rights standards implies limits on the exercise of power, whoever or whatever exercises that power, and for good reasons or bad.

As regards the question of political safeguards, these are obviously insufficient from the individual perspective. It is an executive body – the Security Council – which is imposing a legal penalty. The procedure for ending up on the list, and getting off the list, contains no legal safeguards for individuals whatsoever. For example, the Resolution 1267 delisting procedure cannot be initiated by the individual. It 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. I would say that whatever arguments of principle might have existed for not granting individuals a right of petition to an interstate body, the Security Council, these have disappeared when the Security Council itself is directing sanctions on individuals. And the Resolution 1267 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 is, in the circumstances, of little concrete value.⁵⁴

As regards the issue of the Security Council creating a judicial body, such a power clearly exists. The Security Council has previously created judicial bodies when this is necessary for the maintenance of international peace and security (the ICTFY and ICTR). And in the Effect of Awards of Compensation Made by the UN Administrative Tribunal, Advisory Opinion, the ICJ affirmed the right, and indeed, hinted at a duty, on the part of the UN to create judicial bodies when this is required for the protection of human rights of its staff, involved in disputes with the UN.⁵⁵ The same argument I would say also naturally applies to third parties, involved with disputes with the UN. The ICJ stated that it would “hardly be consistent with the expressed aim of the Charter to promote freedom and justice for individuals ... that [the UN] should afford no judicial or arbitral remedy to its own staff for the settlement of any disputes which may arise between it and them”.⁵⁶ Nonetheless, the *advisability* of creating of

⁵³ For a discussion, see Kichling, 2001.

⁵⁴ The Resolutions 1333/1390 Monitoring Group notes the disquiet expressed by certain states regarding the lack of criteria for inclusion on and removal from the list. They also note the reluctance of states to add further names to the list (paras 26-31). However, they do not really draw the causal connection. Nor do they make any recommendations as regards human rights.

⁵⁵ See 1954 ICJ Rep. 47

⁵⁶ Ibid. at p. 57. See also Reinisch, 2001, p. 857

a judicial body, especially in the area of security, is obviously not the same issue as the *authority* to do so. And the access such a body could or should be given to security intelligence is a particularly problematic issue. This point will be considered further below.

Similarly, the issue of the desirability of subjecting the Security Council to a given judicial body, such as the International Court of Justice (ICJ) is also another matter. The relationship between these two bodies, and the issue of *kompetenz kompetenz* (*compétence de la compétence*) has arisen as a result of the Lockerbie case and is still unsettled.⁵⁷ But the problem of whether some form of judicial or quasi-judicial body would undermine the authority of the Security Council by overruling it can be avoided by focussing on the subsidiary bodies established by the Security Council, the sanctions committees. I would say that in the same way as the renaissance King could do no wrong, but his ministers could, so too can the sanctions committees commit errors and be reviewed by an external body, without damaging the authority of the Security Council as such.⁵⁸

But even if some form of external review body is created, this does certainly not mean that there should be a legal remedy for all people affected, directly or indirectly, by general economic sanctions (trade etc. embargoes). The decision to initiate a general sanction is conceptually speaking different from placing a name on a blacklist. In the former case, the decision is genuinely “political” and legal remedies seem inappropriate, as well as being totally impracticable. An analogy with taxation can be made here. We do not give individuals a right of access to courts to challenge a parliamentary decision to set a tax rate, even if this does affect drastically individual interests. We accept that this is a political decision. But we do give such a right when the government or the tax authorities take a decision in an individual case to impose a tax penalty.

As regards the argument of an external review body being a luxury, as noted before, the decline of conventional warfare and globalisation means that terrorism problems are likely to increase and to increasingly become transnational in character. And conflicts over natural resources are likely to continue too. After the Iraq sanctions, it is doubtful whether, politically, the Security Council is prepared to have any more general (embargo) sanctions. And, as already noted, sanctions can be an attractive and relatively cheap means of showing political leadership and resolve. Moreover, focusing on private actors is easier politically for diplomats than identifying heads of states, who always have some allies, however odious their regimes. So targeted sanctions, both unilateral and multilateral are “here to stay” and the tendency will probably be for more people to be covered by targeted sanctions. Nonetheless, the number of people likely to appeal to an external review body will probably be limited. As discussed below in section 10.1, this should influence the design of the body. Still, once it is accepted that one should also look at such sanctions from the perspective of international human rights law, rather than simply politics, the relatively small *number* of people whose rights are possibly infringed is no longer decisive.

⁵⁷ See, in particular, the separate opinion of Judge Schwebel in the Lockerbie case, *op. cit.*, to the effect that the Security Council is bound by the law, but not subject to ICJ judicial review.

⁵⁸ It is clear that the sanctions committees, even if their membership is the same as the Security Council, are subsidiary organs of the Council. See Sarooshi, 1999, p. 90. It should be admitted that there is problem as regards one particular person, namely Usama bin Laden, who is identified by the Security Council itself as a threat to international peace and security. See further below, sections 10.1 and 10.5.

One final point should be made regarding the efficacy of sanctions. As already mentioned, writers are divided as to the value of targeted sanctions. As regards sanctions directed against terrorists in particular, these have mainly focused on financing of terrorism. It should be remembered that most terrorism is national in character, and carried out with inexpensive, low technology weapons. While financing of terrorism can indeed be transnational, the primary motivation for political terrorism is not profit. And there is no reason to suggest that Al-Qaida is financed significantly by “dirty” money which has to be laundered, and so using anti-money laundering techniques against it are unlikely to be successful.⁵⁹ In any event, the idea that improved banking monitoring techniques would have discovered the transfers of funds to the US to carry out the September 11 attacks is not realistic. The New York InterBank system handles 200,000 payments totaling \$1.1 trillion every day.⁶⁰ Looking for the sum of \$200,000 transferred over a period of months is like looking for the needle in the proverbial haystack.⁶¹ As of March 2002, only \$103.8M had been frozen as a result of the September 11 attacks, of which approximately half are connected with Usama Bin Laden and Al-Qaida.⁶² The conclusion of the Monitoring Group established under Resolution 1390 is that Al-Qaida has relatively easily circumvented financial controls by inter alia increased reliance on gold and gems, by using minor financial centres which are not so well monitored and by using the informal (underground) banking sector.⁶³ As regards the informal banking sector, it would seem clear that this is used for money laundering and terrorist financing, and that this must be much better controlled. However, the way to do so is not necessarily by Security Council measures imposing sanctions on individuals involved in informal banking. These systems are often the only way for people in certain states (e.g. those hostile to Western banks or money transfer systems) for moving money. And many people in poor states depend heavily for their livelihood on informal money transfers from friends and relatives in other states. Better controls over the informal banking sector can be achieved on a multilateral but cooperative basis, e.g. by implementing the FATF Special Recommendations on Terrorist Financing 31 October 2001.⁶⁴ This is not to say that all measures by UN Security Council resolution, to stop or make more difficult transnational terrorist financing are in vain or misconceived. Freezing may, for example, deter financiers who are worried about losing everything if they

⁵⁹ See Kichling, 2002 and Pillar, 2001, p. 94.

⁶⁰ Judicial Review Commission, 2001, p. 140.

⁶¹ In fact, as the Monitoring Group established by Resolution 1390 note, at least one of the transfers to the September 11 terrorists was reported as a suspicious transaction, but this got lost in the mass of such reports. Monitoring Group First Report, S/2000/541, 15 May 2002, para. 25.

⁶² Ibid.

⁶³ See Second Report of the 1363/1390 Monitoring Group op. cit., paras 45-70. Even the first report had identified these tendencies.

⁶⁴ Recommendation VI on alternative remittances states that: Each country should take measures to ensure that persons or legal entities, including agents, that provide a service for the transmission of money or value, including transmission through an informal money or value transfer system or network, should be licensed or registered and subject to all the FATF Recommendations that apply to banks and non-bank financial institutions. Each country should ensure that persons or legal entities that carry out this service illegally are subject to administrative, civil or criminal sanctions. This would mean the imposition of national standards of evidence and criminal law.

contribute to terrorism. But it is important to keep the limited efficacy of these measures in mind, when judging what limitations in human rights are justified in taking them.

6 Which entities are bound by which human rights in targeting sanctions and who are the bearers of the rights?

To begin with, I should stress that there are three different ways in which human rights catalogues can bind in relation to targeted sanctions. First, the Security Council itself is bound by certain human rights. Second, the states which are members of the Security Council can, if they have ratified human rights treaties, be bound by these treaties even when acting together collectively within the Security Council in adopting sanctions. And third, all states acting in implementation of Security Council sanctions remain bound by whatever human rights obligations they may have undertaken. The human rights catalogues and the extent of the substantive rights can thus vary depending on the addressee. The standards in treaty law will usually be higher as compared to rights at general international law. 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).⁶⁵ Arguably, the core contents of the two covenants on human rights, the ICESCR⁶⁶ and the ICCPR,⁶⁷ are authoritative interpretations of the UNC and are in effect binding on the Security Council as such. As this is open to debate, however, I will not invoke the ICCPR/ICESCR articles against the Security Council as such (although the derogation issue is considered in section 7).

The substantive rights involved depend upon the type of sanctions (financial, travel, arms embargo). 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). Financial sanctions interfere with a person's private and family life, and his or her property rights. Arms embargoes can interfere with the seller's rights to dispose of his or her property as well as the buyer's property rights, when weapons paid for already are not permitted to be transferred. In all three cases, travel, financial and arms sanctions, 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 all three cases, particularly travel and financial sanctions, there may be an interference with the right to reputation.

If one begins with the first addressee, the rights to an effective remedy, to access to court/fair trial, to reputation, to freedom of movement and to property are all contained in the UDHR (Articles 8, 10, 12, 13 and 17 respectively). As regards the second and third addressees, the main global treaty on civil rights is the ICCPR. The ICCPR contains the right of freedom of 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. As regards the three regional treaties setting out civil

⁶⁵ 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).

⁶⁶ 993 UNTS 3 (1966).

⁶⁷ 999 UNTS 71 (1966).

rights generally, the European Convention on Human Rights (ECHR),⁶⁸ the American Convention on Human Rights (ACHR)⁶⁹ and the African (Banjul) Charter on Human and Peoples Rights,⁷⁰ the situation is as follows. 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). As regards the ACHR, the rights which are primarily relevant are to access to court/fair trial (Article 8), to privacy (Article 11) to honour and reputation (Article 12), to property, (Article 21), to freedom of movement (Article 22), and to effective remedies at the national level (Article 25). As regards the African Charter, the rights which are primarily relevant are to appeal to competent national organs (Article 7), to freedom of movement (Article 12) and to property (Article 14).

As already mentioned, all the rights in question are relative rather than absolute rights: i.e. they can be restricted by states subject to certain conditions contained in the rights themselves.⁷¹ It is necessary to look at the case law of the supervisory organs to determine whether a restriction is compatible with the treaty in question. I will content myself in the present report with looking at this case law as concerns the ICCPR, to which 148 states, including four permanent members of the Security Council are parties (and the other permanent member is a signatory), and as regards the regional treaty with which I am most familiar, the ECHR, to which almost all European states are parties, including three permanent members of the Security Council. In many ways, the ECHR case law is more developed than the case law of the Human Rights Committee, which justifies looking at it in detail. Concentration on the ECHR can also be explained by the fact that the report is to the Swedish Foreign Office. Potential and actual conflicts with European human rights norms are thus of special interest. I will not say anything directly about conflict with EU human rights norms. To a large extent there is overlap with the ECHR, as this is part of the general principles of EC law as well as being a source of law for the EU (Treaty on European Union, TEU, Article 6, Charter on Human Rights and Fundamental Freedoms, Article 52(3)).⁷²

I will turn now to the question of the bearers of the rights. Individuals are obviously bearers of rights as are companies (for certain rights, in particular property rights and rights of access to court). As mentioned before, UN sanctions are an interstate mechanism of pressure that is now being used against individuals in their capacity as members of governments, terrorist organisations etc. It may seem repugnant to some to regard a terrorist or the leader of a government engaged in “banditry” as being entitled to human rights safeguards. However,

⁶⁸ ETS No. 5 (1950).

⁶⁹ 9 ILM 672 (1970).

⁷⁰ 21 ILM 59 (1982).

⁷¹ In the case of the UDHR, there are general accommodation clauses, Articles 29 and 30.

⁷² The case law of the European Court of Justice (ECJ, together with the Court of First Instance, CFI) to some extent goes further than the case law of the European Court of Human Rights (EctHR). See in particular *Borelli*, C-97/92, 1993 ECR I-6313. Decisions must be motivated by reference to objective and reviewable criteria, including where this is relevant, expert opinions and recommendations, *Commissionen v. Austria*, C-424/99 ECR. The right of access to court must be effective and reasons must be given for limiting an individual's rights, *Heylens* 222/86, 1987 ECR 4097. See further on the position under EC law, *Andersson et al. op. cit.*

human rights are granted to all humans. Being a member of a government does not mean that one is divested of one's human rights. *Targeted* sanctions means breaching the state/government veil. In a sense it is the other side of the human rights coin. Nonetheless, as shown below in section 10.1, the remedy a member of a government can in practice expect is very limited.

However, before looking at this issue, and the substantive rights, I should say something about derogation, which can affect the extent of all these rights.

7 A right of derogation?

As already mentioned, an argument can be made that, even if the Security Council, and/or all or most of its member states, is bound by the ICCPR, then just as states party are entitled to derogate from their obligations under the ICCPR, so too must states acting collectively in the Security Council have this possibility. (This is not relevant as far as the UDHR is concerned, as it contains no derogation clause, but instead general limitation clauses.) The Security Council, when it determines that something is a threat to international peace and security, is implicitly stating that there is a situation analogous to a "public emergency". All the rights mentioned above are, under the ICCPR (and the regional human rights treaties) derogable rights. Thus, if the Security Council considers that, e.g., a restriction in the right of access to court is called for, this should be accepted.

This argument is not without merit. However, three 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 is 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. Moreover, derogation is only permissible to the extent "strictly required by the exigencies of the situation" (Article 4, ICCPR).⁷³ The human rights committee can determine whether this condition is fulfilled, if it has the competence to receive individual complaints in an individual case, but also, where this competence is lacking, in general comments on the state report. Similar substantive and procedural limitations apply in the regional human rights treaties.⁷⁴ 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 to deal with the situation, the notion of a totally unsupervised power to derogate is contrary to human rights treaties. Second, the question arises whether the total suspension of the rights in question really are "strictly required". If one argues that the Security Council has a right of derogation then it 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.⁷⁵ If the creation of some form

⁷³ Similar procedural and substantive restrictions apply in the ECHR (Article 15) and ACHR (Article 27).

⁷⁴ See, e.g. *Aksoy v. Turkey*, 18 December 1996 (pre-trial detention of 14 days disproportionate).

⁷⁵ Cf. Sir Robert Jennings dissenting opinion in the *Lockerbie* case, *op. cit.* "The first principle of the applicable law is this: that all discretionary powers of lawful decision-making are necessarily derived from the law, and are therefore governed and qualified by the law. This must be so if only because the sole authority of such decisions flows itself from the law. It is not logically possible to claim to represent the power and authority of the law, and at the same time, claim to be above the law."

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”.

8 Substantive rights under the ICCPR

I will begin with the right of freedom of movement. This right, naturally, is not formulated so as to oblige states to admit aliens into their territory. Thus, as far as aliens are concerned, states are generally free to restrict their entry by means of visas, or to remove this right from a category of people altogether (assuming that there is no discrimination). Thus, although individuals residing in a state party to the ICCPR have the right to leave this state (Article 12(2)), they have no right under the ICCPR to enter any state other than their state of nationality. Travel bans, operating as they do at both the point of entry and the point of exit, will only raise an issue for state parties under Article 12 ICCPR if a person subject to a ban is attempting to enter his or her state of nationality, and is refused entry. Even here, a travel ban will almost certainly not violate the ICCPR, as the obligation on the state of nationality is not to “arbitrarily” deny entry. A denial pursuant to a Security Council decision would hardly be seen as violating this. As mentioned, there can be rare situations in which an individual might risk losing his or her life if denied entry (e.g. seeking refuge from a state where he or she could be subject to the death penalty, or torture, or where urgent medical treatment is required). However, these rare situations can be handled by means of humanitarian exceptions, and certainly do not require removal of a person from a sanctions list. One of the criticisms which can be made against the imposition of travel sanctions on the family of a government leader is that it is a punitive measure imposed on people who may not be directly responsible for the activity considered to be damaging to international peace and security and who may possess little influence in practice over the main target. However, if travel sanctions in practice rarely involve violations of human rights these people cannot complain about this.

Having said this, while states implementing the sanctions only in practice impose entry bans, the Security Council itself imposes an exit ban. This will infringe Article 12(2). However, Article 12(2) can be restricted inter alia to protect national security and public order. The Human Rights Committee has taken a relatively restrictive approach to the right of freedom of movement⁷⁶ and it is difficult to see how an exit ban imposed for the maintenance of international peace and security will breach Article 12 - always assuming that it is imposed on the right person. This presupposes some form of procedural safeguard to identify the right person, and, I would submit, some form of method for checking that the right person really has been identified. Both these safeguards are considered in the next section.

As regards reputation (Article 17), the obligation is framed so as to prohibit unlawful attacks on a person’s reputation, and so as to oblige states to enact and implement laws so as to protect people from such attacks. It is difficult to see Security Council sanctions as “unlawful attacks”. On the other hand, as already mentioned, inclusion on a terrorist list carries with it an implicit allegation of criminal activity (see further section 9.3). As regards privacy, this should probably be interpreted widely so as to include those property rights necessary for a private and family life (see further section 9.4).

I consider that the main right which might be violated by Security Council sanctions is the

⁷⁶ See, e.g. *Karkar v. France*, communication 833/1998, views of 26 October 2000.

right of access to court. For reasons developed in the next section, I do not think that sanctions can be seen as the “determination of a criminal charge” (and so Article 15 is not relevant either). However, Article 14 ICCPR also requires access to court to determine a person’s “rights and obligations at a suit at law”.⁷⁷ Disputes over the right to dispose of possessions, bank accounts etc. undoubtedly concern rights or obligations at a suit of law. Similarly, the right to challenge bans on selling property, including weapons, will also fall under such a suit. The Human Rights Committee has stated in the context of immunity for a head of state that absolute immunity is not compatible with Article 14.⁷⁸ However, to my knowledge it has not considered the question whether a total ban on access to court is permissible in order to promote other values necessary to international society. This issue has been looked at by the ECtHR. Although the contexts of the two treaties, the ICCPR and the ECHR, are very different, and the Human Rights Committee is not in any way bound by the case law of the ECtHR, this case law is of highly persuasive authority, and I believe that the Human Rights Committee would be likely to take the same general approach to this issue as the ECtHR. Accordingly I leave this issue here, and examine it in the next section.

9 Substantive rights under the ECHR

9.1 Scope of contracting parties obligations to comply with the ECHR

It should be noted at the outset that the ECHR governs only acts within the jurisdiction of the contracting states (Article 1). This will usually mean that it is only implementation of sanctions within Europe which can possibly give rise to a Convention violation. However, as explained in more detail in section 9.7, the Convention can also affect the freedom of action of European states acting collectively within the framework of the Security Council.

9.2 Freedom of movement

As regards freedom of movement, little need be added to the treatment of the issue under the ICCPR. The ECtHR has required procedural safeguards and applied the principle of proportionality to restrictions on freedom of movement.⁷⁹ Under Protocol 2, Article 2(1), the right of freedom of movement is limited to people “lawfully” within the territory of the state. This means that aliens who have entered or attempted to enter the country illegally can be expelled without having to justify this under paragraphs (3) and (4). But as the freedom only applies to enter one’s state of nationality, a non-discriminatory entry ban on aliens, even selected (blacklisted) aliens, will not violate the ECHR. Travel sanctions can also interfere with family life (Article 8), where a person’s family is resident in a European state, and the targeted person is prohibited from visiting them. A prohibition to visit private immovable

⁷⁷ See *Apirana Mahuika et al. v. New Zealand*, 547/1993, views of 20 October 2000 “In certain circumstances the failure of a State party to establish a competent court to determine rights and obligations may amount to a violation of article 14(1)” (at para 9.11). See also *Angel N. Olo Bahamonde v. Equatorial Guinea*, views of 20 October, 1993 Annual report A/49/40, Vol. II (1994), Annex IX, “the notion of equality before the courts and tribunals encompasses the very access to the courts and that a situation in which an individual's attempts to seize the competent jurisdictions of his/her grievances are systematically frustrated runs counter to the guarantees of Article 14(1)” (at para. 9.4).

⁷⁸ See *Joseph et al.*, 2000, p. 282.

⁷⁹ See, e.g., *Labita v. Italy*, No. 26772/95, 6 April 2000.

property situated in a European state can also raise an issue under Article 8. In both cases, some mechanism must exist for assessing the necessity for, and proportionality of, the interference (see *mutatis mutandis* what is said about proportionality in section 9.4). However, it is not necessary that this mechanism be judicial in nature. A quasi-judicial or executive process is sufficient as long as adequate procedural safeguards exist.⁸⁰ Freedom of movement is not a “civil” right within the meaning of Article 6, and so there is no right of access to court. It is, nonetheless, likely that the total lack of individual access to sanctions committees, plus the lack of procedural safeguards (a possibility of making arguments before the sanctions committees, legal assistance etc.) would mean that the present UN system breaches the Convention. However, relatively little would be necessary to devise a system giving some right of individual access and some procedural safeguards which would satisfy Article 2 of Protocol 4. Such minimal safeguards would also satisfy the minimal requirements of Article 8. The restrictive approach the EctHR has taken *inter alia* to the issue of dependent immigration would indicate that it is seldom, if ever, that a travel sanction would not be seen as justified under Article 8(2). And the – presumably rare - potential violations of Articles 2 or 3 (death penalty, torture) due to refusal to admit either aliens or nationals subject to travel sanctions can be dealt with by means of individual *ad hoc* humanitarian exceptions.

9.3 Reputation

As regards the issue of reputation, identification of a named individual as a terrorist suspect and/or as assisting terrorists can be defamation, thus triggering a right of access to court to determine the issue.⁸¹ I would argue that this is the case whether or not the alleged assistance is witting or unwitting. In both cases, the person is being held up for the disapproval of others. Normally, a 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 obviously different here, as the person can be on a blacklist for a considerable time.

As regards intergovernmental sanctions which are not connected to an allegation of criminal activity, or assistance in criminal activity, such as the Liberia and Sierra Leone sanctions these are more difficult to see as an assault on reputation. Politicians must tolerate more criticism than others. However, to the extent that these sanctions also affect businessmen, who, as already mentioned, to a large extent survive on their reputation, even these sanctions may conceivably trigger a right of access to court. This is not to say that a national court would actually find that the persons have been defamed: simply that some sort of evidence would have to be produced before the court that there are grounds for the measure. In most conceivable cases, public sources would presumably suffice to show that such grounds exist.

9.4 Private and family life/property rights

Those property rights which are necessary for the realization of private and family life (e.g. private bank accounts) 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

⁸⁰ See Cameron, 2000, pp. 342-346.

⁸¹ cf. *Golder v. UK*, 21 February 1975, A/18 and *Rotaru v Rumania*, No. 28341/95, 4 May 2000.

freezing *all* of a person's assets can be justified as "necessary in a democratic society" under Article 8(2). The amendment to Resolutions 1267/1390 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.

As regards the issue of arms sanctions in particular, arms sales are typically subject to stringent licencing requirements. The "right" to sell weapons is severely circumscribed in national law. Thus, 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".

As regards the issue of protection of property in general (including business accounts etc) this is protected under Article 1, Protocol 1. The content of the property right is relatively weak. A confiscation of property used in crime is not a denial/deprivation of property but rather a "control on use".⁸² So I would argue that a simple freezing will not be seen as a confiscation either. Having said this, there is no time limit on Resolution 1390. Thus, freezing can be of unlimited duration, and probably will be, as the war against terrorism risks being an eternal war. 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.⁸³

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.⁸⁴ Where the Security Council "legislates by list" no detailed motivation is given for the interference. However, the *implicit* and vague motivation is the maintenance of international peace and security. As far as UN sanctions freezing individuals' assets are concerned, the "goal" in interfering with property would appear to be one of the following:

1. X is a member of the government engaged in activities allegedly damaging to international peace and security and X's assets are to be frozen until the Security Council considers that he or she has stopped engaging in these activities OR
 2. X is linked to/directly supporting the government as above (presumably knowingly and willingly, but conceivably even unknowingly and/or unwillingly) OR
 3. X is associated with, or helping people who are supporting the government as in (2) OR
 4. X is a member of a terrorist group threatening international peace and security and X's assets are to be frozen until the Security Council considers that he or she has left the group or the group has, in one way or another, ceased to be a threat to international peace and security OR
 5. X is financially contributing, willingly or unwillingly, knowingly or unknowingly, to the functioning of the terrorist group by fundraising, managing, transferring etc. resources OR
 6. X is associated with, or helping people who are supporting a terrorist group as in (5) above.
- AND

Freezing the assets in some way contributes to bringing the activities to an end.

⁸² AGOSI v. UK, 24 October 1986, A/108.

⁸³ See, e.g. Sporrang and Lönnroth v. Sweden, 23 September 1982, A/52.

⁸⁴ See, e.g. James v. UK, 8 July 1986, A/98, para. 46.

But what is the proportionality test to be applied here? 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. This is probably the most important purpose of the UN, and courts will be, and should be, cautious of going against the determination of the Security Council.

As regards the specific issue of proportionality in relation to property rights and UN sanctions, there is a case currently before the EctHR concerning the Irish seizure of Turkish registered aircraft in implementation of sanctions against FRY.⁸⁵ The ECJ has previously looked at this case, and applied *inter alia* Article 1, Protocol 1. However, the ECJ engaged in only abstract balancing, finding the sanctions not to be disproportionate.⁸⁶ 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. As already mentioned, the necessity for such a general measure is a political decision *par excellence*, and judicial review of such a measure seems inappropriate. Secondly, it is individuals who are affected, not simply companies. And they are affected drastically, not peripherally. Their reputations are also severely affected, as the resolutions amount to an accusation that they are involved in some way in terrorism. As the sanction is quasi-criminal in nature, the main issue should be one of whether there is sufficient proof of involvement in terrorism justifying the measure. This demands a specific, concrete test of proportionality.⁸⁷ This means 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 does not involve questioning the determination of the Security Council that there is a threat to international peace and security: only that proportionality and necessity of the measure adopted against a particular individual.

Although the ECtHR may well go on the same line as the ECJ in the Bosphorus case, targeted financial or arms sanctions on individuals are a different matter. I consider that, while the ECtHR will not itself engage in such a concrete test of proportionality, as it obviously will lack the necessary information, it is likely, should a case ever be submitted to it, to insist that the implementing state, or the Security Council, apply some form of objective review mechanism so as to allow a concrete test of proportionality in such cases. Now, the Security Council can, of course, claim that it does this already. However, there is no objective

⁸⁵ Bosphorus Hava Yollari Turizm ve Ticaret AS, v. Ireland No. 45036/98, 13 September 2001.

⁸⁶ Bosphorus Hava Yollari ve Ticaret AS v. Minister for Transport, Energy and Communications, Ireland and the Attorney General, European Court of Justice, Case C-84/95, ECR 3953 (1996). For a discussion of the case, see e.g. Canor, 1998.

⁸⁷ One can add that in *Bosphorus Airways*, what was at issue were general sanctions, issued against an abstractly defined class of people. In this case, the direct addressees of the Commission regulations are the named individuals. So arguably it is not actually *possible* to engage in an abstract test of proportionality, measuring the abstract advantages for international peace and security against the abstract disadvantages for a class of applicants.

mechanism for checking if this really is the case. This brings me to the issue of the applicability of Article 6 (access to court).

9.5 A criminal charge?

Interference with property is, according to the settled case law of the ECtHR, an interference with a civil right under Article 6. I do not, however, believe that freezing, travel or arms sanctions can be seen as a “criminal charge” within the meaning of Article 6 ECHR. One can argue the opposite, that freezing sanctions are sufficiently serious and long-term to satisfy the autonomous definition applied by the ECtHR of a “criminal charge”, notwithstanding the view presumably taken by the Security Council (and EC legislator) that these measures are administrative in character.⁸⁸ On the other hand, it is likely that Article 6(2), the presumption of innocence, does not apply.⁸⁹

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 *Rechtstaat*. In legislating by list, the Security Council acts as both legislature and the executive.⁹⁰ The regulations lay down no prohibited activity against which the named individuals' actions or omissions are to be measured. 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 this case is in one sense meaningless.

9.6 Access to court: restrictions for national security reasons

However, whether or not freezing constitutes a “criminal charge”, it is incontrovertible that disputes over property, as is the case here, fall under the concept of a “civil right”.⁹¹ The ECtHR further requires that the proceedings must be “decisive” for a civil right.⁹² This means that interim measures will not usually qualify, unless these partially determine the case.⁹³ 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, here one is speaking about access to court to challenge a state freezing of property which is of vital importance to the individual concerned. Such a seizure cannot be regarded as being “interim” in the sense of being a short-term measure pending a final judicial determination of the issue. There is thus undoubtedly a right of access to court under Article 6.

Having settled this, the first issue which arises is whether access to court can be blocked for

⁸⁸ These criteria 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. See, e.g. *Lauko v. Slovakia* and *Kadubec v. Slovakia*, 2 September 1998 and *Malige v. France*, 28 September 1998.

⁸⁹ See also *Phillips v. UK*, No. 41087/98, 5 July 2001.

⁹⁰ See, in this respect, the ECtHR case, *Anagnostopoulos and others v. Greece*, No. 39374/98, 7 November 2000 (Legislative intervention in pending court proceedings, violation of Article 6).

⁹¹ See, e.g. *Sporrong and Lönnroth*, op. cit.

⁹² See, e.g., *Ringeisen v. Austria*, 16 July 1971, A/13.

⁹³ See, e.g. *Markass Care Hire Ltd v. Cyprus*, No. 51591/99, 23 October 2001.

reasons of national security. The answer to this is no. There is a long line of 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. For example, the case of *Tinnelly and McElduff v. UK*,⁹⁴ 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.).

In the case of *Tinnelly*, the Fair Employment Agency was in effect blocked from pursuing its investigation. In the case of *McElduff*, the Fair Employment Tribunal was never presented with any evidence as to why the complainants were considered a security risk. The judicial review proceedings in the *Tinnelly* case never got to the heart of the issue either, as the judge was unable to consider the factual basis of the Secretary of State's decision, i.e. whether the certificate was properly issued. Nor did the judge even have access to all the necessary documentation. 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.⁹⁵ 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 general on collection and transmission of security information could not compensate for the total absence of effective judicial remedies in this area. It 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".⁹⁶ The Court noted that solutions to this problem had been provided in the area of race and sex discrimination, both as a result of the requirements of EC law, and that there was no reason why similar arrangements could not be made in the area of alleged religious discrimination.⁹⁷ The final argument advanced by the UK government was that extending the degree of judicial oversight in this area might actually undermine public confidence in the Northern Ireland judiciary. This argument seemed to assume that the courts would invariably rule in the government's favour after *in camera* hearings from which the plaintiff was absent. The Court had no difficulty in rejecting this.⁹⁸

⁹⁴ *Tinnelly and McElduff v. UK*, 10 July 1998.

⁹⁵ In particular, *Leander v. Sweden* and *Esbester v. UK*, see Cameron, 2000 chapter 3 for a detailed discussion.

⁹⁶ At para. 77, referring to *Chahal v. UK*, 15 November 1996, at para. 131.

⁹⁷ Referring to the already mentioned *Johnstone* case. This case led directly to the Sex Discrimination (Amendment) Order (SI 1988 No. 249) and indirectly to the Race Relations (Northern Ireland) Order 1997 (SI 1997 No. 869).

⁹⁸ The Court stated that "The introduction of a procedure, regardless of the framework used, which would allow an adjudicator or tribunal fully satisfying the Article 6(1) requirements of independence and impartiality to examine in complete cognisance of all relevant evidence, documentary or otherwise, the merits of the submissions of both sides, may indeed serve to enhance public confidence" (at para. 78).

9.7 Access to Court: restrictions for reasons of fulfilling international law obligations/State responsibility under the ECHR for acts of international organizations

Can access to court be blocked because a state is obliged to do so, in order to fulfill another international obligation. It is now well established that the contracting parties to the ECHR continue to bear collective responsibility under the Convention for implementing in their jurisdiction acts of international organisations.⁹⁹ The ECtHR has stressed that states cannot in general avoid their obligations under the Convention by transferring power to an international organisation. However, the specific question is whether a state's obligation under the UNC would justify limiting access to court, bearing in mind the fact that the UNC predates the ECHR. As the right of access to a court under Article 6(1) is an implied right, 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.¹⁰⁰ *Waite and Kennedy v. Germany* and *Beer and Regan v. Germany* concerned the immunity from suit of an international organisation.¹⁰¹ The applicants, employed by foreign companies, had been placed at the disposal of the European Space Agency (ESA) to perform services at the European Space Operations Centre in Darmstadt. When their contracts were not renewed they instituted proceedings before the Darmstadt Labour Court against the ESA, arguing that, pursuant to German labour law, they had acquired the status of employees of the ESA. In these proceedings, the ESA relied successfully on its immunity from jurisdiction under Article XV(2) of the ESA Convention and its Annex I.¹⁰²

According to the Court in these cases, the attribution of privileges and immunities to international organisations was 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. 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 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".¹⁰³ It was also open to temporary workers to seek redress from the firms that had employed them and hired them out. The Court considered that the test of proportionality could not be applied in such a way as to compel an international organisation

⁹⁹ See, in particular *Mathews v. UK*, 18 February 1999 (responsibility for EU norms), *Naletilic v. Croatia*, No. 51891/99, 4 May 2000 (responsibility for transfer of suspect to ICTFY), *T. I. v. UK*, No. 43844/98, 7 March 2000 (continued state responsibility for removal of refugee notwithstanding obligations under the Dublin Convention) and the *Beer and Regan* and *Waite and Kennedy* cases, below.

¹⁰⁰ See, e.g., *Fayed v. UK*, 21 September 1994, A/294.

¹⁰¹ 18 February 1999.

¹⁰² Convention for the Establishment of a European Space Agency, 1975, 14 ILM 864 (1975). The court applied section 20(2) of the German Courts Act which provides that persons shall have immunity from jurisdiction according to the rules of general international law, or pursuant to international agreements or other legal rules.

¹⁰³ At paras 30 and 59. As provided for by Regulation 33(1) of the ESA Staff Regulations.

to submit itself to national litigation in relation to employment conditions prescribed under national labour law. It further buttressed this conclusion by reference to teleological factors, namely that a different interpretation of Article 6(1) would undermine the proper functioning of international organisations and run counter to the current trend towards extending and strengthening international cooperation. In view of all these circumstances, the Court found that, in giving effect to the immunity from jurisdiction of ESA, the German courts did not exceed their margin of appreciation.

More recently, the ECtHR has found that the right of access to a court can be totally barred by an international obligation. *Prince Hans-Adam II of Liechtenstein v. Germany* concerned the applicant's attempts to have a painting returned to him which had been confiscated by Czechoslovakia after the Second World War.¹⁰⁴ The courts in Germany (where the painting was temporarily situated) applied the Settlement Convention between the Western Allied Powers and Germany, which basically excluded attempts retroactively to question such seizures of property. The Court accepted the respondent government's argument (at para. 42) that this exclusion had been necessary for the purpose of re-establishing the sovereignty of Germany and to ensure the recognition of German property. Germany had, quite simply, not been able to obtain any other terms. In these circumstances, which the Court described as "unique" (para. 59), the denial of access was not a breach of Article 6(1). Similar reasoning was applied in *Al-Adsani v. UK*, and *McElhinney v. Ireland*, which both concerned state immunity blocking claims for damages.¹⁰⁵

However, these later cases do not affect the basic principle that, barring wholly exceptional circumstances, there must be "reasonable alternative means to protect effectively Convention rights" or, to put it another way, a broadly equivalent level of human rights protection available within the international organization, before the ECtHR will accept a total prohibition on access to national courts. This broadly equivalent level does not exist with the present system - certainly not in the Security Council (and probably not in the EU system either) Although the Security Council's determinations of threats to international peace and security might be seen as an "exceptional" situation, it is certainly not unique. Moreover, as already mentioned above, the lack of safeguards built into the system is not unavoidable, as it was in the *Prince Adam* case where the respondent state, literally, had had no choice. This being so, there is no reason to accept what is in effect a total bar on access to court/judicial remedies against a measure freezing all of a person's economic assets for an unlimited period of time, as well as a total bar on subsequent damages claims if the measure is ever lifted. Where there is no means whatsoever of challenging the Security Council measure before some form of independent tribunal satisfying, more or less, the standards of the ECHR, the very essence of the right of access to court is impaired.

9.8 Effective remedies

Article 13 ECHR requires the provision of effective remedies at a national level. However, in most cases, the rights under Article 13 are subsidiary to those of Article 6. To put it another way, where the case falls under the right of access in Article 6, the ECtHR does not (except in the area of delay in judicial proceedings) make a separate examination of Article 13.

¹⁰⁴ no. 42527/98, 12 July 2001.

¹⁰⁵ Respectively, No. 35763/97, and No. 31253/96, 21 November 2001.

9.9 Conclusions and consequences

This section has identified at least one very likely violation of the ECHR, namely the right of access to court to determine a dispute over property.¹⁰⁶ But even the rights of freedom of movement and business property rights may be violated, where there is no adequate mechanism for ensuring that targeting decisions are directed at the “right” people and are proportional. Confirming a definite violation means waiting for a judgment from the ECJ or ECtHR. Of course, predicting the outcome of a case before any court is risky. And obviously, a case has to get to one or other of these courts in the first place. As already mentioned, there are two cases before the ECJ at the present time. However, as noted already, the applicants in one of these cases have now been removed from the list.¹⁰⁷ There is a right to sue for damages even when (especially when) removed from an EC blacklist (Article 235, 288 EC) but it is not clear if these applicants mean to continue with the case. The impugned regulation has now been changed and this may mean that the case falls, and this applies to the other applicant too. Nor, to my knowledge, has anyone brought an application to the ECtHR.¹⁰⁸ The exhaustion of domestic remedies rule would anyway require challenging EC measures first before the CFI. So, the prospect of the ECtHR in the near future been given the opportunity to find a direct conflict between the ECHR and UN targeted sanctions is fairly remote. Nonetheless, the issue is not so much what the ECJ, or ECtHR, will do, but the legal sensibilities of the states party to the ECHR. This Convention, like the similar regional conventions for Latin America and Africa, constitutes the minimum shared standard of rights for the region. It is a symbol of what the states in question regard as acceptable. The implementation of UN Security Council sanctions is a delicate business. If states are not wholehearted in their implementation, if the customs authorities, the export control agencies, the financial inspection units, and financial police are less than enthusiastic, then the sanctions are very easily undermined. It is in this sense that possible conflicts with the ECHR should be understood.

What are the legal consequences of the incompatibility between obligations for European states under the ECHR on the one hand and the UNC on the other? For reasons set out already, despite Article 103 UNC, one cannot say that UN obligations in the present case have precedence over the others. The logical consequence is that, until something is done about providing an equivalent level of protection, European states in the Security Council would be obliged not to accept new freezing sanctions, or renewals of old ones, where these breached their nationals' or residents' rights under the ECHR. If they do so, they are avoiding the application of Convention obligations, but not creating broadly equivalent levels of protection. As stated several times already, as such levels of protection can be created without violating obligations under the UNC, then European states are obliged to do so. The Security Council contains, at any given time, several European states, including three permanent members. In particular, as regards EU states, two further legal obligations should be recollected. Article 11 of the TEU states that the purposes of the EU include the maintenance of international peace and security *and to develop and consolidate democracy, the rule of law*

¹⁰⁶ As noted in section 9.4, where a humanitarian exception is provided for private bank accounts, there is probably no violation of private/family life.

¹⁰⁷ Above, note 25.

¹⁰⁸ Applications have been made regarding EU Common Position 2001/930/CFSP on terrorism, Segi and others and Gestoras Pro-Amnistia and others v. 15 States of the EU, Nos 6422/02 and 9916/02, 23 May 2002. This was declared inadmissible on the basis that the applicants were not “victims” of the common position.

and respect for human rights and fundamental freedoms. Secondly, under Article 19(2) of the TEU, there is a duty on EU states which are permanent Security Council members to “ensure the defence of the positions and interests of the Union“. Obviously, the interests of the Union include the interests of the member states, which in turn include the interests of their citizens. Pending adequate reform (see below section 10), EU states should at a minimum adopt a common position to the effect that EU nationals should not be added to any blacklist at least until consultations have been held with the state of nationality.

This incompatibility between European human rights law and the present sanctions system would obviously not prevent the Security Council from continuing with such measures against non-European nationals where these have no European connection (property, family life etc.). But that this is hardly acceptable. Besides, the violation of the right of access to court is so fundamental that the ICCPR and other regional human rights conventions (which I have not gone into in detail) may well give rise to the same incompatibility problem. Even if the incompatibility problem turns out to be a purely European phenomenon, non-European states may naturally resent a higher level of protection being applied to Europeans and decide to block all such measures. Obviously, no one wins from a situation of incompatibility. It is in this light that one should see the problem, and read the following section with possible solutions.

10 Proposals for improvements

10.1 Considerations in designing a better system of legal safeguards

My proposals for improvements are of a tentative nature. More work needs to be done in investigating the practicalities of each of these. They fall under five general headings: maintaining the existing system but improving it in minor ways, maintaining Security Council blacklisting but requiring the satisfaction of certain material conditions before blacklisting can occur, maintaining Security Council blacklisting but requiring states to create adequate national judicial mechanisms for hearing appeals from blacklisted individuals, creating some form of Security Council arbitral body to hear appeals from blacklisted individuals, and abolishing Security Council blacklisting of individuals not connected to governments/governmental entities and replacing it with national blacklisting (which would be subject to national judicial appeal/review mechanisms). One's approaches to the proposed solutions are dependent on one's view of whether or not there is a problem, and the extent of this. If one is convinced that there is a problem, then previously politically unacceptable solutions become feasible or even desirable. While at first sight some of the proposals may seem very unpalatable to some states, particularly the US, the alternative - no or severely weakened UN targeted sanctions - is presumably much worse. I have tried to take account of political realities and have therefore proposed a selection of measures, noting the advantages and disadvantages of each. However, I feel that for a study of this nature, it is quite wrong to start from the perspective of what the present US administration is prepared to accept. Nonetheless, the difficulties in persuading the US of the unacceptability of the present system should not be underestimated. From the perspective of “economic warfare on terrorists (see below section 10.3) the present practice of (more or less) endorsing selected parts of the US lists, giving them a universal validity, is presumably ideal. There may also be a typically legal inability to see beyond one's own familiar legal forms. Thus American lawyers may find it difficult to grasp that while freezing measures may not infringe rights under US constitutional law, they can infringe European human rights norms. And there may be an inability to understand the fact that European solutions can be devised to protect intelligence material in

judicial proceedings: it is not a question of either accepting full disclosure in a jury trial or doing nothing.

It is useful to sketch out some points which should be borne in mind in considering the following proposals. This involves a degree of recapitulation of previous comments made in the report.

First, the problem is not simply a practical one, of identifying the right people. If this were so, then improved executive procedures (particularly better mechanisms for exchange of information between friendly governments/intelligence agencies) would ameliorate the problem. But there is a conceptual problem with the blacklisting technique as such: it is an executive mechanism infringing rights, with no judicial or quasi-judicial safeguards. Second, the human rights problems generally speaking vary in intensity depending upon type of sanctions involved (travel-financial-arms embargoes). Third, the value in practice of a review mechanism will vary according to the type of target (government – non-government). This last point must be explained. Blacklisting is in effect a statement that the blacklisted person is doing something which is damaging to international peace and security. There can be a wide variety of different ways individuals can contribute to a particular threat identified by the Security Council. In some cases, the connection between the individual's conduct and the threat is obvious, e.g. where the individual is a member of a government believed to be engaged in the supply of weapons to guerrillas, or known to be in occupation of foreign territory. But in other cases, this connection will not be obvious. Blacklisted individuals may genuinely not know of what it is that they are “accused”. If they know what it is they are accused of, they can formulate a challenge to the claim and/or the evidence for the claim. This challenge is likely to take one of the following forms:

1. I am not the person, X, who the sanctions committee wishes to blacklist. There may be a person X who is engaged in activities damaging to international peace and security, but, contrary to what the sanctions committee claims, I am not him/her. In other words, I have been wrongly identified.
2. I am the person, X, identified by the sanctions committee, but I am not responsible for, or am no longer engaged in, the activities damaging to international peace and security.
3. I am the person, X, identified by the sanctions committee, and I am engaged in activities which the Security Council considers to be damaging to international peace and security, but these activities are not, in fact, so damaging.
4. I am the person, X, identified by the sanctions committee, but I consider that the sanction is disproportionate.

These challenges involve reviewing different types of decision. For claims falling under 1, 2 and 4, providing some mechanism of legal challenge would be a big improvement from the present system of political safeguards which is woefully inadequate from a rights perspective. The first is a claim that a simple error has been made. The second and third claims allege more material errors. The fourth claim can be seen as either a claim of a material error and/or a request for some form of humanitarian exception. How meaningful it is to require some form of legal review of the claim depends upon the *type* of decision and the *evidence* that exists for the claim.

Challenges to all four of the claims set out above challenges can involve looking at sensitive material. The first claim (error) will usually be the simplest case, and may well be the most common. This is the sort of claim that even a political body ought to be prepared to handle, and be capable of doing so. But even here there may be cases where some sort of judicial

procedure (a right to be heard, to submit information etc.) would be desirable. And even here, albeit exceptionally, intelligence material may be relevant to show that X has been wrongly, or correctly, identified. The second type of claim will be the sort made by businessmen accused of supporting targeted governments or entities, by family members of government officials or by people accused of being terrorists or of supporting terrorist groups. Ruling on this claim involves looking at the factual evidence for the accusation. This will usually be the most problematic case from the perspective of the evidence. (Although as regards family members, it will not usually be an evidential problem, but one of policy – if we do not freeze this person’s assets too, we will allow the primary target to circumvent the sanctions).

The third type of claim can conceivably also be made by a businessman/suspected terrorist supporter, but is more likely to be made by a government member, or executive official. It differs in an important way from the second type of claim as it is essentially a challenge to the political determination of the Security Council that the government or entity is engaged in activities damaging to international peace and security. While conceivably the evidence for this determination can partly consist of sensitive intelligence material, it must be assumed that there will be ample evidence that a threat exists from public sources. Both the type of decision and the evidence means that providing a legal mechanism of challenge will be almost invariably be of little use to the applicant in claim three above. This does not mean that there is not a *duty to provide* a legal mechanism: simply that it will be of very limited value.

One could then say that it must be a simple matter to provide a remedy before national courts for people making claim three. In Europe, for example, while the ECHR requires the provision of a judicial remedy for interferences in property rights, the issue to be determined by a national court in claim three cases is whether the Security Council is correct that the government is involved in activities threatening international peace and security. A European court is not going to go against the Security Council’s determination that something is a threat and so, providing a legal remedy will hardly sabotage the effective implementation of UN sanctions in Europe.

However, conceding the power of European courts in theory to question the determination of the Security Council necessarily involves conceding the same power to the courts of other states. In many countries of the world, including some European states, the courts are insufficiently independent from the government. Where the government in a state is indifferent to particular Security Council sanctions, or even hostile to them, then allowing the courts in these states to challenge the validity of Security Council sanctions will risk sabotaging these sanctions. If this happens in a state that has an important geographical relation to a targeted state (e.g. the main trading partner, or transit state) the sanctions may be totally undermined.

Fourth, the number of people likely to apply make claims falling under 1-4 above is likely to be limited. US 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.

Fifth, one can envisage either a post-hoc review procedure and/or a preventive control mechanism (i.e. a legal standard to be satisfied before measures are ordered). The former functions as a guarantee of non-abuse, the latter as a remedy. But even if a preventive measure can be devised, it alone will not meet the human rights difficulties if the measure is of very long duration. Moreover, there can be practical problems (delay etc.) in having a

preventive control mechanism. As regards travel sanctions, the need for speed is less. As regards arms embargoes, there can be situations in which it is necessary to act quickly, but these will probably be rare. As regards asset freezes, the need for speed and secrecy would seem to mitigate against a preventive control. On the other hand, one can pose the question how speedy and secret is the present procedure for asset freezing? Circulation of lists before a decision is taken is already the customary procedure, in order to facilitate an effective freeze. And the US lists on terrorism are often published first, thus warning international terrorists. A requirement to submit a draft list would at least allow checking against whatever objective criteria might be devised (see below). Of course, there is nothing stopping both improved procedures before the imposition of the measure and post hoc procedures.

Sixth, time limits on sanctions are not a solution to the human rights difficulties. As mentioned, Resolution 1390 is different from the other sanctions resolutions as it can be, in practice, of unlimited duration. As regards the other sanctions resolutions, which have to be periodically renewed, a time limit obviously means that the interference in human rights is of shorter duration. But this does not necessarily reduce the degree of infringement. Damage to protected interests can sometimes occur rapidly. This applies particularly to the right to reputation, especially for businessmen. Moreover, the existence of a time limit can undermine the effectiveness of the sanctions. However, time limits may have a role to play as regards the procedures for challenge. For example, one could also set a sliding temporal scale of justification, i.e. the longer the measure continues, the more the onus of proof shifts more and more to the state wanting to keep a name on the list.

Seventh, humanitarian exceptions, such as the exception now provided under Resolution 1267/1390, may remove some human rights problems, and will certainly ameliorate the position of individuals affected by sanctions, but will definitely not solve all the problems involved.

Eighth, there are issues of both practicality and principle in designing a body at the UN level. Anything so radical as to require amendment of the UNC can obviously be ruled out in practice. But even changes in Security Council practice take time to negotiate, and big and small power rivalries and bureaucratic infighting can make the end result uncertain. One might end up with something worse than one began with.

10.2 Less far-reaching proposals to ameliorate the present system

1. In order to ensure effective action by the other countries, the content of the lists could be made as precise as possible, and must identify people as much as possible (e.g. name, passport no. date of birth, photographs if possible - which would show such obvious things such as the colour of the target's skin). One should also list, if possible, nationality, aliases, places of residence, marital status, place of business, and other available information indicating identity. Bank account numbers or location of assets should be listed, if these are available. For entities or groups one should list such matters as their main place of business, subsidiaries, affiliates, fronts, nature of business or activity, leadership, aliases and acronyms, and other available identifying information such as countries of activity. Proposals on these lines have already been made by the Monitoring Group established under Resolution 1390¹⁰⁹ and by the association of major banks, the Wolfsberg Group.¹¹⁰

¹⁰⁹ S/2002/541.

More relevant to the issue of criteria (studied below) one can require some form of description of the evidence or information that forms the basis for taking the action; including sensitive information, if necessary, where adequate mechanisms exist to protect such information. The fact that one can have second, and even third, tier sanctions (i.e. sanctions on a person (A) who has failed to stop having dealings with other people on lists (B) and even sanctions on C who has failed to stop having dealings with A) means that, at a minimum, there must be a statement of reasons as to why this particular individual is targeted. This is obviously a requirement which is most geared towards increasing efficiency of implementation, and showing responsiveness to the needs of industry and the financial sector in complying with sanctions, something which is vitally important in a system which largely works on voluntary compliance. However, it can also serve to cut down cases of mistaken identity.

2. Make public the state which proposed the name, which would at least allow the target to institute whatever proceedings might exist in the courts of the nominating state to challenge the decision. There can, occasionally, be a problem in directing remedies towards the “Designating country”. It is sometimes difficult to identify this, when several states are involved in an informal forum (e.g. the G7). But such cases can assumed to be few in number. The delisting procedure adopted by the Resolution 1267/1390 committee for example assumes that the designating state is known. However, as shown below in section 10.4, the problem with this is that there may be no such proceedings available, or such proceedings may be only formal, and not get to the heart of the issue
3. Make an exception in Security Council resolutions, or national (or EC/EU) implementing measures for humanitarian matters allowing the target to buy food, pay rent etc. Such exceptions exist in e.g. Swiss legislation, the new EC Regulation and US legislation. This is obvious, both from a humanitarian perspective/human rights and from the perspective of effectiveness. As the alleged problem is the target facilitating in some way large flows of money financing international terrorism, it will not matter if the target has small sums of money to maintain him/her and his/her family’s welfare. As already mentioned, the committee established under Resolution 1267/1390 has now adopted a humanitarian exception, delegating the power to unfreeze assets to allow payment of certain specified expenses (food etc.). 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. Admittedly, even this exception is not unproblematic. Rich people who are subject to sanctions (and many of the sanctions have been aimed at people who have become extremely rich) would take the view that even very large sums of money are “normal living expenses” for themselves and their families.
4. Create a fast administrative mechanism for challenging blacklisting on the basis of mistaken identity. This may not be as simple as one might think if intelligence material is involved. One can, however, envisage in such cases a fast referral back to the designating state which is requested to double check all its sources.
5. Create a trust fund for dealing with cases of mistaken identity and cases (if there are any) where the designating state subsequently admits that it was wrong to propose blacklisting of a particular person. Obtaining damages from the UN in tort actions requires an arbitral agreement with the person’s state of nationality or residence and the UN. In the absence of such an agreement, there are only two remedies – create a trust fund or pay ex gratia damages from the normal budget (compulsory contributions). As it is not likely that UN

¹¹⁰ See the Wolfsberg Principles, annexed to the second report of the Resolution 1333/1390 Monitoring Group, op. cit.

members would accept the latter, a trust fund is necessary. One could require that states proposing names for inclusion also contribute to the trust fund, in case the designation later turns out to be incorrect. The problem with this is that a designating state may never accept that an error was committed. For example, in the case of the three Swedes and the Canadian removed from the 1267/1390 list, the US government did not concede that an error had been made but on the contrary emphasised that the people in question had been removed because they had given adequate undertakings not to persist in the future in the activity deemed damaging to international peace and security, Al-Barakaat money transfers.

10.3 Maintaining the present system, but requiring the satisfaction of certain legal conditions at the UN or national level before blacklisting can occur

As far as setting conditions are concerned, one must distinguish between two types of situation: where the target is suspected of committing a crime and where there is no such suspicion, e.g. the present Liberia and Sierra Leone sanctions. With the former situation, you can require some sort criterion of, and evidence for, involvement in crime. With the latter, it will be difficult to elaborate criteria in advance more detailed than that the government is doing something which the Security Council considers to be a threat to international peace and security.

Even with the former situation, criteria will not solve everything, as even if you are operating on precise criteria, you are still acting on *suspicion* that the person in question satisfies the criteria. In any event, however desirable the elaboration of objective criteria is, it will not solve the human rights problem of a lack of an appeal/review mechanism. On the other hand, setting out some form of criteria will be *necessary* for a meaningful judicial review of the necessity for and proportionality of the interference in individual rights (assuming that the review is not de novo, of the facts and the suitability etc. of the designation). If the competence of the review body is limited to checking whether the designating body acted within its discretion without detailed criteria, it will never be able in practice to question the designation.¹¹¹

The EU states have taken the first steps towards establishing criteria on 27 December 2001 in adopting two common positions and a regulation setting out basic requirements to be followed in future freezing cases.¹¹² Article 4 of the Common Position on the Application of Specific Measures to Combat Terrorism sets out minimum objective criteria for blacklisting, and attempts to establish a degree of “quality control“. The article refers to “precise information or material” “indicating a relevant decision” “by a competent authority” “based on credible evidence or clues or *condemnation*”.

“Competent authority” is defined as a “judicial authority, or where judicial authorities have no competence in the area ... an equivalent competent authority”. Thus, while the activity in question need not be a crime, the link to criminal activity is nonetheless clear. The ECJ has

¹¹¹ See further below the deficiencies of the US APA standard of “arbitrary and capricious” below, section 10.4.

¹¹² Common Position on Combating Terrorism, 2001/930/CFSP, Common Position on the Application of Specific Measures to Combat Terrorism 2001/931/CFSP, Council Regulation 2580/2001 on specific restrictive measures directed against certain persons and entities with a view to combating terrorism.

interpreted the meaning of “competent authority” in a security context in the case of Gallagher.¹¹³ Article 9 of Directive 64/221/EEC requires that EC nationals subject to restrictions on residence and these restrictions are not capable of being appealed to a court, the person must be able to submit his or her case to a “competent authority“. The ECJ had concluded that the fact that the “competent authority“ was appointed by the executive did not mean that it was in breach of the directive, so long as it in practice acted independently and applied a procedure, allowing the individual concerned effectively to present his or her defence. The ECJ considered that it is for the national court to determine whether the composition and procedure of the competent authority met these requirements.¹¹⁴

In the area of money laundering/terrorist financing, one can envisage at least one criterion which should meet universal approval, and which is capable of objective verification, namely that the target has *considerable* financial assets (e.g. money in his or her accounts) which is being transferred to other accounts. Alternatively (and this was the case for the EU sanctions against companies controlled by Milosovic and his associates, under EC regulation 2488/2000) that there is a relatively large *flow* of money going through accounts controlled by the target. The transferring of small sums of money to terrorists is hardly a threat to international peace and security. The sum of money held in an account or records of a flow of money through an account, and its destinations, are naturally objectively verifiable facts, although identifying the recipient account holders as terrorists or as linked to terrorists would probably still involve intelligence information.

It may be possible to require an ongoing judicial, or at least, security investigation in terrorism cases, where I consider that most of the human rights problems arise, because terrorism, and financing of terrorism is, or will be thanks to Resolution 1373, a crime in all states. Money laundering is already criminal in the majority of jurisdictions as is, or will be, running an underground banking system. But even with terrorism cases, it will presumably be very difficult to get states in the Security Council to agree on a minimum level of reasonable suspicion or “probable cause” which provides a real safeguard that a person has been correctly targeted. The present EU standard is not so strong a safeguard as one might think. The standard for initiating investigation of certain crimes, in particular security crimes, is set relatively low and is easily satisfied. Moreover, the standard of investigation of money laundering is, of necessity, set very low – at the level of an “unusual” transaction. The fact that even a judicial investigation into terrorist financing may be started on rather thin evidence is not really a problem in ordinary criminal investigations at the national level, even when accompanied by interim executive or judicial ordered freezing measures seizing assets. This is because such measures can later be challenged at the national level. Either the police find more evidence of involvement in crime, and the measures are kept in place, or they do 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 freezing measures at the UN level cannot be challenged at either the national or the UN level by the affected individual, and so it is not possible for him or her to get them lifted by court order.

¹¹³ C-175/94, R. v. Secretary of State for the Home Department, ex parte Gallagher [1995] ECR I-4253. See also the later case of Queen v. SSHD ex parte Shingara and Radiom, [1997] ECR-I 3343.

¹¹⁴ Gallagher, *ibid*, at p. 4278.

One could envisage a situation in which states agreed to allow freezing of their nationals' assets at the UN level, on relatively little evidence of involvement in terrorist financing or financing etc. of regimes or organizations which are subject to sanctions, *if* in return, the state wanting the blacklisting undertook to not object to removing the person from the list *if* a subsequent criminal investigation in the state where the blacklisted person's assets were located revealed that there is insufficient evidence on which to proceed with a prosecution. Such a system might satisfy the requirements of the ECHR, especially if combined with a compensation requirement. But the problem is still that the designating state may be unwilling to hand over whatever evidence it might have of criminal activity to the state in which the assets are located.

Although such a system may work with European and certain other states, it is difficult to see it being acceptable more generally to the US. Thus, it would seem better to abandon the idea of reaching a *common UN Security Council standard* of reasonable suspicion and instead institute a *practice of not listing* a person in terrorist financing cases unless there is *already an indictment* issued by a national court alleging the commission of a criminal offence by the person in question. There is a close link between this proposal and the proposal under 10.6 to abandon UN targeted sanctions which involve infringements on human rights. The difference would be that a national indictment would be a precondition to the issue of UN sanctions, rather than an alternative (dealt with in section 10.6).

The advantage of such a system is that a national judge has scrutinized the evidence and issued the indictment. It sets a judicial standard before freezing is allowed. The issuing of an indictment is, in practice, is a requirement under one of the US statutes providing for sanctions programs on individuals, the Foreign Narcotics Kingpin Designation Act.¹¹⁵ Indictments can naturally be sealed, so as to preserve secrecy and the element of surprise. On the other hand, making such a requirement may set too high a standard of proof before action can be taken. Still, such a system would have the advantage, from European perspective, that European states on the Security Council which are worried about the human rights of their nationals or residents could, *de facto*, and without needing US permission, impose this standard by automatically blocking the blacklisting of any European national or resident who was not already under indictment in an *European* state for commission of a crime. As far as EU states are concerned, it fits in with the EU system of mutual recognition of judicial assistance measures, which is now the accepted method of cooperation in criminal matters.¹¹⁶ This would mean that the US could content itself with revealing the information necessary to indict someone to a single EU state that would issue an indictment, which would be automatically valid in all the other EU states. The US could choose the state it trusts most to maintain the confidentiality of the material, and/or the state with whose legal system it is most familiar. However, it would also have to be accompanied by a practice of the designating state not objecting to removal if the indictment in the EU state was later successfully challenged, e.g. for being insufficiently supported.

More generally one can say that this proposal would disadvantage non-European states not on the Security Council that would have no means of protecting their nationals' interests (unless

¹¹⁵ 21 USC section 1901-1908.

¹¹⁶ See, e.g. the framework decision on the European Arrest Warrant and the proposals for framework decisions on freezing assets (5126/01, 2 February 2001) and on confiscation of assets (10701/02, 18 July 2002).

they too banded together on a regional basis). Moreover, it would have the disadvantage of not being able to be used as regards sanctions that are not connected to criminality.

10.4 Maintaining the present system, but creating an obligation at national law to allow appeals on the merits

If there was a genuine possibility of challenging blacklisting before the courts of the state proposing a name for a blacklist, some of the objections against the present system would disappear. This, at least, would be the case if this were combined with the above suggestions as to ameliorations and a rule whereby a successful appeal before the courts of the proposing state led to the deletion of the name in the Security Council list too. However, we should be wary here. There are unfortunately many historical (and, regrettably, some present day) examples in Europe and elsewhere, of purely formal mechanisms of challenge as far as security matters are concerned.¹¹⁷ For example, a court's jurisdiction is limited, e.g. by standing requirements, or where the review is only of 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 useless. It can be worse than useless, as it gives the impression of just procedures, without the reality. The law serves only an ideological function, as a smokescreen.

As the initiative to place most (all?) of the people on the lists in resolutions 1290, 1373 and 1390 has apparently come from the US, and as the US has, by far, the most extensive unilateral system of blacklisting it would be helpful to say something about challenging US decisions before the US courts. The Foreign Narcotics Kingpin Designation Act has recently been the object of a Congressionally appointed judicial inquiry.¹¹⁸ The Judicial Review Commission took the opportunity to look more generally at US legislation on sanctions, and the findings of the Commission are of considerable interest, both as regards the (in)effectiveness of US national review procedures and, more generally, to the wider issue (particularly relevant for Security Council sanctions) of the value of judicial review. The following description draws heavily upon this official report.

In the US, there is a variety of different statutes and executive orders providing for blacklisting procedures, depending upon the category of target, and the decision to blacklist is taken by different entities.¹¹⁹ The body responsible for coordination of the US programs, OFAC, is relatively underfunded. Only 12 people work in the International Programs Division, with responsibility for all the terrorist programs and liason with foreign governments.¹²⁰ Compliance with sanctions, like the tax system, works largely on voluntary

¹¹⁷ For an examination of these issues from the perspective of the ECHR, see Cameron, 2000, pp. 157-161, and *passim*.

¹¹⁸ Judicial Review Commission on Foreign Assets Control, Final Report to Congress, January 2001 (hereinafter, (Judicial Review Commission, 2001), available at www.stetson.edu.law.

¹¹⁹ The main statute is the International Emergency Economic Powers Act ("IEEPA") 50 USC Sec. 1701 et seq.

¹²⁰ Judicial Review Commission, 2001, p. 31, although the prominent academics which the Commission heard considered that the main problem was not so much underfunding but the

cooperation. Enforcement works by a bank somewhere in the chain of transactions confessing. OFAC then goes “upstream” to see which bank processed the transfer. OFAC puts pressure on the wrongdoer by threatening heavy civil penalties. These are negotiated down in exchange for undertakings to improve routines etc. There are few actual cases. The OFAC Departmental office performance report FY2000 revealed that of the 1000 cases instituted (mainly related to the terrorism programs), 132 resulted in civil penalties being imposed (after negotiation), and only 73 criminal investigations were launched of which 6 resulted in the Department of Justice deciding to bring a prosecution.¹²¹ Despite the vital nature of voluntary cooperation, OFAC has been accused of lacking greatly in willingness to cooperate with the business community. As Fitzgerald has pointed out, if one is engaged in “economic warfare” then there is no need to be friendly with the community.¹²²

Administratively speaking, a sanctioned person or organization can *request* OFAC to reconsider its decision.¹²³ As regards judicial review procedures, the availability of these, and the grounds on which review can be requested, vary according to the body taking the designating decisions, and the legal authority for the designation decision. The most relevant grounds are judicial review of administrative action and constitutional challenge. As regards judicial review, this is possible on the basis *inter alia* that it is in excess of statutory authority (which is of little use to a targeted individual, because the statutory authority is so wide) or if the decision is arbitrary, capricious, an abuse of discretion or otherwise not in accordance with the law.¹²⁴ The standard of review is not thus not demanding at all (although, as far as factual determinations are concerned, it is doubtful whether the administrative law standard of “substantial evidence” is in fact more demanding).¹²⁵ The courts will thus not rule on whether a decision is “correct” or “best”. Moreover, deference to executive determinations is at its highest because of the national security and foreign policy implications and the fact that, under statutory sanctions programs, the executive is acting in concurrence with Congress.¹²⁶ As the Judicial Review Commission put it, “The consistent theme in the courts’ review of OFAC actions in IEEPA based sanctions programs is judicial deference to the agency”¹²⁷ Moreover, even if a court was inclined to set a more demanding standard of review, the absence of criteria for making a designation and the absence of a proper administrative record means that there is little which can be reviewed. There are no sanctions programs where a

institutional culture, p. 125.

¹²¹ Fitzgerald, 2001/02, p. 81.

¹²² Fitzgerald, 1999, p. 88.

¹²³ Administrative reconsideration and review provisions can be found in section 501.806 and 501.807 OFAC’s regulations in 31 Code of Federal Regulations.

¹²⁴ 5 USC 706. However, it is not possible to obtain judicial review of Presidential designations, because the President not an “agency” within the meaning of the APA. *Franklin v. Massachusetts*, 505 US 788, 800 (1992) and Judicial Review Commission, 2001, p. 28.

¹²⁵ Judicial Review Commission, 2001, Separate Opinion of Commissioner Smith, p. 42-3.

¹²⁶ See, e.g., *Haig v. Agee*, 453 US 280 (1981). In *People’s Mojahedin Organization of Iran, v. United States Department of State*, 182 F.3d 17 (D.C. Cir. 1999), the court concluded that the Secretary’s finding that the organisation’s activities threatened national security is nonjusticiable (at p. 23).

¹²⁷ The Commission noted that some courts consider that there is a presumption of validity in relation to OFAC’s action and that the plaintiff has the burden of proof to overcome that presumption. Judicial Review Commission, 2001, p. 28. See also Fitzgerald, 1999, p. 139.

targeted individual has the right to look at the *material basis*, i.e. *the evidence* for the blacklisting. Even where such a right was explicitly given for terrorist organizations¹²⁸, albeit to a edited version of the evidence, it has proved to be of little use in practice.¹²⁹ Those few cases in which an OFAC blacklisting was found to be contrary to law have been on formal grounds.

As regards reviews on constitutional grounds, foreign parties without a “substantial connection” to the US have no standing to bring constitutional challenges.¹³⁰ In the rare situation where a constitutional challenge can be mounted, it is obviously necessary to show that a constitutional right has been infringed. But, so far, blocking of property as a result of blacklisting has not regarded as a “deprivation” of property without due process (contrary to the 5th Amendment), although on the basis of other precedents it could be.¹³¹ However, the due process requirements of a fair hearing are variable, and would allow, e.g. dispensing with pre-designation procedures¹³² (which is obviously sensible) and limiting access to the file on national security grounds.¹³³ It would not appear that blocking – even for a period as long as five years – would be regarded as a “taking” of property without compensation.¹³⁴ Nor is blacklisting a “bill of attainder” (contrary to the 8th Amendment) because it is not the legislature which designates, but the executive.¹³⁵

¹²⁸ Section 302 of the Antiterrorism and Effective Death Penalty Act (AEDPA) 1996, Pub. L. No. 104-132, 110 Stat. 1214 (1996) (codified as amended in various sections of 8, 18, 28, 40 & 42 USC) authorizes the Secretary of States to designate groups as “foreign terrorist organizations.” Designated groups have the right to obtain a sanitized version of the administrative record, and the court has the right *ex parte* to see the whole record. But t

¹²⁹ See *People’s Mojahedin Organization of Iran*, *op. cit.*, where the court stated “We reach no judgment whatsoever regarding whether the material before the Secretary is or is not true. . . . [T]he record consists entirely of hearsay, none of it was ever subjected to adversary testing, and there was no opportunity for counter-evidence by the organizations affected. . . . Her conclusion might be mistaken, but that depends on the quality of the information in the reports she received—something we have no way of judging. (at p.25). Despite the explicit provision for judicial review in section 302, the court held that its “only function was to decide if the Secretary, on the face of things, had enough information before her to come to the conclusion that the organizations were foreign and engaged in terrorism” (*ibid.*).

¹³⁰ *Chicago & S. Air Lines, Inc. v. Waterman Steamship Corp.*, 333 US 103 (1948). (“A foreign entity without property or presence in this country has no constitutional rights, under the due process clause or otherwise.”). See also *United States v. Verdugo-Urquidez*, 494 US 259, 271 (1990).

¹³¹ This was the conclusion of the Judicial Review Commission, 2001, pp. 76-77.

¹³² See, e.g. *Calero-Toledo v. Pearson Yacht Leasing Co.* 416 US 663 (1974).

¹³³ See e.g. *Haig v. Agee*, *op. cit.*

¹³⁴ *Nielsen v. US*, 424 F.2d 833 (DC Circuit 1970) and (Judicial Review Commission, 2001, pp. 89-94.

¹³⁵ (Judicial Review Commission, 2001, pp. 94-100. Cf. the situation under EC/EU law.

So, while there is no doubting the independence of the US courts from the executive, there is, at the present time, no evidence to suggest that a genuine right of appeal exists for foreigners who lack a sufficient connection with the US.¹³⁶

One could, however, create an obligation, or develop a practice in the Security Council, whereby a state was only permitted to suggest names for inclusion on a blacklist if that state provided a genuinely effective judicial appeals mechanism in its own courts. This would involve guarantees of fair procedures, of a security screened advocate to assist, of independent and expert judges with full powers to look at the merits of the case. This would involve some form of mechanism (expert scrutiny) for checking if the courts in the state in question really were not only capable of providing a remedy on paper, but expert enough, and willing enough, to do so. It would not necessarily involve giving the expert scrutiny body any power to look at actual cases, simply at the powers of the courts, the procedures and the "legal culture". Perhaps a role could be played in this respect by an independent expert, e.g. appointed by the UN High Commissioner for Human Rights. This is still, obviously, a highly sensitive matter to hand over to an international body or expert. Having said this, the member states of the Council of Europe have accepted this very obligation under the ECHR. Still, in the context of the Security Council, it might be politically impossible to "rank" states in this fashion. On the other hand, it might be more attractive than the next alternative.

10.5 Creating an international review mechanism

Logically it is the Security Council that should require the evidence to be submitted to it, because it is the body which takes the decision (and so should have the responsibility). However, this would involve creating an "in-house" UN intelligence capacity, and many states see major problems involved in this. This is shown inter alia by the refusal of states to implement the Brahimi Report recommendations regarding intelligence capacity.¹³⁷ There are special problems involved in giving international judicial bodies access to very sensitive intelligence material. There is a real risk of leakage of intelligence to hostile states, which may well be members of the Security Council. There is the cost issue and the issue of policy - many states are reluctant to do anything which can contribute to an expansion of a UN bureaucracy, which is occasionally accused, with varying degrees of justification, of being lacking in expertise, impartiality etc.

There is relatively little experience of international judicial bodies handling intelligence material. The EctHR has seldom seen the intelligence basis for a particular challenged compulsory measure, surveillance etc. but has tended to rule in abstracto on the issue on basis of the structural, mainly procedural, safeguards applicable at national law.¹³⁸ The issue of access to intelligence material arose inter alia for the ICJ in the Corfu Channel Case, without being satisfactorily resolved.¹³⁹ In *Prosecutor v. Blaskic*,¹⁴⁰ the Appeal Chamber of the

¹³⁶ This, in fact, was the conclusion of the Judicial Review Commission 2001, p. 113-116.

¹³⁷ UN Secretary General, 2000.

¹³⁸ See, in general, Cameron, 2000.

¹³⁹ Corfu Channel Case, Merits (UK v. Albania), ICJ Rep. 1949, p. 4.

¹⁴⁰ Judgment on the Request of the Republic of Croatia for Review of the Decision of the Trial Chamber of 18 July 1997, Case No. IT-95-14-AR108bis (Appeals Chamber) 29 October 1997.

ICTFY refused to let state withhold information or prevent an individual from giving evidence because it would prejudice national security, where this evidence was material to the prosecution. The experience of the Blaskic case led to the adoption, for the International Criminal Court, of Article 72 of its statute, which attempts to balance the interests of justice with legitimate national security concerns.

However, many of the difficulties associated with an international judicial body disappear if one instead uses an *arbitral* body. Such a body could be organised in the following way. All members of the Security Council propose a member. These must be qualified for high judicial office, but also very experienced in assessing intelligence material. All democratic states have such judges (e.g. in the US the Foreign Intelligence Surveillance Court, in the UK, the Security Immigration Appeals Tribunal, in Sweden, Registrernämnden). The integrity of these judges would be vital, because the targeted individuals and their home states would have to trust them. The Security Council could reject any judge proposed who has not had the necessary security experience. Again, perhaps some sort of (confidential) advisory role could be given here to the independent expert on terrorism and human rights which the UN High Commissioner for Human Rights proposes (if agreement is ever reached on such an appointment). The arbitral body could sit in panels of three members. Targeted individual could request their case to be heard and propose a panel to hear the evidence. The state proposing the blacklist must also propose a panel. Failure to do so within a given period of time would mean removal of the blacklisted person from the list. Both the individual and the proposing state would have a veto on the composition of the panel, but pending agreement on the composition, the individual would remain on the blacklist. In practice this would mean that the panel would consist of a judge from the state proposing the blacklist (A), and two judges from two other states which A trusts. There would be mechanisms designed to ensure as fair a procedure as possible, e.g., using the device of representation by means of a security cleared advocate (provided and paid for by the state which proposed the blacklisting). An arbitral body would be cost effective, as it would have no standing secretariat at all. And the risk of leakage of intelligence material would be very small. Of course, the procedure would not be ideal from anyone's perspective. The state proposing the blacklisting would have to accept that two foreign judges saw very sensitive intelligence material. And the blacklisted individual may well not consider that he or she has had a fair hearing before three judges one of whom comes from the blacklisting state and (probably) two from allied, or at least, friendly, states. It would seem sensible to have only one such arbitral body for all the targeted sanctions committees, rather than several. To fully satisfy the human rights objections, the decision of the arbitral body would have to be binding on the sanctions committee, but as noted in section 5, this would not mean that the authority of the Security Council is undermined.

This proposal has definite advantages, inter alia making explicit the individual nature of the rights, and procedural safeguards. But there are bound to be problems in practice of getting states to agree on an advisory body in the Security Council which does not include them. Although I think that the argument is incorrect, for political reasons some states are likely to be adamant that an arbitral body would hinder the Security Council in its task of maintaining international peace and security. And it is presumably unthinkable for the US to reveal intelligence material to an international arbitral body. In fact, US law enforcement and intelligence agencies tend not to allow any such material to appear in the administrative file, to avoid the risk that a subsequent court challenge might secure disclosure of it. If these

agencies are worried about revealing information even to their own courts, they will not reveal it to an international body.¹⁴¹

On the other hand, where intelligence material does not lie behind the evidence, then there would be no problem in having an arbitral body. As noted in section 10.1, the types of claim can be divided into four. Intelligence material is most likely to be relevant in claim two (businessmen suspected of assisting targeted governments/entities and people suspected of assisting terrorists). The creation of an arbitral tribunal would be unproblematic as regards governmental officials objecting to the very fact that the Security Council considers their government's activities to threaten international peace and security (claim three). To be realistic, or cynical, the arbitral tribunal will never question the Security Council's determination. Nor is an arbitral tribunal likely to cause governments much in the way of problems as regards the majority of cases falling under claim one (mistaken identity). At the same time, even governmental officials whose property in European states has been frozen are under European human rights law entitled to a judicial determination of property disputes. Thus, a UN arbitral tribunal clearly seems the best solution for these types of claim.

10.6 Abandoning the present system of UN targeted financial sanctions as far as these concern individuals not belonging to governments/governmental entities and returning to unilateral sanctions

This, however, leaves the claims made by individuals not members of governments or governmental entities such as UNITA in control of territory. An alternative to Security Council sanctions committees blacklisting people is that the Security Council simply identifies the criteria, and leaves it to states or regional agencies such as the EU to implement, i.e. draw up their own blacklists. Such decisions can then be challenged before national courts (or the ECJ, but, as already mentioned, the ECJ does not possess the expertise to evaluate intelligence material). This would have major advantages from the perspective of legal safeguards, but there would be obvious disadvantages, in particular, sanctions would no longer have a universal applicability. Some states would fail to take measures against people who were identified, either through inefficiency or because they disagree with the policy.

As already mentioned, the human rights problems with travel sanctions and arms embargoes are much less, even when these are directed against individuals not belonging to governments/governmental entities. As far as terrorist supporters, particularly financiers, are concerned, one can pose the question what is the *point* in practice in the Security Council continuing to list them directly. Those states which faithfully implement UN targeted sanctions have already implemented, or are in the process of implementing, Resolution 1373, which contains a general obligation to freeze terrorist assets to suppress the material supporting of terrorism and to prevent the financing of terrorism. When such implementing national legislation is in place, the listing of terrorist/terrorist financier suspects can be handled on a bilateral basis, with the state, or states, possessing information indicating that a given person is involved in terrorist financing transferring this information to the state where the person and/or his/her assets are situated, which can then take the measures in accordance with national law and practice.

This already works well as regards money laundering, as regards OECD states, where the different financial inspection units, and finance police forces, transfer confidential

¹⁴¹ Judicial Review Commission, 2001, separate opinion of Commissioner Smith, pp. 8-9.

information to each other frequently, information which is sufficient to allow freezing measures to be ordered. Admittedly, the information transferred must be of such quality as to satisfy applicable national evidential standards for the imposition of freezing measures. However, this should hardly be seen as a “problem”, quite the contrary. The Resolution 1363/1390 Monitoring Group has claimed that it is too difficult to freeze assets in some states. However, it gives only one example, that of a Luxembourg court which supposedly ordered Al-Barakaat assets to be unfrozen.¹⁴² I very much doubt that the standard to be satisfied in the major financial markets, including the EU, before a court, or prosecutor, may order interim freezing of assets on suspicion of terrorist crime is more, or much more, demanding than the applicable US standard. What may be more demanding is the standards of subsequent proof that the assets frozen are connected to money laundering or other criminality. And it is this which is the core of the problem, and the core of the European reluctance to accept the present system. As already mentioned in section 10.4, assuming that the present EU proposals on mutual recognition of freezing/confiscation orders are accepted, the US could choose to act through one state, which then can issue an order which will be implemented in all the other EU states. And challenge would be before the courts of the issuing state.¹⁴³ This system ought to be acceptable (assuming minimum standards complying with the ECHR). As noted in section 10.1, one could also add an explicit temporal justification requirement.

As regards states which do not want to cooperate with the listing for political or other reasons, it is true that they can sabotage the freezing, by, e.g. setting a spuriously high national standard which allows them to demand more, and more secret, information from the designating state, information which the designating state is unwilling to give. But, in practice, one is not in a worse position than before, when the UN Security Council listed the names directly. As the reports of the Monitoring Group established under Resolutions 1333/1390 clearly show, non-cooperating states have anyway found ways of evading the obligation to freeze assets, which in any event only works when there is enthusiastic, and speedy, implementation of sanctions. It would naturally be desirable to seize all the assets of a terrorist network such as Al-Qaida, but if this is unrealistic, it might be better to content oneself with first having effective controls over the major financial markets, i.e. the EU (and Switzerland), Japan and the US/Canada and second, trying to prevent or at least make more difficult, terrorist operations in those states which the particular terrorist network is most opposed to. In the case of Al-Qaida, which the Security Council has been most concerned with, this is the US and its close European allies. Carrying out major terrorist operations in the US and European states will mean transfer of assets to the target state – at which point they can be frozen. So world wide measures, while desirable, may not be strictly necessary.

11 Proposals for action at the national (Swedish) level, especially as regards resolutions 1267, 1333 and 1390

As reform at the EU, and, particularly, Security Council level is a long and difficult business, the question arises as to what can, and should, be done at the national level. Sweden does not want to risk undermining Security Council targeted sanctions. At the same time, the rights of Swedish citizens and residents should not be infringed. Rights under the ECHR are part of Swedish law, as a result of the statute (1994:1219) incorporating the ECHR. These rights are

¹⁴² Second report, op. cit. para. 39.

¹⁴³ See Article 9 of the Proposal for a Framework Decision on Freezing of Assets, op. cit.

also part of the general principles of EC law. Security Council resolutions 1267, 1333 and 1390 are implemented in Sweden by means of a directly applicable EC regulation. The validity of this may or may not be determined in the cases currently before the ECJ. Normally, the validity of EC law may not be questioned by a national court, except in the context of interim measures of protection, and then subject to strict limits. However, from the perspective of Swedish constitutional law, the Swedish delegation of legislative competence to the EC by means of statute 1994:1500, was conditioned on respect for a level of protection of human rights equivalent to that of the ECHR (see Instrument of Government, RF, 10:5). The normal restrictions on the courts engaging in constitutional review (RF 11:14) apply to conflicts between Swedish norms, including the incorporated ECHR. They do not apply to conflicts between directly applicable EC norms and Swedish statutes.¹⁴⁴ Nor can they apply to the question whether a delegation of authority to the EC falls within the area of “reserved protection” of the Swedish instrument of government. The effect of this is that it is possible for the Swedish courts to refuse to apply the directly applicable EC norms, even in the absence of a ruling on the (in)validity of these by the ECJ, or even, ultimately, in direct contradiction to such a ruling. This would mean open conflict with the principle of the supremacy of EC law, and is, politically speaking, highly improbable, but theoretically possible.

A less radical solution is to ensure that the new EC regulation, implementing the humanitarian exception, is formulated so as to allow the states considerable freedom of action in how they interpret and apply humanitarian exceptions. Until an adequate reform is made of the UN (and EU) systems, where there is reason to doubt that a targeted individual is, in fact, a terrorist, or suspected of supporting terrorism, the infringement in the rights of these targeted individuals must be minimized as much as possible. One sensible approach to implementing humanitarian exceptions is not to make each purchase by a targeted person the object of scrutiny and control by a national authority, but to establish a form of “guardianship”. In Sweden, minors’ use of money deposited on their behalf is subject to monitoring by a guardian (see Parental Code, chapter 13). Something similar could be devised, with a large automated component. A person’s normal operating income and expenditure could be calculated, and programmed into his or her account on a monthly basis (leaving a relatively generous margin). Where a not insignificant deviation from this pattern occurred, the income/expenditure could be automatically suspended and the guardian could determine, after consultation with the target, whether or not the income/expenditure is justified. Such a system would, as far as possible, allow the target to live a reasonably normal life.

Such a system would not violate the obligation to implement Security Council obligations in good faith. Security Council orders freezing assets must be interpreted in a teleological fashion, in line with the function of the Security Council to maintain international peace and security. For anyone who is not wealthy, allowing him or her more or less unrestricted access to his or her private bank accounts is hardly a threat to international peace and security, even if there are suspicions that the person in question is favourably inclined towards terrorist groups. Freezing a private bank account is in such circumstances a punishment, rather than a mechanism of preventing terrorist financing. (As already mentioned, an exception can be made to this where there is large *flow* of money in and out of bank accounts, as this can constitute significant financing.) Moreover, Security Council sanctions resolutions must be interpreted in line with the technological capacity of the implementing state. These sanctions are not meant to be self-executing, but must be adapted to the national context of over 180

¹⁴⁴ cf. RÅ (judgments of the Supreme Administrative Court) 1997, ref. 65.

states. Where the implementing state has adequate technological capacity to monitor a person's income and expenditure in a relatively "hands off" fashion, then this must be seen as compatible with UN obligations. I recommend therefore that one should consider whether the Swedish law which attaches criminal penalties to the breach of Security Council sanctions, and the directly applicable EC norms, the Sanctions Act (1996:95), should be amended to allow some such "guardianship" system of monitoring humanitarian exceptions, and de minimis rules decriminalizing minor infringements of sanctions. (This law should also be subjected to a review for other, constitutional, reasons.¹⁴⁵) This recommendation should not, of course, be seen as an alternative to resolute action, at the EU and Security Council level, to make the necessary fundamental changes in the systems, so as to ensure these respect minimum human rights.

¹⁴⁵ It is now much harder to argue that authority to exercise public power has not in substance, although still not formally, been delegated by the Swedish parliament to an international body (namely the UN sanctions committees). The Sanctions Law Committee looked at this issue in 1995, and reached the conclusion, albeit with some hesitancy, that the procedures for obtaining exceptions from the sanctions committees was not covered by RF 10:5 para. 4 (See SOU 1995:28, p. 84). Admittedly, the UN decision to blacklist a Swedish citizen and to freeze his or her assets does not have direct effect, but this is anyway the result if the EC Commission automatically transforms such UN decisions to a regulation. Under RF 10:5 para. 4, a delegation of public power must be preceded by a decision from parliament with a $\frac{3}{4}$ majority, or in accordance with the procedure for constitutional amendment. Failure to comply with this procedure will lead Swedish courts to refuse to apply Swedish criminal law which criminalises violations of international norms promulgated in breach of RF 10:5 para. 4 (see NJA 1996, s. 370). This constitutional protection as far as sanctions are concerned has now been emptied of substance.

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