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National implementation of United Nations sanctions

Towards fragmentation

The implementation of the United Nations security council sanctions by member states has gained increasing importance in the sanctions debate over the past 15 years. Having remained long neglected in academic circles, the sanctions review process sponsored by the Swiss, German, and Swedish governments over the past decade has been instrumental in putting the question of implementation at the centre of the sanctions research agenda.¹ One of the main innovations that has characterized the sanctions landscape in the aftermath of the Cold War is the transformation of sanctions

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¹ Thomas Biersteker, Sue Eckert, Aaron Haelgua, and Peter Romaniuk, "Consensus from the bottom-up? Assessing the influence of the sanctions reform process," in Peter Wallensteen and Carina Staibano, eds., *International Sanctions: Between Words and Wars in the Global System* (London: Frank Cass, 2005), 15-30.

instruments: the classical trade embargoes that dominated the sanctions scene for most of the 20th century have given way to more sophisticated and carefully crafted “targeted” measures. The establishment of targeted sanctions has been accompanied by other novel developments, such as the practice of targeting individuals rather than states. These transformations make it necessary to explore how the national implementation of multilateral sanctions has been affected, as well as its consequences for the efficacy of the measures.

This article sketches the main issues surrounding the national implementation of United Nations sanctions. It identifies the most salient trends in the implementation of sanctions by individual states—and a regional entity, namely the European Union—and outlines how they have been affected by the emergence of targeted, often blacklist-based sanctions. At the same time, the analysis endeavours to focus on the impact that new developments have on the efficacy of the measures concerned.

The article is divided into four sections. The first provides a brief introduction to the transformations in sanctions as a tool over the past two decades. A second section outlines conflicting trends working both in favour and to the detriment of sanctions implementation. The third reviews the problems caused by the increasing encroachment on domestic legal orders by recent sanctions regimes. A final section discusses the difficulties posed by the violation of standards of due process resulting from UN blacklists, which merits special attention as it is the source of a number of legal cases in Europe.

THE UN SANCTIONS LANDSCAPE AND ITS POST-COLD WAR MUTATIONS

The use of sanctions by the UN security council increased significantly in the aftermath of the Cold War. While the security council subjected only two countries to mandatory sanctions prior to 1989 (Rhodesia and South Africa), Carina Staibano has counted 20 voluntary and mandatory sanctions regimes that were active between 1964 and 2005.² As of the end of November

² Carina Staibano, “Trends in UN sanctions and state capacity: Towards a framework for national level implementation,” in Wallenstein and Staibano, *International Sanctions*, 31. Andrea Charron, meanwhile, has counted 37 voluntary and mandatory regimes. See Andrea Charron, “UN sanctions in four conflict types,” PhD dissertation, Royal Military College, Kingston, 2009. Regardless of the number, it is the increase in the number of regimes that is germane.

2009, there were 11 active sanctions regimes. UN sanctions practice has undergone a series of transformations at different levels. For the purpose of our analysis, the innovations introduced in UN practice can be succinctly summarized as follows.

In the early to mid-1990s, the UN security council began to authorize sanctions to deal with internal armed conflict, especially in countries where state authority had collapsed, or so-called “failed states.” This was the case even in instances where internal conflict had limited external ramifications. From that point of view, the security council departed from the restrictive interpretation of what constituted “a threat to international peace and security” that had characterized its practice since its inception. Apart from expanding the range of situations that qualified for enforcement action, the security council also started to apply some of its sanctions regimes on only one of the parties in conflict, therefore manifestly taking sides. In a range of internal conflict situations such as in the Democratic Republic of Congo, Côte d’Ivoire, Sierra Leone, and Angola, the sanctions targeted rebel groups. Similarly, the goals of sanctions regimes expanded to cover gross human rights violations, concerns about the proliferation of weapons of mass destruction, and international terrorism, thus acquiring new roles in preserving peace and security.³

Most importantly, the very instrument of sanctions was subject to a transformation. As a result of the loss of legitimacy generated by the public outcry over the humanitarian disaster provoked by comprehensive sanctions applied against Iraq, Haiti, and the Federal Republic of Yugoslavia, the security council moved away from full economic embargoes towards “smart” or targeted sanctions. A more sophisticated concept, targeted sanctions constitute a heterogeneous toolbox, encompassing commercial measures such as commodity embargoes and aviation bans, along with blacklist-based sanctions such as assets freezes and travel bans. Their aim is to focus the effect of sanctions on the individuals and elites responsible for the policies they are intended to reverse, while avoiding or at least minimizing damage to the civilian population and neighbouring countries.

Towards the end of the 1990s, new trends in sanctions design emerged. These have subsequently been reinforced by the intense effort to fight international terrorism after September 11th. Blacklists originally

3 Margaret Doxey, “Reflections on the sanctions decade and beyond,” *International Journal* 64, no. 2 (spring 2009): 541.

targeted individuals directly linked to state authorities. During the conflict that unfolded in the former Federal Republic of Yugoslavia in the early 1990s, the security council mandated the freezing of the assets held by the government and state-owned enterprises, along with the personal assets of the leading elites. The later 1990s witnessed a trend towards the application of sanctions against individuals unconnected to states. The financial and aviation sanctions—first threatened and then made mandatory—targeting the Taliban in 1999 entailed the “listing” of individuals and organizations suspected of conducting or lending support to terrorist activities, but without any formal association to state authorities.⁴ At that stage, there was still a link to the state of Afghanistan as the Taliban authorities were instructed to surrender a well-known terrorist suspect, Osama bin Laden. Extradition for terrorism suspects had been requested before, in the case against Libya for its role in the Pan Am and UTA flight bombings in 1988 and 1989 respectively and in the case of Sudan’s support of the attempted assassination of Egyptian President Hosni Mubarak in 1995. Yet the inclusion of specific names in the body of a resolution was new. The initial list created by the 1267 committee and circulated via a press release featured the names of five entities and one individual, Mohammed Omar.⁵

The first reference to a “consolidated list” came in March 2001 in a press release that listed the names of 156 individuals and 17 entities. It came to be known in the media as the “blacklist.” The September 11th attacks in New York and Washington made the list infamous because of the increase in the number of names added to it. The sanctions regime has since expanded its scope beyond the territorial boundaries of Afghanistan. In January 2002, the security council broadened the financial, travel, and arms sanctions against Taliban-controlled Afghanistan. Resolution 1390 extended the reach of the sanctions regime to address what had morphed into a global threat, with al Qaeda at its centre. Reflecting the universal scope of the regime, the name was changed from the Afghanistan regime to the 1267 regime. The global 1267 regime list is, therefore, fully disconnected from states, their authorities, and even their territories. As a result, the terrorist

4 Security council resolution 1267, 15 October 1999. The sanctions had a built-in delay: if the Taliban did not comply with security council demands, sanctions would come into effect on 14 November 1999. The security council had first demanded such actions in resolution 1214 in 1998.

5 Security council resolution 6844, 13 April 2000.

blacklist has added a new function to the catalogue of objectives pursued through sanctions: rather than aiming at compelling a behavioural change in targeted leaders, its goal is to combat terrorism by preventing suspects from travelling and/or financing terrorist activities.⁶ The targets are private persons and entities—not state leaders or organizations—whose place of residence remains often unknown. As of the end of September 2009, 509 individuals and entities were on the 1267 list.

To some extent, the evolution of sanctions parallels that of peacekeeping operations. As the number of missions increased, their mandates were gradually expanded to encompass a host of responsibilities, resulting in “mission creep” and leading to questions about the impartiality of the mission. Indeed, the concept of peacekeeping has evolved so dramatically that operations have been labelled as being of the first, second, or even third generation.⁷ The fact that both armed missions and sanctions, the principal enforcement measures of the UN under chapter VII of the charter, have undergone profound transformations in the past 15 years mirrors the UN’s creative endeavours to adapt to a new strategic environment, not least through its response to threats. Perhaps more conspicuously, the security council’s response to the emergence of international terrorism as a central item on the global security agenda, consisting of the blossoming of suspected terrorists’ blacklists, represents a further step away from the traditional employment of sanctions as a means of focusing pressure on states. The evolution of targeted sanctions represents a trend towards the personalization and individualization of measures in the field of peace and security, a development mostly visible in the rise of ad-hoc international tribunals to deal with war crimes such as the international criminal tribunal for the former Yugoslavia, the international criminal tribunal for Rwanda, the special tribunal for Cambodia, and the International Criminal Court.

THE TREND TOWARDS FRAGMENTATION IN SANCTIONS IMPLEMENTATION

Targeted sanctions exacerbate the obstacles that obstruct the implementation of sanctions. In addition, UN targeted sanctions pose new challenges to

6 Author’s interview with anonymous policy officer at the German Foreign Office, Berlin, 2007.

7 Jean E. Krasno, “To end the scourge of war: The story of UN peacekeeping,” in Jean E. Krasno, ed., *The United Nations: Confronting the Challenges of a Global Society* (Boulder: Lynne Rienner Publishers, 2004).

the member states that have to implement them. One difficulty of a legal-technical nature stems from the fact that the UN charter does not impose a particular model on member states for the implementation of security council resolutions. Two methods exist: one of them consists of the adoption of a general piece of legislation specifically designed to allow for the transposition of these measures into domestic legal frameworks, which typically takes the form of a so-called “United Nations enabling act.” The other consists of a case-by-case transposition of resolutions into laws, a method that leaves more flexibility to the legislator as to how exactly to implement the measures but has proven to be more time consuming. Prior to targeted sanctions, the problem of the time lag between the release of the security council resolution and the implementing national legislation—which sometimes amounted to as much as two or three years—could easily have been addressed by the adoption of pre-existing enabling legislation. However, with the advent of targeted sanctions, enabling legislation has become insufficient to fully cover the range of measures in the security council’s sanctions toolbox. As Gowlland-Debbas points out, “sanctions...which include specifically targeted measures, in particular financial restrictions, may require particularly tailored legislation directed at financial and banking operations.”⁸ The increasingly technical nature of the legislation required for implementation exacerbates the problem of the time lag. Even the European Union, an organization with considerable experience in the implementation of sanctions, needed no less than six months to pass legislation implementing sanctions against North Korea.⁹

To some extent, the availability of pre-existing legislation permitting the transposition of security council sanctions resolutions can help speed the process in those countries that have them in place. What is probably most striking are cases in which the sanctions are applied by sender states, but via mechanisms other than the enabling legislation. A prominent illustration is the incorporation in the Maastricht treaty of an article specifically designed for the joint implementation of financial sanctions, which was not used by member states in the application of the financial measures in the following

8 Vera Gowlland-Debbas, ed., *National Implementation of United Nations Sanctions: A Comparative Study* (The Hague: Martinus Nijhoff, 2004), 647.

9 Olaf Poeschke, “Maastrichts langer Schatten: Das Auswärtige Handeln der EU—Verschiebungen im institutionellen Gefüge?” *Hamburg Review of Social Sciences* 3, no. 10 (2008): 16.

years.¹⁰ Instead, member states preferred to use national legislation. This is especially surprising in view of the fact that they had been jointly implementing economic embargoes since the early 1980s. Whatever considerations might have led states to refrain from using clauses, this phenomenon bears significant consequences for sanctions efficacy and policy coherence.

Targeted sanctions are particularly complicated to apply for several reasons. The requirement to give effect to targeted sanctions—far more sophisticated measures than the classical interruptions of trade—translates into the need for highly trained personnel with specialized knowledge. This is particularly true for such measures as financial sanctions. In a number of countries, the sheer administrative capacity necessary to implement, monitor, and enforce the measures is insufficient or lacking.

Secondly, and again in contrast to full embargoes, changes in the sanctions packages have become more frequent. In the case of sanctions against states, or individuals targeted in their capacity as state leaders, regimes are often tightened so as to reciprocate any aggravation of the policies that gave rise to the sanctions, or loosened to reward the targets for concessions. The modulation of the sanctions regime requires member states to amend existing regulations or supersede them with new pieces of legislation. As suggested by Charron, even a country like Canada, celebrated for its model sanctions machinery, can be overwhelmed by the workload resulting from frequent modifications to a growing number of sanctions regimes.¹¹

Thirdly, security council resolutions often leave terms undefined. The vagueness or lack of definitions of key concepts such as the scope of the items covered under a particular ban, the determination of the breach giving rise to the sanctions, or the provisions for humanitarian exceptions results from the need to agree on consensual formulations acceptable to all members of the security council. However, this in turn creates a need for the implementing entities to define the terms of the sanctions regime, which obstructs the efficacy of measures in two ways. In the first place, it hinders homogeneity.

¹⁰ Sebastian Sick, *Das Kohärenzgebot bei Wirtschaftssanktionen der EU: Zum Verhältnis zwischen Außen- und Sicherheitspolitik und Handelspolitik* (Nomos: Baden-Baden, 2001), 56.

¹¹ Andrea Charron, “Canada’s domestic implementation of UN sanctions: Keeping pace?” *Canadian Foreign Policy* 14, no. 2 (spring 2008): 15-16.

For example, the security council did not define “luxury goods” when it imposed sanctions against North Korea in 2006 pursuant to resolution 1718. Individual states, therefore, had to decide what commodities constituted a luxury good. For the US, this meant performing an unsophisticated Google search of the expression “luxury good.” The adoption of increasingly complex measures unaccompanied by precise definitions or identifying information is a recipe for increasing fragmentation and inefficiency of implementing legislation. A central consideration that compelled European Community member states to centralize the implementation of UN sanctions, for example, was to enhance the efficacy of the measures through uniform implementation in all member states. This solution was seen as preferable to implementation through national legislation, which option had resulted in the adoption of “measures of differing content and at different times.”¹²

A further difficulty is that this situation further delays the process of transposing the resolution into domestic legislation, thus aggravating a problem that has characterized the implementation of sanctions all along. The employment of blacklist-based measures presents specific problems. Sometimes the origin of the delay lies with the security council, which might not release a list to accompany the imposing resolution. When it imposed a travel ban and asset freeze on certain targets in the Democratic Republic of the Congo, for instance, the security council did not provide a list for a year. But even when blacklists are attached to the resolution, the need to transpose all of the decisions reflected in the security council resolutions into domestic law gives rise to considerable delays.

From a legal point of view, the trend towards fragmentation appears extremely difficult to reverse. While security council resolution 1373 imposes on states the obligation to criminalize the conduct of private individuals and entities, it leaves the identification of targeted persons and entities undefined. Measures outlined in resolution 1373 are not sanctions but are sanctions-like. Gowlland-Debbas laments that “this introduces a decentralisation of sanctions decision-making without requiring adequate human rights guarantees to be exercised by the implementing member states.”¹³ Some authors have expressed uneasiness about the coexistence of autonomous

12 Panos Koutrakos, *Trade, Foreign Policy and Defence in EU Constitutional Law: The Legal Regulation of Sanctions, Exports of Dual-use Goods and Armaments* (Oxford: Hart Publishing, 2001), 58.

13 Gowlland-Debbas, *National Implementation of United Nations Sanctions*, 647.

sanctions imposed by certain states in parallel to security council measures because of potential legal difficulties, not least as far as judicial review is concerned.¹⁴ However, it appears that in view of the configuration of the system in place, divergences in implementation are unavoidable. Indeed, Gowlland-Debbas believes that “consistency of sanctions implementation across national boundaries is...impossible to achieve.”¹⁵

On the other hand, the absence or inadequacy of administrative capacities and expertise at the state level is partly alleviated by post-September 11th capacity-building.¹⁶ Notably, the imposition of obligations on UN members to enact legislation criminalizing activities associated with terrorism and proliferation of weapons of mass destruction (WMD) has provided powerful momentum. The security council created two working committees, one in 2001 pursuant to resolution 1373, which commits states to criminalize acts financing international terrorism and to freeze and seize funds used for terrorism, and one in 2004 pursuant to resolution 1540, which prescribes the adoption by all states of legislation criminalizing activities related to the proliferation of WMD and the establishment of domestic controls to prevent the trafficking of sensitive materials. This development has been felicitously accompanied by the willingness of European countries to fund the administrative and enforcement capacity-building of states that required it.

THE HUMAN RIGHTS CHALLENGE: BLACKLISTING AND DUE PROCESS

One of the most notable features of the security council’s practice in the wake of the Cold War is the growing degree of encroachment of its enforcement action into the domestic jurisdiction of member states. The field of targeted sanctions, which now requires states to criminalize certain actions, is part of this development. In recent years, some legal challenges emerged from the adoption of implementing legislation in federated entities such as the US and Belgium. However, these cases were unrelated to the targeted nature of

14 David Bethlehem, “The European Union,” in Gowlland-Debbas, *National Implementation*, 162.

15 Gowlland-Debbas, *National Implementation*, 649.

16 Curtis Ward, “The counter-terrorism committee: Its relevance for implementing targeted sanctions,” in Wallenstein and Staibano, *International Sanctions*, 167-180.

the sanctions instruments, and the courts invariably ruled in favour of the federal level.¹⁷

As we shall see, the most serious challenge emerged from the incompatibility between the blacklists and general standards of due process guarantees.¹⁸ The following discussion provides a brief sketch of the consequences relevant to the national implementation of security council sanctions regimes.

Prior to the September 11th attacks, but particularly afterwards, the assets freeze and the travel ban list that the security council created were extended to a list of individuals identified as financial supporters of al Qaeda. The designations, overwhelmingly proposed by the US, often on the basis of classified intelligence, were accepted by the other members of the security council in a climate of solidarity and determination to combat the terrorist threat. The one check and balance in place has been that consensus must be reached for a name to be added or removed from the list. The same procedure applies to all subsidiary bodies of the security council, including sanctions committees.

International lawyers immediately identified as problematic the incompatibility between duties emanating from security council resolutions and constitutionally protected fundamental rights and freedoms.¹⁹ Indeed, in 2002, three Swedish citizens protested their listing under resolution 1267. Given that they were not able to request their delisting, the Swedish government, exercising diplomatic protection, petitioned the security council and filed a request to the 1267 committee, which ultimately proved successful. A number of lawsuits over designations were filed in several countries, with courts in Pakistan and Turkey ruling in favour of the

17 Bruno Coppieters, "The international security involvement of federated states: Comparing Massachusetts, Illinois and Flanders," *International Spectator* 42, no. 2 (June 2007): 221-35.

18 See especially Eric Rosand, "The security council's efforts to monitor the implementation of al Qaeda/Taliban sanctions," *American Journal of International Law* 98, no. 4 (October 1994): 745-63.

19 Iain Cameron, "Protecting legal rights: On the insecurity of targeted sanctions," in Wallenstein and Staibano, *International Sanctions*, 181-206; Gowlland-Debbas, *National Implementation*, 2004.

plaintiffs. As of October 2009, over 30 legal challenges to the council's 1267 list have been pursued worldwide.²⁰

Undoubtedly, the legal challenge that has received the most attention is the *Kadi* judgment of the European court of justice of September 2008, which reversed an earlier ruling of the court of first instance in 2005. The court of first instance received a complaint from Yassin Abdullah Kadi, the Al Barakaat International Foundation and Ahmed Ali Yusuf, all listed on the 1267 consolidated list adopted by the EU in compliance with resolution 1269. They requested that the court annul European Community regulation 881, of 27 May 2002, which had brought them within the scope of the sanctions. The applicants maintained that the regulation infringed their fundamental rights, in particular their right to property, the right to a fair hearing, and the right to an effective judicial remedy, as guaranteed by the European convention for the protection of human rights and fundamental freedoms. After the court of first instance dismissed their request, the judgements were appealed. In what has been hailed as a landmark decision, the European court of justice reversed the judgements, annulling the implementing regulation.²¹

In order to justify its dismissal of the claim, the original ruling in 2005 by the court of first instance held that the obligations arising from the UN charter prevail over every other obligation of domestic law or international treaty law—in accordance with article 103 of the UN charter, which stipulates that “in the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail.” In other words, the security council's requirement to freeze the assets of the claimants had to supersede human rights concerns. The court only accepted jurisdiction in the event that the regulation would violate peremptory norms of international law, or rules of *jus cogens*. Having established that the freezing of funds mandated by the EC regulation was

20 Monika Heupel, “Multilateral sanctions against terrorism suspects and the violation of due process standards,” *International Affairs* 85, no. 2 (2009): 307-21, especially 311. Thomas Biersteker and Suan Eckert, “Addressing challenges to targeted sanctions: An update of the Watson report,” Watson Institute for International Studies, Providence, 2009, 7.

21 Johannes Reich, “Due process and sanctions targeted against individuals pursuant to UN resolution 1267 (1999),” *Yale Journal of International Law* 33, no. 2 (2008): 505.

not relevant to peremptory law, the court declined jurisdiction and ruled against these claims.²²

The argument that measures taken in implementation of security council resolutions should enjoy immunity from judicial review was contested by Advocate General Poiares Maduro in his opinion of January 2008.²³ He argued that the court should not confine its scrutiny to the violation of peremptory law, but should apply its normal judicial standards to the protection of fundamental human rights. In accordance with this argument, the European court of justice ruled that the community judiciary must ensure the review of the lawfulness of all community acts in the light of protected fundamental rights, including the review of community measures designed to give effect to council resolutions. On this basis, the court found a violation of the right to be heard and the right to effective judicial review. It confirmed previous jurisprudence, affirming that the principle of effective judicial protection requires communicating the grounds for being included on the blacklist. Thus, the lack of communication of the evidence against the appellants violated the right to be heard. As this prevented the court from reviewing the lawfulness of the listing, it was considered a breach of the right to effective legal remedy.

Neither court accepted that international law requires that the UN charter take precedence over EC law. Specifically, the European court of justice stated that “a constitutional guarantee stemming from the EC Treaty as an autonomous legal system” cannot “be prejudiced by an international agreement.”²⁴ Although the ruling resolves a situation that had been widely resented as unsatisfactory for protection of fundamental rights,²⁵ the court of justice has been criticized for undermining the binding force of international obligations, as the ruling suggests that “within the Community they may only be implemented and enforced if properly authorised by the

22 Andrea Gattini “Case law: Joint cases C-402/05 P and 415/05 P, Yassin Abdullah Kadi, Al Barakaat International Foundation v. Council and Commission,” *Common Market Law Review* 46, no. 1 (2009): 216. Yusuf withdrew his appeal after he was removed from the UN list in August 2006.

23 For a summary, see press release no. 2/08, “Advocate general’s opinion in case C-402/05, Yassin Abdullah Kadi v Council of the European Union and Commission of the European Communities,” CJE/08/2,16 January 2008, 2.

24 Judgment in *Kadi v Council and Commission*, paragraph 316, <http://curia.europa.eu>.

25 Iain Cameron, “Protecting legal rights,” 508.

Community legal system,” while it falls short of explaining how this notion can be reconciled with its concomitant claim that the “Community must respect international law in the exercise of its powers.”²⁶ The ruling has thus been criticized for performing a judicial review of the security council-mandated measure: by overturning the most important findings of the court of first instance, the court of justice established “a fully-fledged, yet indirect fundamental rights review vis-à-vis Security Council resolutions.”

However, some important considerations are in place in connection with these criticisms. Firstly, the European court of justice made a distinction between the review of the legality of an international agreement and the measures intended to give effect to the international agreement. The judgement argues that the annulment of a community measure intended to give effect to an international law measure does not entail any challenge to the primacy of that measure in the international legal order: “it is not for the Community judicature...to review the lawfulness of such a resolution adopted by an international body.”²⁷ Instead, the court maintains that council resolutions are to be given effect in accordance with the procedure applicable in the domestic legal order of each member of the United Nations. Hence, it reaffirms that it is the judicial review of the internal lawfulness of the domestic act implementing the council resolution that falls within its jurisdiction. This reading is consistent with the jurisprudence of the European court of human rights, which held in its judgement in *Bosphorus* that when a contracting party has taken steps to implement a council resolution in its legal order, such measures are attributable to that party and are therefore amenable to review.²⁸ By invalidating the ruling, the court of justice seized “a golden opportunity to bring a step further the proclaimed ‘constitutionalisation’ and autonomy of the Community legal system.”²⁹ This idea also corresponds to the understanding exhibited by the security council, which mandated in resolution 1624 that “states must ensure that

26 Stefan Griller, “International law, human rights, and the union’s autonomous legal order: Notes on the European court of justice’s decision on Kadi,” *European Constitutional Law Review* 4, no. 3 (2008): 528-53, especially 537-39.

27 Judgement, paragraphs 287-88.

28 Anthony Dawes and Bjorn Kunoy, “Plate tectonics in Luxembourg: The ménage à trois between EC law, international law and the European convention on human rights following the UN sanctions cases,” *Common Market Law Review* 46, no. 1 (2009): 71.

29 Gattini, “Case law,” 224.

any measures taken to combat terrorism (pursuant to resolution 1373) comply with all their obligations under international law, and should adopt such measures in accordance with international law, in particular human rights.”³⁰

A second consideration relates to the court of justice’s implicit concession that the reexamination procedure before the 1267 sanctions committee could potentially benefit from a limited form of immunity from judicial review within the European Community legal order if it offered adequate protection for fundamental rights.³¹ Mirroring the “Solange” jurisprudence of the German federal court—entailing a conditional renunciation of the review of fundamental rights *as long as* they are protected by the European court of justice—Maduro affirmed the court’s jurisdiction “only to the extent and so long as the UN did not organise a judicial or quasi-judicial system of review of the decisions of the Sanctions Committee.”³²

In fact, the conduct of the court of justice in this case can be seen to be aiming at the preservation of its own jurisdiction, established for itself as European integration progressed. The principal motivation behind the court’s embrace of fundamental rights as part of the community’s legal order in the early days of European integration was the preservation of the primacy of EC law over the domestic laws of the member states.³³ In this light, the court of justice’s reversal of the original ruling can be regarded as a decision taken in the spirit of “self-preservation.”

TOWARDS FURTHER FRAGMENTATION?

What are the implications for the implementation of UN sanctions at the domestic level? The most immediate effect of the legal challenges, and particularly of the rulings in favour of the plaintiffs, has been a loss of legitimacy in the eyes of UN member states, and broadly speaking the general public. This has translated into a growing reticence by some governments to name individuals to the list. According to a UN report, more than 50 member states have expressed reservations about the lack of due process and

30 Security council resolution 1624, paragraph 4; Dawes and Kunoy, “Plate tectonics,” 91.

31 Dawes and Kunoy, “Plate tectonics,” 81-82.

32 Gattini, “Case law,” 234.

33 Kunoy and Dawes, “Plate tectonics,” 73,102.

absence of transparency in listing and delisting procedures.³⁴ Aware of the threat to the legitimacy of its measures and the decline in support for their effective implementation that this might entail, the council has gradually adopted a number of improvements to its listing and delisting procedures. These were later complemented by the formulation of guidelines governing the committee's working methods, the establishment of a requirement to notify individuals of their listing, and the creation of a focal point in the UN secretariat—an officer in charge of receiving petitions for delisting. However, despite these endeavours, current listing and delisting procedures are still considered by human rights lawyers largely insufficient to meet due process standards.³⁵ The UN special rapporteur, Martin Scheinin, has defined the minimum requirements to ensure a fair hearing as entailing:

the right of an individual to be informed of the measures taken and to know the case against him...the right to be heard...by the relevant decision-making body; the right to effective review by a competent and independent review mechanism; the right to counsel with respect to all proceedings; and the right to an effective remedy.³⁶

Yet the most evident consequence of the European court of justice ruling is the dissolution of the idea initially espoused by the court of first instance that courts have only limited jurisdiction to review the validity of measures when these implement UN law obligations due to reluctance to “indirectly review...the lawfulness of the underlying United Nations Security Council Resolution.”³⁷ Now that it has been clearly established, at least at the European level, that courts are to have full jurisdiction, national legislators can be expected to exercise extreme caution in ensuring that fundamental rights are protected under their respective legal systems when

34 “Letter dated 1 December 2005 from the chairman of the security council committee established pursuant to resolution 1267 (1999) concerning al-Qaida and the Taliban and associated individuals and entities addressed to the president of the security council,” UN security council, S/2005/761, 6 December 2005.

35 Heupel, “Multilateral sanctions,” 313.

36 Martin Scheinin, “The promotion and protection of human rights and fundamental freedoms while countering terrorism,” United Nations, document A/63/223, 22 October 2008, United Nations, 2008, 6-7.

37 Dawes and Kunoy, “Plate tectonics,” 90.

enacting sanctions legislation. This is bound to have a noticeable impact on the transposition of sanctions measures, both in terms of timing and the scope of the implementing legislation. Conscious of the delicate nature of the measures, legislators are likely to take more time to draft implementing legislation more carefully. When unconvinced by the supporting evidence for blacklisting certain individuals, they might seek additional information, which might be complicated to obtain or may not be disclosed due to its confidential nature. Under these circumstances, one can easily picture a situation in which blacklists are implemented “selectively” by choosing to impose measures only on certain individuals whose connection to terrorism activities is unequivocal, rather than on the whole list. This state of affairs is likely to exacerbate the problems already identified above: that of the time lag between the adoption of the blacklist by the security council and the growing heterogeneity of implementing instruments across member states.

As the protection of fundamental rights varies from country to country, the implementing legislation of council resolutions might differ too. As Gattini has aptly put it,

on the one hand, one cannot but welcome the unbending commitment of the European Court of Justice to the respect of fundamental human rights, but on the other hand the relatively high price, in terms of coherence and unity of the international legal system...is worrying.³⁸

Still, much will depend on the course that the council eventually chooses to secure fair procedures. A straightforward option would consist in taking up the challenge of profoundly revising its procedures. Regretting that the latest adjustments introduced by security council resolution 1822 are still insufficient for meeting the fairly demanding standards spelled out in the *Kadi* judgement, Scheinin called for the establishment of a mechanism of independent review at the UN level in the form of a quasi-judicial review body composed of independent security-classified experts, suggesting that this “would be likely to be recognized by national courts, the EU courts and regional human rights courts.”³⁹ Broadly speaking, two alternatives are contemplated. One of them would maintain the current system unaltered,

38 Gattini, “Case law,” 244.

39 Scheinin, “Promotion and protection of human rights,” 6-7.

whereby blacklists are agreed to at the level of the security council and review is provided at the national level. While this option would most likely lead to increased litigation, judicial review at the national level could be considerably facilitated by provision of the grounds for listing individuals and entities “so that the person or entity may be informed of those reasons and will be able to contest the implementation of the listing before national courts and the EU court.” A second possibility would involve abolishing the 1267 committee and leaving responsibility for the drafting of listings to individual governments, similar to the 1373 requirement. But would this result in any blacklisting, especially by other states? Neither alternative seems a solution to further fragmentation. This thus leaves the creation of a quasi-judicial review body along the lines sketched by Scheinin as the only option capable of stemming growing heterogeneity in the national implementation of UN sanctions.

CONCLUSION

The preceding analysis reveals conflicting trends in the field of national implementation of UN sanctions. A number of obstacles make the internationally homogeneous and speedy implementation of sanctions appear to be an unattainable goal. Part of the problem is connected to the domestic regulations governing the transposition of international obligations into national legislation. The fragmentation of the national implementation of resolutions is exacerbated by the ambiguity displayed in the language of security council resolutions, increasingly intrusive in the domestic competences of member states, but often too vague to provide effective guidance for their implementation.

Recent developments in due process have proved encouraging with regard to the protection of individual rights, although they are hardly promising in terms of their potential to smooth sanctions implementation. This development must not be viewed as detrimental to efficacy. The *Kadi* ruling might well function as a wake-up call, encouraging the security council to revise its delisting procedures substantially. While earlier recommendations in this direction were ignored and the council has been slow in responding to pressure, the loss of legitimacy and the ensuing weakening of state obligations to comply with council mandates are likely to compel it to take the recommendations more seriously. The benefits that could be gained from improving due process do not lie principally, or immediately, in the optimization of the efficacy of the measures. Yet an increase in security council legitimacy, as well as the enhanced protection

of fundamental rights, will eventually, albeit indirectly, contribute to its effectiveness. Conversely, the most preoccupying feature of current council practice is the circumvention of established standards in due process in the absence of any apparent gain to the efficacy of the measures.