TARGETED SANCTIONS, JUDICIAL ANTAGONISM OR LEGAL DIALOGUE

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Abstract

This piece begins by illustrating the current status of United Nations targeted sanctions regimes, from the formal point of view. It then proceeds to explain the mechanisms of listing and de-listing at the UN level, as well as the means by which UN Member States, and the European Union, implement these sanctions in their national (regional) legal orders, and why the chosen means of implementation create potential situations where the states (the EU) might find themselves in breach of differing international obligations. In the final part, the article shows how the major international European courts (the Court of Justice of the European Union and the European Court of Human Rights) have dealt with this potential conflict, and posits that their approaches are very different and will have different consequences: i.e. whereas the CJEU has taken a militant approach, which threatens to damage the unity of international law, the ECtHR has taken an unitary approach, which strengthens the international system, while also promoting human rights over sanctions.

Keywords: *UN, targeted sanctions, CJEU, ECtHR, Article 103, international obligations, human rights, 1267 Committee*

Introduction

1 The international practice of targeted sanctions is a fairly recent development of the United Nations Security Council (UNSC) practice. The thinking behind such an approach is that comprehensive economic sanctions have an indiscriminate impact on a country and can entail severe negative humanitarian consequences for the civilian population and third countries. A particular black spot on the record of general, traditional, sanctions regime, was the Iraq case, where the same persons who were supposed to suffer from the effects of sanctions (i.e. the Baath regime) were in fact profiting from the Oil for Food Program.

2 In order to minimize the general negative impact of country-directed sanctions, the UNSC developed "targeted sanctions" aimed directly at the elite and at specific individuals in problematic countries. The hope is that, by limiting these individuals' access to economic resources, travel and generally impeding their activities, they will be pressured into changing their negative behavior, or otherwise lose their power and influence in their respective countries. As a corollary, sanctions against legal persons and associations of persons were also imposed, as these are often useful vehicles for the transfer and concealment of economic resources.

3 Targeted sanctions can be imposed at the UNSC level, or, in the case of the European Union (EU), also at the European level. EU targeted sanctions include all the UNSC ones, but sometimes go beyond those, both in terms of targets and the restrictions that they impose. Generally, UNSC sanctions involve 1) asset freezes; 2) travel restrictions; 3) restrictions on trade in certain goods; 4) restrictions in economic contacts with the targeted individuals and organizations.

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4 The list of targets, as it stands today, can be broadly classified in A) individuals and organizations making up the governing elite in "problematic" countries (dictatorial regimes, regimes which promote international instability, regimes which flaunt international norms) (10 regimes) and B) terrorists, their supporters and financiers (3 regimes). The current sanctions regimes in place are enumerated in Table 1[1].

Table 1. Situation of current sanctions regimes instituted by the UNSC

No.	UNSC Resolution(s)	Scope of application
1	751 (1992) 1907 (2009)	Eritrea and Somalia
2	1267 (1999) 1989 (2011)	Any individual or entity associated with Al-Qaida
3	1518 (2003)	Senior officials of the former Iraqi regime and immediate family members, including entities owned or controlled by them or by persons acting on their behalf
4	1521 (2003)	Liberia
5	1533 (2004)	Democratic Republic of the Congo
6	1572 (2004)	Côte d'Ivoire
7	1591 (2005)	The Sudan
8	1636 (2005)	Individuals designated by the international independent investigation Commission or the Government of Lebanon as suspected of involvement in the 14 February 2005 terrorist bombing in Beirut, Lebanon that killed former Lebanese Prime Minister Rafiq Hariri and 22 others[2]
9	1718 (2006)	Democratic People's Republic of Korea (DPRK)
10	1737 (2006)	Islamic Republic of Iran (in particular its nuclear program)
11	1970 (2011)	Libya (in particular the leaders of the Qaddafi regime)
12	1988 (2011)	Any individual, group, undertaking and entity designated as or associated with the Taliban in constituting a threat to the peace, stability and security of Afghanistan
13	2048 (2012)	Guinea-Bissau

5 Each of these UNSC Resolutions provides that a specialized Committee, which is a subsidiary organ of the UNSC, designates individuals and entities to be included on lists of targeted sanctions. Some of the Resolutions provide exceptions (humanitarian or otherwise) from the general restrictions imposed on these individuals, others do not. The decision to list an individual or entity is a political one, taken according to the normal voting process of the

[1] For a „bridge" between the situation at the end of WWI when individuals were indicated in peace treaties as being indicted for war crimes trials, see the new and informative work by Kevin Jon Heller, Gerry Simpson (Eds.), *The Hidden Histories of War Crimes Trials*, OUP, Oxford, 2013, in particular Chapters 1 and 3.
[2] At present, no such persons have been designated.

UNSC. There is no previous communication with the potential "targets" and there is no direct means of judicial review of a listing, once it has been decided.

6 At their introduction, targeted sanctions were hailed for their important advantages, such as 1) reduction of hardship and distress towards the general population of a country; 2) ability to be tailored to specific individuals, places, types of resources and types of travel; 3) immediacy of the UNSC's decisions, which sidesteps normal judicial procedures, and can list a person or entity based on any kind of available information; 4) their "temporary and preventive" character, which leaves place for legal proceedings to take place in the normal criminal justice forums.

7 Over time, a number of counter-arguments have been advanced, chief among which are 1) the lack of any judicial oversight of the listing and de-listing procedures; 2) the closed nature of the listing and de-listing debates, and the occasional use of confidential intelligence, leaving the targets with no means to make prove their innocence; 3) negative effects towards innocent third parties (such as co-owners of frozen assets); 4) the lack of humanitarian and other exceptions to the strict sanctions regimes.

8 As the UNSC is immune from the jurisdiction of the International Court of Justice, as well as that of regional or national courts, and there are no judicial mechanisms to review the legality of the sanctions regimes, there have been few options for the targeted persons and entities to challenge their listing in a meaningful and legally binding way. However, due to the fact that the sanctions regimes are to be implemented by the UN Members States, the targeted persons and individuals have been able to challenge the implementing measures in national and regional courts.

9 Europe, and the EU, have arguably the most advanced regional system of human rights protection, which is guaranteed mainly by the European Court of Human Rights (ECtHR) and, secondarily, by the European Court of Justice (ECJ). It is only natural that the most resounding legal sagas concerning the legality of sanctions and their implementing measures have been played before these two international, regional, courts. As expected, the judicial solutions have not been able to please everyone, and have generally given priority to the protection of human rights over the UNSC Resolutions. However, it is arguable that these Courts have at the same time attempted to preserve the unity and harmony of the international normative system, by trying to find a "third way" which would reconcile the obligations of UN Member States under UNSC Resolutions with their obligations under human rights treaties.

10 This article attempts to provide an overview of (I) the functioning of UNSC sanctions regimes and their national implementation, including (IA) the procedure for listing and actual restrictions being imposed on the targeted individuals and entities and (IB) the procedure for de-listing and other possible challenges to listing; following which it will discuss the legal basis of the UNSC sanctions regimes (II), including the relationship between key UN Charter articles and general international law (IIA), finishing with the competing approaches that the regional courts have taken when assessing the legality of sanctions and their implementing measures (IIB).

I Organization of UNSC Sanctions Regimes

IA Listing and Restrictions

11 Each of the 13 sanctions regimes provides for a separate listing procedure. However, they are organized on broadly similar lines. Thus, there is a Security Council Committee pursuant to each of the relevant Resolutions, which has among its attributions the

designation of individuals and entities as targets of the several sanctions[3]. The Committees are invariably composed of representatives of the same Member States as those present in the UNSC itself, and change accordingly. These Committees are subsidiary organs of the UNSC and have individual Secretaries coordinated by an Officer-in-Charge. The voting procedure in the Committees is the same as in the UNSC, including the power of veto of the five Permanent Members[4].

12 The types of sanctions taken against individuals and entities are summarized in Table 2.

Table 2. Types of sanctions taken against individuals and entities

No.	Type of Sanctions	Description
1	Arms Embargo	Targeted ban on arms transfers to individuals and entities (not to be confused with the territorial arms embargo usually imposed concurrently on the affected country). This usually includes arms-related materiel of all types, spare parts, technical advice, assistance or training related to military activities
2	Travel Ban	Prevention of entry into or transit through the territories of Member States of the designated individuals
3	Assets Freeze	Immediate freezing of funds, other financial assets and economic resources owned or controlled, directly or indirectly, by the designated individuals and entities
4	Ban on the export of luxury goods	A territorial ban on the DPRK which, due to the particular situation in the country, acts as a targeted ban – only the regime has access to luxury goods
5	Ban on the provision of financial services or the transfer of financial or other assets	A ban imposed against the financial institutions of the DPRK which are presumed to contribute to prohibited programs or activities, or to the evasion of sanctions

Additionally, there are country-specific measures such as a Charcoal Ban for Somalia, a nuclear-related spare parts ban for Iran, or a Diamonds Ban for the Democratic Republic of Congo (DRC), which aim to prevent the value of these resources from accruing, through export or import, to the perpetrators of violence or elites of the local regimes. Out of these, the most immediately damaging and problematic bans are 1) Travel Bans and 2) Assets Freezes. It is these types of sanctions which concern the present article, since they directly concern individuals and private entities and can potentially create situations of human rights violations.

13 The voting procedure takes place individually, for each person or entity designated, as well as for every type of sanction. Thus, there can be individuals subjected only to travel bans, while others are subjected both to travel bans and asset freezes within the same sanctions regime. Some of the UNSC Resolutions have instituted criteria for listing. A more

[3] The only exception is Resolution 1636 (2005) concerning Lebanon, where the Committee is supposed to „register" the persons indicated by the international investigation Commission appointed in the death of Rafiq Hariri. No such person has been „registered" yet.

[4] See for the mechanics of listing and de-listing under Resolution 1267 (1999) Dire Tladi, Gillian Taylor, *On the Al Qaida / Taliban Sanctions Regime: Due Process and Sunsetting*, 10 Chinese JIL 771 et seq. (2011).

developed example is that concerning the DRC, which provides that there shall be designated by the Sanctions Committee

"1) persons and entities acting in violation of the arms embargo;
2) political and military leaders of foreign armed groups operating in the DRC, or Congolese militias receiving support from abroad, who impede the process of disarmament, demobilization, repatriation, resettlement, and reintegration;
3) political and military leaders recruiting or using child-soldiers, and individuals violating international law involving the targeting of children;
4) individuals operating in the DRC and committing serious violations of international law involving the targeting of children or women in situations of armed conflict, including killing and maiming, sexual violence, abduction and forced displacement;
5) individuals obstructing the access to or the distribution of humanitarian assistance in the eastern part of the DRC;
6) individuals or entities supporting the illegal armed Groups in the eastern part of the DRC through the illicit trade of natural resources, including as a consequence of not having exercised due diligence consistent with the steps set out in Resolution 1952 (2010)."

However, it should be noted that the majority of UNSC Sactions Resolutions do not provide for such criteria, nor have the relevant Committees produced such criteria themselves.

14 Quite apart from the general criteria for listing an individual or an entity are the actual reasons given for the listing. Here, one must take into account the UNSC's view that targeted sanctions are a temporary and preventive measure, and therefore, they are not to be subjected to the same high standards of proof as normal criminal judicial proceedings. Therefore, the UNSC has in practice provided very little information on why a particular person or entity has been listed. The sources of such information vary widely: from BBC reports to confidential intelligence, everything is included and summed up in a few phrases. Sometimes, the reasons being given are very general to the point of being no reasons at all. A few examples are illustrated in Table 3.

Table 3. Different examples of reasons for listing

Extensive, reasoned listing	„Hassan Dahir Aweys has acted and continues to act as a senior political and ideological leader of a variety of armed opposition groups responsible for repeated violations of the general and complete arms embargo and / or acts that threaten the Djibouti peace agreement, the Transitional Federal Government (TFG) and the African Union Mission in Somalia (AMISOM) forces. Between June 2006 and September 2007, AWEYSs served as chairman of the central committee of the Islamic Courts Union; in July 2008 he declared himself chairman of the Alliance for the Re-Liberation of Somalia-Asmara wing; and in May 2009 he was named chairman of the Hisbul Islam, an alliance of groups opposed to the TFG. In each of these positions, AWEYS's statements and actions have demonstrated an unequivocal and sustained intention to dismantle the TFG and expel AMISOM by force from Somalia[5]."

[5] List of individuals and entities subject to the measures imposed by paragraphs 1, 3 and 7 of SC Resolution 1844 (2008), p. 5. Available at http://www.un.org/sc/committees/751/pdf/1844_cons_list.pdf

Short, reasoned listing	"Ibrahim. Hassan, Tali, Al-Asiri; Operative and principal bomb maker of Al-Qaida in the Arabian Peninsula (AQAP). Believed to be hiding in Yemen as at Mar. 2011. Wanted by Saudi Arabia. INTERPOL Orange Notice has been issued for him. Also associated with Nasir 'abd-al-Karim 'Abdullah Al-Wahishi, Said Ali al-Shihri, Qasim Yahya Mahdi al-Rimi, and Anwar Nasser Abdulla Al-Aulaqi[6]."
Short, basic reasoning	"Said Jan, 'Abd Al-Salam; In approximately 2005, he ran a "basic training" camp for Al-Qaida in Pakistan[7]."

15 Usually, only one or a few of the UNSC Member States have the particular details regarding a specific individual, and they only share them (if at all) within the closed confines of the specialized Committee. These details do not make it onto the public lists. Member States invoke the potential negative effects that more details would have on their sources and operatives on the ground. What is clear, however, is that the standard of reasoning for listing is very much lower than that for a judicial criminal action. Furthermore, the allegations contained in the lists do not have to be materially proven before the Committees, since the listing procedure is political, rather than judicial.

16 The UNSC Resolutions are addressed to Member States. The typical language for a Travel Ban reads as follows:

"1. *Decides* that all Member States shall take the necessary measures to prevent the entry into or transit through their territories of individuals designated by the Committee pursuant to paragraph 8 below, provided that nothing in this paragraph shall oblige a State to refuse its own nationals entry into its territory[8]."

The typical language for an Asset Freeze reads as follows:

"3. *Decides* that all Member States shall freeze without delay the funds, other financial assets and economic resources which are on their territories, which are owned or controlled, directly or indirectly, by the individuals or entities designated by the Committee pursuant to paragraph 8 below, or by individuals or entities acting on their behalf or at their direction, or by entities owned or controlled by them, as designated by the Committee, and decides further that all Member States shall ensure that any funds, financial assets or economic resources are prevented from being made available by their nationals or by any individuals or entities within their territories, to or for the benefit of such individuals or entities[9];"

While the Travel Ban obligations are naturally implemented by the Member States through their organs, border protection and regulation being a traditional attribution of state institutions, the Asset Freeze obligations cannot be directly acted upon by the Member States, in the context of a market economy where private property is the main form of economic ownership of assets. In other words, the State needs the private sector to actually freeze assets and prevent their use by the designated individuals and entities. To this end, the State has two options: 1) make the UNSC Resolutions directly applicable within its legal system, thus obliging the relevant private actors to apply them directly; or 2) implement the UNSC Resolutions through national legal rules. In the context of the EU, where Member States have pooled the decision-making process concerning targeted sanctions at the European level

[6] The List established and maintained by the 1267 Committee with respect to individuals, groups, undertakings and other entities associated with Al-Qaida. Available at: http://www.un.org/sc/committees/1267/AQList.htm
[7] Idem.
[8] UNSC Resolution 1844 (2008) concerning Somalia, para. 1. Available at: http://www.un.org/ga/search/view_doc.asp?symbol=S/RES/1844(2008)
[9] Ibidem, para. 3.

(specifically, within the Council of the EU), without, however, renouncing their sovereign rights on the matter, the relevant implementation measures are those taken at EU level. The private sector, being deemed to know national law, is responsible for its application. The second option is taken by most states. Furthermore, several states, including Romania, have established specialized institutions to deal with the imposition of Asset Freezes and its practicalities.

17 Some UNSC Resolutions provide for exemptions from the restrictions. Regarding the restrictions against individuals, the exemptions generally have a humanitarian nature. The typical language for a Travel Ban exemption reads as follows:

"2. *Decides* that the measures imposed by paragraph 1 above shall not apply:

(a) where the Committee determines on a case-by-case basis that such travel is justified on the grounds of humanitarian need, including religious obligation; or

(b) where the Committee determines on a case-by-case basis that an exemption would otherwise further the objectives of peace and national reconciliation in Somalia and stability in the region[10];"

Typical language for an Asset Freeze exemption reads as follows:

"4. *Decides* that the measures imposed by paragraph 3 above do not apply to funds, other financial assets or economic resources that have been determined by relevant Member States:

(a) to be necessary for basic expenses, including payment for foodstuffs, rent or mortgage, medicines and medical treatment, taxes, insurance premiums, and public utility charges or exclusively for payment of reasonable professional fees and reimbursement of incurred expenses associated with the provision of legal services, or fees or service charges, in accordance with national laws, for routine holding or maintenance of frozen funds, other financial assets and economic resources, after notification by the relevant State to the Committee of the intention to authorize, where appropriate, access to such funds, other financial assets or economic resources, and in the absence of a negative decision by the Committee within three working days of such notification;

(b) to be necessary for extraordinary expenses, provided that such determination has been notified by the relevant State or Member States to the Committee and has been approved by the Committee; or

(c) to be the subject of a judicial, administrative or arbitral lien or judgement, in which case the funds, other financial assets and economic resources may be used to satisfy that lien or judgement provided that the lien or judgement was entered into prior to the date of the present resolution, is not for the benefit of a person or entity designated pursuant to paragraph 3 above, and has been notified by the relevant State or Member States to the Committee;

5.*Decides* that Member States may permit the addition to the accounts frozen pursuant to the provisions of paragraph 3 above of interests or other earnings due on those accounts or payments due under contracts, agreements or obligations that arose prior to the date on which those accounts became subject to the provisions of this resolution, provided that any such interest, other earnings and payments continue to be subject to these provisions and are frozen[11];"

18 A few important circumstances may be identified from the texts above. Firstly, the UNSC, through the Committees, has monopolized the decision-making process regarding the Asset Freeze and Travel Bans. In practice, with the exception of basic expenses and legal services, any other expense of a targeted individual or entity must be approved in advance by the Committee. In other words, each individual must apply, through the relevant State, to an obscure international body who decides, politically and without recourse, on whether he or

[10] Ibidem, para. 2.
[11] Ibidem, para. 4-5.

she may incur a certain expense or make a certain trip. Secondly, regarding travel, practically the targeted individuals are "frozen" on the spot they found themselves on the date of their listing, since no country is allowed to let them "enter into or transit through" its territory, and this presumably includes transit through international airports. Even if the country where they are found is not their country of citizenship, unless the two are contiguous, it is hard to see how such a person would be able to return to their country of citizenship. Thirdly, these sanctions have no automatic time limitation, even though several commentators have proposed "sunset clauses", i.e. the automatic lapse of sanctions after a period of time if they are not renewed. All these circumstances transform the sanctions into a harsh form of punishment taken without a judicial process.

IB De-listing and Challenges to Listing

19 In principle, a listing should be a temporary and preventive measure, designed to impede the escalation of conflict, or the actions of a particularly important person, and thus determine this person to stop perpetrating acts against international peace and security. Therefore, the UNSC sanctions Resolutions provide for means of de-listing individuals designated by the specialized Committees. The typical language for such a provision is:

"9. *Decides* that the measures outlined in paragraphs 1, 3 and 7 above cease to apply in respect of such individuals or entities if, and at such time as the Committee removes them from the list of designated individuals and entities[12];"

Until 2006, there was no direct means for an individual or entity to apply for de-listing to the relevant Specialized Committee. They had to apply to the individual state where they were found, or to their state of citizenship, and, after a review process, that state would forward the request to the Committee for consideration. This procedure was obviously not expedient, and it was also finally subject to the same constraints as any other decision of the UNSC – its peculiar rules of voting, which meant that even one negative vote by a Permanent Member would impede any de-listing.

20 In 2006, the UNSC established through Resolution 1730 (2006) a Focal Point for De-listing, "as part of its commitment to ensure that fair and clear procedures exist for placing individuals and entities on sanctions lists and for removing them, as well as for granting humanitarian exemptions[13]." Currently, a targeted person may ask for de-listing through either their State of Citizenship or State of Residence, or through the Focal Point[14]. The Focal Point consults with the two relevant states, as well as with the Requesting State (the one which requested the listing in the first place), and, if these states oppose the de-listing or give no reply, with the other members of the relevant Committee. If even one member of the Committee proposes de-listing, providing the reasons thereof, the Chairman circulates this proposal under the No Opposition rule, meaning that the individual or entity is de-listed unless the Committee opposes the request. Thus, the procedure is reversed, leading to a high number of de-listing in the past seven years (13 individuals out of 54 requests).

21 The Focal Point does not have competence to deal with de-listing requests from the Al-Qaida Sanctions List. The reasons are that 1) the Al-Qaida Sanctions list is in a class of its own, concerning a non-state entity with a global presence; 2) it is by far the longest list in the targeted sanctions system; and 3) it affects quite a lot of persons indirectly, including family members, co-owners of assets under the control or ownership of listed persons; and 4) it sometimes affects persons with no link to Al-Qaida, due to some wrong listings. For this particular list, the UNSC through Resolution 1904 (2009) has established the Office of the

[12] Ibidem, para. 9.
[13] Focal Point description, available here: http://www.un.org/sc/committees/dfp.shtml
[14] The exceptions are France and Hungary which have made declarations pursuant to which their citizens or residents should address their de-listing requests directly to Focal Point.

Ombudsperson. This "independent and impartial" Ombudsperson, appointed by the Secretary-General, "is mandated to gather information and to interact with the petitioner, relevant states and organizations with regard to the request. Within an established time frame, the Ombudsperson will then present a comprehensive report to the Sanctions Committee. Based on an analysis of all available information and the Ombudsperson's observations, the report will set out for the Committee the principal arguments concerning the specific delisting request. The report will also contain a recommendation from the Ombudsperson on the delisting request. Where the Ombudsperson recommends that the Committee consider delisting, the individual or entity will be delisted unless, within 60 days, the Committee decides by consensus to maintain the listing. However, if there is no such consensus, during that 60 day period a Committee member may request the matter be referred to the Security Council for a decision on the question of whether to delist[15]."

22 The Office of the Ombudsperson has made some significant steps towards transforming the de-listing process into a more open and impartial activity. For example, it has adopted a Standard for Analysis, Observations, Principal Arguments, and Recommendation, as well as an Approach to Assessment of Information alleged to have been obtained by Torture, and procedures for access to confidential or classified information. Currently, there are 49 Cases on the roster of the Ombudsperson. Out of these, 27 have been solved through de-listing, 3 were denied de-listing, one each have been amended or retracted by the petitioner and the rest are still under consideration. The Cases concern one or more individuals each, and one or more entities.

23 Even though the Ombudsperson has taken significant measures to ensure that individuals have an easy access to its procedures, the final decision regarding de-listing remains with the 1267 Committee, and the UNSC. Therefore, in essence, it remains a political process. While the Ombudsperson is a public attorney of a sort (in the absence of any procedure for the Committee to listen to the listed persons directly), the Committee is certainly not a court of law.

24 The options available to listed individuals and entities are indeed limited. The Committees, and the UNSC, are immune from legal suits according to public international law at large. The International Court of Justice may not hear individual petitioners. The Human Rights Committee established under the International Covenant on Civil and Political Rights does not have direct jurisdiction since the United Nations is not a party to the Covenant. The United Nations Administrative Tribunal does not have jurisdiction *ratione materiae.* And, of course, the United Nations has legal immunity from suits in regional or national courts. Therefore, as far as direct actions by the listed individuals are concerned, they have no options.

25 Supposing that a certain state would like to exercise diplomatic protection and take up their case, it would be similarly limited in its options. Thus, the International Court of Justice would not have direct and compulsory jurisdiction, since the UN is not a state. Only through a concerted action, such as a request for an Advisory Opinion from the ICJ, presumably addressed through the General Assembly, would the question of the legality of targeted sanctions be put to the "judicial organ of the United Nations." Such a request is not forthcoming.

26 The only opening available to individual petitioners, for a judicial review of their sanctions regime, is therefore to be found at the national and regional level. At this point, two potential "targets" of review present themselves, namely 1) the UNSC Resolution instituting sanctions itself; and 2) the implementing measures taken by the Member State. The interplay

[15] Ombudsperson introduction page, available here: http://www.un.org/en/sc/ombudsperson/

between these two, and the court's approach to such judicial actions is presented in the second part of this article.

II UNSC Sanctions Regime and International Law

IIA Conflicting Obligations of Member States

27 According to Article 24(1) of the United Nations Charter (UNC), the Security Council has 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 UNSC 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. The UNSC 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[16]." Once a Resolution is adopted, the measures contained in it must be implemented by the Member States *exactly* as stated in it – there is no margin of appreciation unless the Resolution says so. There *might* be a margin of appreciation or at least the possibility of influencing the listing of a person, i.e. *before* the Resolution takes effect against the listed individual, but this issue will be dealt with later. In any case, once a person is listed, the Member State has only three things to do: 1) implement the Resolution exactly; 2) receive and recommend action on any de-listing request; and 3) possibly act within the margin of appreciation left by the wording of the Resolution.

28 Under article 103 UNC, "In the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail." The text is very clear that anything contained in the UNC prevails over any other obligation of a Member State. It has been generally interpreted to apply also to any obligation arising out of a decision taken *according to* the Charter, such as a Chapter VII Resolution of the UNSC[17]. A problem appears in the case of Member States which have assumed international obligations with respect to human rights, especially ones which impose *procedural* rights, such as the right to a fair hearing. Because, in this case, even though the underlying *material* right may be derogated from (e.g. the right to travel), the derogatory measure would still be a violation of human rights if it was taken without appropriate procedural safeguards.

29 Exactly such a situation arises regarding the State Parties to the European Convention of Human Rights (ECHR)[18], and even more so regarding the Member States of the EU. Article 6 of the ECHR provides for the "Right to a fair trial" while Article 8 protects private and family life, and Article 13 guarantees the "Right to an effective remedy." Concurrently, in the EU, human rights are protected by the Charter of Fundamental Rights of the European Union, which has the same legal value as the Treaties[19], in respect of the validity, interpretation and application of EU legal measures. At the same time, "fundamental rights, as they are guaranteed through the ECHR and as they result from the constitutional traditions common to Member States, are general principles of the Union law[20]." Suffice it to

[16] Iain Cameron, *Targeted Sanctions and Legal Safeguards*, Uppsala University Working Paper, available here: http://pcr.uu.se/digitalAssets/96/96817_sanctions.pdf at p. 5.
[17] Jean-Pierre Cot, Alain Pellet, *La Charte des Nations Unies, Commentaire article par article*, 3rd Edition, Economica, Paris, p. 2133 et seq.
[18] Convention for the Protection of Human Rights and Fundamental Freedoms and its additional Protocols, available here: http://www.echr.coe.int/Documents/Convention_ENG.pdf
[19] Treaty on the European Union, Article 6(1).
[20] Treaty on the European Union, Article 6(3).

say that the Charter has grown on the ECtHR developments and fully provides for the same and other human rights.

30 Finally, every UN Member State is also bound by customary law, including the norms of *jus cogens*. Inasmuch as such norms protect human rights, it is argued that they would supersede even Article 103 UNC, since their effect voids even preexisting law which runs contrary to their tenets. It is, however, fairly hard to find rules of *jus cogens* which would apply in our situation.

31 The direct effect of UNC provisions within the national legal systems are debatable, as are those of UNSC Resolutions[21], even though their binding and superior legal power is not. Therefore, Member States have chosen to repeat the provisions of the targeted sanctions Resolutions in national law, through corresponding legal instruments (Laws, Orders, Government Decisions etc.), which have unquestionable direct effect in national law and are also practically more accessible to their intended recipients (mainly the financial and legal services sectors). However, this opens a wedge between the international legal obligations of the Member States and the obligations imposed on national natural and legal persons by the same States. It is a wedge in which the State can find itself squeezed.

32 In the EU, the decision-making power with regard to targeted sanctions has been taken to the European level, in a consensus procedure, which means that every Member State has a power of veto over the proposed measures. However, it is important to note that, at the same time, every state has an obligation under Article 48 UNC, to apply the UNSC decisions both directly, as well as through their actions in the relevant international organizations where they are members. This obligation is not imposed on international organizations or organs *per se*, but it imposes on Member States a positive duty of action which should be taken into account in order to engage their own responsibility, if the organization adopts measures incompatible with the UNSC decisions, provided that these measures would not have been possible without the active or passive contribution of the relevant Member State[22]. Therefore, the Member States reunited in the EU Council only have a measure of discretion if either 1) the UNSC Resolution allows one; or 2) for the targeted sanctions imposed by the EU outside of the UNSC framework.

33 From the formal point of view, EU decisions concerning targeted sanctions are Council Regulations or Council Decisions. These instruments have clear direct effect according to the Treaties, and therefore do not require further transposition by the EU Member States. In this situation, therefore, it is the EU which creates a wedge between the international obligation of Member States according to UNSC Resolutions and the obligations imposed on their nationals, and chooses to place itself in this wedge by taking the decision-making process off states' hands, at least formally.

33 Every Party to the ECHR, and by implication every EU Member State has a system whereby legal rules, as well as individual decisions, issued by state organs, may be challenged in a court of law. The challenge must be effective, so as to guarantee a remedy that makes the person good on any damage suffered as a result of an unlawful rule or decision. The ECtHR guarantees this right, as well as the procedural right of due process and fair hearing, and there is a direct action against the state available to anyone being “under its jurisdiction,” under the condition that national legal remedies have been exhausted. At the EU level, the ECJ is empowered to verify the validity and legality of EU measures, including Council Regulations and Decisions, in the area of targeted sanctions.

34 As indicated above, the international organizations themselves are not directly obliged to follow UNSC Resolutions. On the contrary, they must also follow their own fundamental instruments, namely the ECHR in the case of the ECtHR, and the EU Treaties in

[21] Cot, Pellet, op. Cit., p. 73-74.
[22] Cot, Pellet, op. Cit., p. 1300.

the case of the ECJ. Both these courts have a respectable record of judicial reasoning and judicial activism, whereby they have consolidated the respective power of their fundamental instruments in the legal orders of the Member States. From the formal point of view, these fundamental instruments are treaties, thus instruments instituting international obligations. Read through the perspective of Article 103 UNC, they would all have secondary status as opposed to Charter obligations. The conclusion is not the same if read through the prism of the European treaties themselves.

35 This point has not been lost on individual applicants seeking to challenge their UNSC listing. Left without any direct challenge against the Resolutions themselves, they have challenged the national or EU norms which "translated" with direct effect the relevant UNSC sanctions lists, both on substantive grounds (i.e. for negating their freedom of movement or their right to property), as well as on procedural grounds (i.e. the lack of a judicial process and effective guarantees when the measures were imposed). Faced with these challenges, for which the ECJ and ECtHR have, respectively, a clear jurisdiction *ratione materiae*, the courts could have taken one of the following courses of action:

A Affirm that the challenge has actually been made against the UNSC Resolutions, and therefore that they have no jurisdiction to annul a norm not issued by the EU or Member States;

B Affirm that, when adopting the implementing rules, the Member States have no margin of appreciation, and therefore that these rules cannot be annulled because that would go against a superior international obligation of the state;

C Affirm that, when adopting the implementing rules, the Member States do have some margin of appreciation, and therefore they should have implemented the UNSC Resolutions in a manner consistent with the rights guaranteed to individual applicants under the ECHR and EU Treaties. Further make an inquiry whether these rights have been respected at either the UN, or EU, or national level, and if the answer is in the negative, annul the implementing measure;

D Affirm that UNC obligations are inferior to *jus cogens* norms, and check whether the obligations imposed by the UNSC Resolutions are contrary to these norms, thus "discovering" and indirect basis of jurisdiction over UNSC Resolutions, and if the answer is in the positive, annul the implementing measure.

As seen above, in two of the four approaches, the Member States and the EU run the risk that their implementing measures are annulled, while leaving their international obligation under UNC standing. In other words, because of the compulsory nature of ECtHR and ECJ decisions, the states would have no power to execute their UNSC obligations internally, while not being able to use this as a valid excuse towards the UN.

36 This is exactly what has happened in the several cases analyzed below, in the final part of this article.

IIB Judicial Antagonism or Legal Dialogue

37 For the present article, I have chosen the main judgments issued by the ECtHR and the ECJ in the matter of targeted sanctions, which have created valid precedents and have illustrated the approaches taken by these courts to analyzing the validity of implementing measures and, some would say, of the UNSC Resolutions themselves. These are *Kadi I*[23] *and II*[24] for the ECJ, and *Nada*[25] and *Al-Dulimi*[26] for the ECtHR.

[23] Case of Kadi & Barakaat Int'l Found. v. Council of the E.U. & Comm'n of the E.C., Joined Cases C-402/05 P and C-415/05 P.
[24] Case of European Commission and Others v Yassin Abdullah Kadi, Joined cases C-584/10 P, C-593/10 P and C-595/10 P.
[25] Case of Nada v Switzerland (Application no. 10593/08), Judgment of 12 September 2012.

38 *Kadi I* concerned a listing made against Mr. Yasin Abdullah Ezzedine al-Qadi (Kadi) by the Committee established pursuant to UNSC Resolution 1267 (1999), regarding the Taliban and Al-Qaida. This listing was "transplanted" into EU law by Council Regulation 881/2002[27]. As a result, a travel ban and asset freeze were imposed on Mr Kadi, who challenged the Regulation before the Court of First Instance (CFI). The CFI rejected his application, reasoning that "that obligation of the Member States to respect the principle of the primacy of obligations undertaken by virtue of the [UNC] is not affected by the EC Treaty, for it is an obligation arising from an agreement concluded before the Treaty, and so falling within the scope of Article 307 EC[28]." The CFI further considered that "in so far as under the EC Treaty the Community has assumed powers previously exercised by Member States in the area governed by the [UNC], the provisions of that Charter have the effect of binding the Community[29]." The CFI also found that, while in normal circumstances, every act of the Member States or of the Community itself must be subject to judicial review, there may be "structural limitations" to this review, which limit its scope. In the case, given that "the Community acted, […], under the circumscribed powers leaving it no autonomous discretion in their exercise, so that it could, in particular, neither directly alter the content of the resolutions at issue nor set up any mechanism capable of giving rise to such alteration[30]," Mr Kadi's challenge was actually targeted at the UNSC Resolution. Such a Resolution could not be challenged except as with regard to the norms of *jus cogens*, which were found not to have been disregarded by the UNSC, as "measured by the standard of universal protection of the fundamental rights of the human person covered by *jus cogens*[31]." On the other hand, the CFI found that it is not competent "to review indirectly whether the [UNSC]'s resolutions in question are themselves compatible with fundamental rights as protected by the Community legal order[32]," nor "to verify that there has been no error of assessment of the facts and evidence relied on by the [UNSC] in support of the measures it has taken or, […] to check indirectly the appropriateness and proportionality of those measures. It would be impossible to carry out such a check without trespassing on the Security Council's prerogatives under Chapter VII of the [UNC][33]." Compared with the approaches presented at para. 35 above, the CFI adopted both B and D, in an interesting way. On the one hand, it rejected the application, finding that the Community legal order is not superior to the UNC obligations, and that the UNSC is independent in its application of the UNC. On the other hand, however, it established a right for the ECJ to review UNSC Resolutions, where they would conflict with *jus cogens* norms. Finally, it also affirmed that *jus cogens* norms, at that point in time, did not cover any obligation of access to a fair hearing before being targeted by an asset freeze or travel ban, which is an important situation of *opinio juris* being expressed on the matter.

39 Mr Kadi appealed the decision to the General Court, and asked for the CFI decision to be overturned, along with the annulment of the contested Regulation. The General Court (GC) proceeded to affirm the supremacy of human rights as a condition of legality for any act of the Community, and in particular the special role played by the ECHR in that assessment. Then, it denied the right of any EU institution to review the legality of UNSC Resolutions, even with the norms of *jus cogens*[34]. Any such review must be directed only at the Community measure which gives effect to the Resolution. It then goes on to affirm that "any

[26] Case of Al-Dulimi and Montana Management Inc. V Switzerland (Application no. 5809/08), Judgment of 26 November 2013.
[27] Adopted on the basis of Articles 60, 301 and 308 EC, currently Articles 75, 215 and 352 TFEU.
[28] *Kadi I*, para. 75. Article 307 EC is now Article 351 TFEU.
[29] *Kadi I*, para. 79.
[30] *Kadi I*, para. 84.
[31] *Kadi I*, para. 90.
[32] *Kadi I*, para. 104, at 283.
[33] Idem, at 284.
[34] *Kadi I*, para. 287.

judgment given by the Community judicature deciding that a Community measure intended to give effect to such a resolution is contrary to a higher rule of law in the Community legal order would **not** entail any challenge to the primacy of that resolution in international law[35]." I would posit that, while the GC statement is valid in that the resolution's validity and supremacy in international law is not affected, it is, at the same time, left without any means of application at the Community and national level, thus placing the Member States in a situation where they cannot fulfill one of their international obligations. In other words, with this statement, the GC opens the way to a type C approach, where it is ready to throw the state in the wedge between international obligations and the impossibility to implement them nationally.

The GC goes on to strike another blow to the supremacy of UNSC Resolutions, affirming that "by virtue of that provision [i.e. Article 300(7) EC], supposing it to be applicable to the [UNC], the latter would have primacy over acts of secondary Community law. That primacy at the level of Community law would not, however, extend to primary law, in particular to the general principles of which fundamental rights form part[36]." This is a very important statement. Although apparently the GC conserves the Article 103 UNC obligations, it does so on different lines than the CFI. Thus, if the CFI adopted an direct approach, saying that, in and of itself, the UNC imposes on the Community its obligations, because the attributions of the Member States in relation to implementing UNC cannot be taken at the Community level without their corresponding obligations, the GC states that, within the EU legal order, the hierarchy of norms is stated by the Treaties, and thus it is the Treaties which confer, in a limited and circumvented way, a legal power to UNSC Resolutions.

Going further, the GC analyzes summarily whether the contested Regulation would be attributable to the UNSC itself, and finds that it cannot be so. This is in quite some contrast with a *prima facie* reading of the Draft Articles on the Responsibility of International Organisations (DARIO), and in particular Article 15 which provides that an international organization which directs and controls another international organization in the commission of an internationally wrongful act by the latter organization is internationally responsible for that act if (a) the former organization does so with knowledge of the circumstances of the internationally wrongful act; and (b) the act would be internationally wrongful if committed by that organization. On the other hand, it is an explainable approach, because, in order to give effect to the judicial guarantees provided for by the EU Treaties, the GC must insulate them from the UNC, so as not to be seen as attacking in any way the UNSC.

At this point in the *Kadi I* decision, the GC takes an opportunity for a sort of "judicial dialogue" with the Member States and the UNSC. It creates a "test" to see whether the UNSC procedure offers the required procedural guarantees which would be similar or equivalent to the judicial guarantees offered by the EU[37]. Of course, given the political nature of the UNSC decision process, it finds that such a system does not exist. On the other hand, by proposing such a test it sends the message that, if and when the UNSC will adopt a listing and de-listing procedure which would offer equivalent guarantees, such a procedure would be recognized and given effect at the European level. It is, thus, a form of judicial encouragement towards the reform of the UNSC.

40 In the final part of the *Kadi I* decision[38], the GC looks at ways in which the procedural guarantees under EU law must be respected. In this regard, it says that, in order for Mr Kadi to refute the accusations made against him, he should have been communicated the

[35] *Kadi I*, para. 288.
[36] *Kadi I*, paras. 307-308.
[37] *Kadi I*, para. 326.
[38] See for an analysis of the margin of appreciation issue here the piece by Antonios Tzanakopoulos, *Kadi Showdown: Substantive Review of (UN) Sanctions by the ECJ sec. IV*, Jul. 26 2013, available at www.ejiltalk.org/kadi-showdown/#more-8613

grounds on which the name of a person or entity is listed. On the other hand, this communication does not need to be done immediately, since the "surprise effect" of the listing would be jeopardized, but at least once the claimant wishes to refute the allegations. Such a communication is also necessary for the GC, because otherwise it cannot "do other than find that it is not able to undertake the review of the lawfulness of the contested regulation in so far as it concerns the appellants, with the result that it must be held that, for that reason too, the fundamental right to an effective legal remedy which they enjoy has not, in the circumstances, been observed[39]." For the same reasons the GC finds that Mr Kadi's right to respect for property has been infringed, since, even though the asset freeze measures might in principle be justified (here the GC summarizes the ECtHR jurisprudence in the matter) and proportional, the lack of any reasoning or imposing it makes it intrinsically infringing[40]. Thus, the GC annuls the contested Regulation in respect of Mr Kadi.

41 *Kadi II* was rendered on the 18th of July 2013, and its contents and effects have not yet been fully analyzed by the doctrine. It is the second part of the Kadi legal saga, and starts off where *Kadi I* left it. Thus, after the *Kadi I* decision, on 21 October 2008, the Chairman of the 1267 Sanctions Committee communicated the narrative summary of reasons for Mr Kadi's listin on that committee's Consolidated List to France's Permanent Representative to the UN, and authorized its transmission to Mr Kadi[41], while also publishing it on the website of the Sanctions Committee. France sent it to the European Commission, which sent it to Mr Kadi, informing him that for the reasons set out there, it envisaged maintaining his listing according to Regulation no. 881/2002, also providing him with a period for comment, which Mr Kadi used to mount a defense, based on the lack of criminal charges brought against him in several countries, and drawing attention to the vagueness and generality of a number of allegations contained in the summary of reasons[42]. The Commission still adopted the Regulation.

Mr Kadi made an appeal to the GC for annulment of the Regulation. The GC took up the arguments presented in *Kadi I* while also analyzing the effect of the communication of reasons on their application. The GC observed that "those rights had been respected only in a purely formal and superficial sense, since the Commission considered itself strictly bound by the findings of the Sanctions Committee and at no time envisaged calling them into question in the light of Mr Kadi's comments or making any real effort to refute the exculpatory evidence adduced by Mr Kadi; and […] the few pieces of information and the vague allegations in the summary of reasons […] were clearly insufficient to enable Mr Kadi to mount an effective challenge to the allegations against him[43]." After applying the same test as shown above at para. 39, the GC found that the judicial standards guaranteed by the EU have not been met, and therefore annulled the Regulation. One extra point made by the GC was that the asset freeze was, given its general application and duration (almost a decade at the time), a significant restriction on his right of property which was not proportional to its purpose. The Commission and the Council appealed this ruling.

42 The Grand Chamber of the ECJ (the Chamber) reaffirmed the reasoning of the GC in *Kadi I*, saying that "without the primacy of a Security Council resolution at the international level thereby being called into question, the requirement that the European Union institutions should pay due regard to the institutions of the United Nations must not result in there being no review of the lawfulness of such European Union measures, in the light of the fundamental rights which are an integral part of the general principles of European Union law[44]." Thus, the wedge posited above was thoroughly consolidated.

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[39] *Kadi I*, para. 351.
[40] *Kadi I*, para. 371.
[41] *Kadi II*, para. 27.
[42] *Kadi II*, para. 29-31.
[43] *Kadi II*, para. 43.
[44] *Kadi II*, para. 67.

Here, the Chamber engages in another round of "judicial dialogue," this time with regard to the apparent impossibility of Member States and the Council to respect their EU law obligation to provide adequate reasons for listing. After repeating the unchallenged facts regarding the listing procedure (explained, in summary, in part I of this article), the Chamber imposes a new obligation on the Member States, thusly: "In that context, it is for that authority to assess, having regard, *inter alia*, to the content of any such comments [i.e. comments made by the listed person], whether it is necessary to seek the assistance of the Sanctions Committee and, through that committee, the Member of the UN which proposed the listing of the individual concerned on that committee's Consolidated List, in order to obtain, in that spirit of effective cooperation which, under Article 220(1) TFEU, must govern relations between the Union and the organs of the United Nations in the fight against international terrorism, the disclosure of information or evidence, confidential or not, to enable it to discharge its duty of careful and impartial examination[45]." And further, "it is for the Courts of the European Union, in order to carry out that examination [i.e. on the merits of the listing], to request the competent European Union authority, when necessary, to produce information or evidence, confidential or not, relevant to such an examination[46]." This is based on the burden of proof being on the accuser, i.e. the UNSC Resolution cannot reverse the burden of proof to the accused, in order to impose on him an obligation to adduce negative evidence.

What happens if the European Union is unsuccessful in its attempts to obtain more information? The Chamber says that the Union itself might provide similar information, in order to establish the well-founded nature of the listing. If neither of these happens, then the listing must be annulled[47]. If, also, the information is confidential or sensitive, the Courts of the European Union are prepared to consider alternative disclosure methods, such as summaries, or *in camera* proceedings. Finally, the Chamber imposes a *de minimis* condition on the validity of the listing – i.e. out of all the reasons invoked for it, if even only one is valid, then the listing must stand, given its preventive nature[48]. After making several determinations of factual errors on the part of the GC, the Chamber dismisses the appeals and maintains the obligation to de-list Mr Kadi from the contested Regulation.

43 The ECJ placed the European Union and, more importantly, its Member States in a legal bind. On the one hand, at the international level, they had an obligation to ensure the application of UNSC Resolution 1267, against the persons enumerated by the 1267 Committee, an obligation which is paramount, according to Article 103 UNC, and leaves no margin of appreciation to the State, as per the text of the Resolution. On the other hand, the Member States had pooled this responsibility at the European level, through the Council, and discharged it through a Council Regulation. This Regulation was found to be unlawful under EU law, while at the same time, the Member States were not able to make national rules on the matter. Thus, they were prevented from discharging their international, UN-mandated obligation by an international, EU-mandated obligation!

I would posit that this result is a blatant manifestation of judicial antagonism to a system of sanctions seen as partial, political, and dismissive of human rights and procedural guarantees. It is a judicial reaction towards the monopolization of sanction power against individuals at the level of the UNSC, where it is immune from any kind of judicial review. It is, thus, a revolt of the European legal spirit against a type of world governance which does not share its human rights and procedural values. Below, I will expose the alternative approach taken by the ECtHR to the same issues.

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[45] *Kadi II*, para. 115.
[46] *Kadi II*, para. 120.
[47] *Kadi II*, para. 123.
[48] *Kadi II*, para. 130.

44 The *Nada* case concerns not an asset freeze, but a travel ban. Mr Nada is a businessman living in the town of Campione d'Italia, which is an enclave of Italy in the South-East of Switzerland, fully surrounded by this country. In 2000, the 1267 Committee decided to list Mr Nada on its Consolidated List. After joining the United Nations on 10 September 2002, Switzerland implemented the travel ban against Mr Nada, who was thus prevented from leaving the town of Campione d'Italia even in order to enter Italy. Since there were no alternate means of transport, apart from car, between the town and the rest of Italy, Mr Nada was in effect barred from seeking medical treatment in his own country[49]. It is worthy to note that the implementation of the sanctions was undertaken by Switzerland through a Federal Ordnance, with an Annex which fully reproduced the Consolidated List of the 1267 Committee. Mr Nada also applied for de-listing through the focal point procedure, but his application was denied due to the opposition of an undisclosed country. After initiating a number of internal administrative appeals in Switzerland against his travel ban, the Swiss Federal Court rejected his final appeal. "It first pointed out that, under Article 25 of the [UNC], the UN member States had undertaken to accept and carry out the decisions of the Security Council in accordance with the Charter. It then observed that under Article 103 of the Charter the obligations arising from that instrument did not only prevail over the domestic law of the member States but also over obligations under other international agreements, regardless of their nature, whether bilateral or multilateral. It further stated that this primacy did not relate only to the Charter but extended to all obligations which arose from a binding resolution of the Security Council. The Federal Court observed, however, that the Security Council was itself bound by the Charter and was required to act in accordance with its purposes and principles, which included respecting human rights and fundamental freedoms. At the same time, it took the view that the member States were not permitted to avoid an obligation on the grounds that a decision (or resolution) by the Security Council was substantively inconsistent with the Charter, in particular decisions (resolutions) based on Chapter VII thereof (action with the respect to threats to the peace, breaches of the peace, and acts of aggression)[50]." Article 190 of the Federal Constitution of Switzerland is a provision similar to that instituting the primacy of international law over internal law in Romania. In searching for a rule to solve a situation of conflict between the different international obligations of States, the "Federal Court was of the opinion that the uniform application of UN sanctions would be endangered if the courts of States Parties to the European Convention or the International Covenant on Civil and Political Rights were able to disregard those sanctions in order to protect the fundamental rights of certain individuals or organisations. The court nevertheless accepted that the obligation to implement the Security Council's decisions was limited by norms of *jus cogens*. Accordingly, it considered itself bound to ascertain whether the sanctions regime set up by the Security Council was capable of breaching the peremptory norms of international law[51]." However, it found that the enjoyment of possessions, economic freedom, the guarantees of a fair trial or the right to an effective remedy did not fall within *jus cogens*, and also found that Switzerland did not have any margin of appreciation in its application of the UNSC Resolution. By a procedure unknown to Mr Nada, his name was however deleted from the sanctions lists after the Federal Court case concluded.

It is striking how similar the judgment of the Tribunal in *Kadi I* is with the judgment of the Federal Court. Both courts approached the problem according to approaches B and D illustrated at the beginning of the case presentations. Both courts found that the only way they could have checked the validity of the UNSC Sanctions Resolutions was by reference to *jus*

[49] *Nada*, paras. 15-21.
[50] *Nada*, paras. 42-43.
[51] *Nada*, paras. 45-46.

cogens, and that the lack of a margin of appreciation for the concerned state (the EU, respectively) meant that they could not verify the legality of the implementing measures independently of that of the UNSC Resolutions, thus rejecting the claims. We will see, however, the different approach taken by the ECtHR as opposed to the EU GC.

45 In its assessment, the ECtHR first illustrated the applicable law, with reference to the UNC, the UNSC Sanctions Resolutions, as well as the *Kadi I* case. It also made a note of the case of *Sayadi and Vinck v. Belgium*, which was dealt with by the United Nations Human Rights Committee. A relevant finding of the Committee was that, although Belgium was not competent to remove the names from the sanctions list, it had the duty to do all it could to obtain that deletion as soon as possible, to provide the complainants with compensation, to make public the requests for de-listing, and to ensure that similar violations did not occur in the future[52]. The ECtHR also mentioned relevant cases at the national level, such as that of *Ahmed and others v. HM Treasury* (United Kingdom Supreme Court) and that of *Abdelrazik v. Canada (Minister of Foreign Affairs)* (Canadian Federal Court).

46 On the merits, the Court found that it had jurisdiction, even against Switzerland, as, due to the factual circumstances of the case, it was Switzerland, and not Italy, which was impeding the movement of Mr Nada. Mr Nada did have the status of "victim" in the sense of the ECHR and that he had exhausted all national remedies. Thus, it found the request admissible. It found that the travel ban constituted a significant restriction on Mr Nada's freedom, especially due to the geographical location of Campione d'Italia[53]. The ECtHR found that the limitation did have a legal basis and a legitimate aim. It approached the question of whether it was "necessary in a democratic society" by first asking whether Switzerland had any margin of appreciation in implementing the Sanctions Resolutions.

Here, the different points of view of the EU Courts and those of the ECtHR come into play. The ECtHR posited a principle that "the United Nations Charter does not impose on States a particular model for the implementation of the resolutions adopted by the Security Council under Chapter VII. Without prejudice to the binding nature of such resolutions, the Charter in principle leaves to UN member States a free choice among the various possible models for transposition of those resolutions into their domestic legal order. The Charter thus imposes on States an obligation of result, leaving them to choose the means by which they give effect to the resolutions[54]." Basing itself on paragraph 2(b) of the relevant Sanctions Resolution, which said that the travel ban did not apply where entry or transit was "necessary" for the fulfilment of a judicial process, the Court took the view that the term "necessary" was to be construed on a case-by-case basis. It also found that the words "where appropriate" in the same Resolution, in the context of urging States to take immediate steps to enforce the sanctions meant that there was a certain flexibility given to the national authorities in the mode of implementation of the Resolution. Thus, the ECtHR found that "Switzerland enjoyed some latitude, which was admittedly limited but nevertheless real, in implementing the relevant binding resolutions of the UNSC[55]."

In my view, this is a completely different approach from that of the EU Courts. Instead of fragmenting international law into a "grand sphere" (the general international law) and a smaller and independent sphere (EU law) with its own hierarchy of norms, thus putting states in a wedge, the ECtHR maintains the unity of international law and the supremacy of UNC obligations, but uses a literal interpretation of the UNC, and of the Sanctions Resolutions, to "discover" some leeway of the States when implementing them. It is a wise and

[52] *Nada*, para. 91.
[53] *Nada*, para. 165.
[54] *Nada*, para. 176.
[55] *Nada*, para. 179-180.

compassionate way of interpreting apparently conflicting norms, and one which does not stand squarely against the very supremacy of UNC obligations.

In approaching the question of proportionality, the ECtHR found that the Swiss authorities, although cognizant of Mr Nada's situation, and having discovered themselves, through criminal investigations, that there was no case to build against him, did not take into account his specific situation, and that "the possibility of deciding how the relevant Security Council resolutions were to be implemented in the domestic legal order should have allowed some alleviation of the sanctions regime applicable to the applicant, having regard to those realities, in order to avoid interference with his private and family life, without however circumventing the binding nature of the relevant resolutions or compliance with the sanctions provided for therein[56]." In other words, and here the ECtHR is admirably square in its appreciation, regardless of the hierarchy of norms between the ECHR and UNC obligations, "the important point is that the respondent Government have failed to show that they attempted, as far as possible, to harmonise the obligations that they regarded as divergent[57]." Therefore, the measures were not proportionate and therefore not necessary in a democratic society, and therefore there was a violation of Article 8 of the ECHR.

The ECtHR also found a violation of Article 13 of the ECHR on the basis that, even if Mr Nada was able to appeal administratively up to the Federal Court, the fact that this latter Court considered itself unable to order the de-listing of his name, there was no remedy in respect of the Convention violations[58]. On the other hand, the ECtHR found that Mr Nada was not deprived of his liberty, even in light of the quite small area of Campione d'Italia.

47 The *Al-Dulimi* ruling, which was only very recently published, and for now only in the French language, was also addressed against Switzerland and concerns the "1518 Sanctions Committee" which was empowered to establish a list of persons whose assets were to be frozen, and given to the Development Fund of Iraq, as a sanction for being members of the former Iraqi regime. Switzerland implemented these sanctions through administrative decisions, which were contested within the Swiss court system by the applicants. After several appeals, the Federal Court did reject their application, basing its decision on a similar reasoning as that in the *Nada* case[59].

48 After reviewing the international and national law and jurisprudence, as it developed in the past few years, including the decisions presented in this article, the ECtHR proceeded to find the case admissible. It is on the merits that the ECtHR develops is specific approach started in the *Nada* case. Under the specific header of "Preliminary Question: the coexistence of guarantees under the Convention [ECHR] and of obligations imposed on States by the resolutions of the Security Council" the ECtHR deals for the first time by an international judicial forum, squarely, with the relationship between the two sources of obligations.

The ECtHR reminds that the ECHR must be interpreted in a manner which can be reconciled with the general principles of international law. It bases this interpretation on Article 31(3)(c) of the 1969 Vienna Convention on the Law of Treaties, but giving a specific weight to human rights treaties[60]. The ECtHR also establishes a principle that there is a presumption that the UNSC does not mean to impose on Member States any obligation which would be contrary to the fundamental principles of human rights protection, unless there was a very clear language to this effect in the Resolution itself[61].

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[56] *Nada*, para. 195.
[57] *Nada*, para. 197.
[58] *Nada*, para. 213.
[59] *Al-Dulimi*, para. 38.
[60] *Al-Dulimi*, para. 112.
[61] *Al-Dulimi*, para. 113.

The ECtHR distinguishes the *Al-Dulimi* case from *Nada* on the basis that, as opposed to *Nada*, the relevant Resolution did not leave any margin of appreciation to Switzerland[62]. It finds that the focal-point system does not offer a protection of human rights equivalent to the one required by the ECHR, a fact recognized by the UN Special Rapporteur on the matter. Therefore, the Court affirms that the national tribunals should have made a full examination of the facts alleged by the applicants, in order to give them a fair hearing on the merits of their listing[63]. The ECtHR finds a violation of Article 6(1) of the ECHR, and that the rest of the allegations were not receivable for the rest.

It is quite a remarkable ruling, in my opinion, in light of the enumerated principles, but also of the proposed solution. Thus, the main principle established by the ECtHR is that apparently conflicting international obligations must be interpreted in a way which makes them compatible with one another. In light of the fact that there was no margin of appreciation left for Switzerland by the UNSC Resolution, and also that there was no adequate mechanism of listing review at the UN level, the ECtHR offered the solution that Switzerland itself should have provided the required review.

In light of this affair, we are left with one question: what would happen if, after a full review on the merits by Swiss courts, finding that the listing was not justified, followed by specific requests of Switzerland for de-listing to the UNSC, the de-listing would be unsuccessful? Would Switzerland still be found guilty of the violation of ECHR or not? In light of the Court's approach, I believe not, because, under that situation, the ECtHR would accept the general hierarchy of international law norms.

Going back to the title of this article, it is also interesting to note that the ECtHR ruling is also a form of judicial dialogue with the UNSC, and specifically with the relevant Sanctions Committees, but also with the State Parties to the ECHR, inviting them to further develop the system of human rights protections within the targeted sanctions regimes. The Court puts forward not only a stick (the threat of finding further violations of the ECHR), but also a carrot (the possibility that the UNSC system would be recognized as meeting the guarantees of the Convention, and thus escaping review by the ECtHR).

49 In Table 4 a summary of the different approaches taken by the European courts is made, by way of **conclusion**. "Both sets of reasoning are bound to be very influential, as they involved two of Europe's most powerful and prestigious courts. Whereas the ECtHR informs the jurisprudence of 47 states that constitute the membership of the Council of Europe, the CJEU impacts the legal developments in 27 states which make up the EU. Moreover, all 27 EU member states (two of which are permanent members of the UNSC) are also members of the Council of Europe and therefore need to take into consideration the jurisprudence of both the ECtHR and the CJEU[64]." It will be interesting to see if, via other similar cases, these approaches will be taken further on their separate pathways, or will be somehow reconciled with one another.

Table 4. Summary of European judicial approaches to targeted sanctions

European Court of Justice	European Court of Human Rights
At international law, UNC obligations are prevalent over any others, except for *jus cogens* obligations	
The Court does not have any jurisdiction to review the UNSC Resolutions, but only the implementing measures	

[62] Al-Dulimi, para. 117.
[63] Al-Dulimi, para. 144.
[64] Erika de Wet, From Kadi to Nada: Judicial Techniques Favoring Human Rights over United Nations Security Council Sanctions, 12 Chinese JIL 5 (2013)

Within the EU normative system, UNC obligations are superior to secondary law, but not to the fundamental EU Treaties	Although the UNC obligations are superior to the ECHR, they must be interpreted in such a way in which they are made compatible as far as possible
Therefore, if a secondary rule of EU law implements UNC obligations in a way which is incompatible with Treaty principles, the secondary rule should be anulled	Therefore, if the Member State did not take absolutely every measure to ensure the furthest compatibility of the two sets of obligations, then the state is in breach of the ECHR obligations
The effect is that the act through which the states implement their UNC obligations is annuled, leaving them without the legal means to execute their international obligations	The effect is that the state is given the means to rectify its breach of ECHR obligations, without putting it in a situation where it would violate its UNC obligations
Further, there is a clear fragmentation of the system of international law	The EctHR promotes the fundamental unity of the system of international law[65]

[65] See for the same opinion Erika de Wet, Jure Vidmar, Conclusions, in *Hierarchy in International Law. The Place of Human Rights*, 305 et seq. (E. De Wet, J. Vidmar, eds., 2012).