

Debating the ‘Smartness’ of Anti-Terrorism Sanctions: The UN Security Council and the Individual Citizen

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1. Introduction

Whereas its Charter¹ presents the United Nations as an intergovernmental organisation dealing with the relations between its Member States (see Arts. 1 and 2), taking decisions that entail obligations for those Member States (Art. 25), and which still is extremely hesitant to interfere in the domestic jurisdiction of any State, the organisation recently embarked on a number of operations directly involving citizens within Member States. Key examples in this respect include the establishment of the International Criminal Tribunals for the former Yugoslavia (ICTY) and for Rwanda, the cases in which the UN has taken over the interim administration of a region or State (Kosovo and Eastern Timor), and the cases in which traditional sanctions that were directed at the State as a whole (e.g. Iraq) are replaced by ‘smart sanctions’ directed at certain individuals or civil groups (Taliban/Afghanistan in particular).² The latter became popular in particular in reaction to the terrorist attacks of 11 September 2001 in the United States. Thus the Security Council placed more emphasis on its ability to take decisions with a large impact

¹ Charter of the United Nations, San Francisco, 26 June 1945.

² Smart sanctions are also referred to as ‘targeted’ or ‘designer’ sanctions. While the Afghanistan/Al-Qaida sanctions renewed academic attention for this issue, comparable smart sanctions were for instance already established by Resolutions 1127 (UN Doc. S/RES/1127, 28 Aug. 1997), 1173 (UN Doc. S/RES/1173, 12 June 1998) and 1176 (UN Doc. S/RES/1176, 24 June 1998) against UNITA (Angola); by Res. 1132 (UN Doc. S/RES/1132, 8 Oct. 1997) concerning Sierra Leone; by Res. 1160 (UN Doc. S/RES/1160, 31 Mar. 1998) concerning Kosovo; by Res. 1298 (UN Doc. S/RES/1298, 17 May 2000) concerning Eritrea and Ethiopia and by Res. 1343 (UN Doc. S/RES/1343, 7 Mar. 2001) concerning Liberia. All Security Council Resolutions are available online at <http://www.un.org/documents/scres.htm>.

on intra-State issues rather than being involved merely in relations between States. Of course this development is not entirely new. By now we are used to the Councils' occasional determination of (the effects of) domestic conflicts as threats to (international) peace and security. Moreover, the discussion on military intervention for humanitarian reasons highlighted the possible (and to some, necessary) role of the Security Council in this area.

The present contribution purports to address the new approach of the Security Council in relation to the use of smart sanctions by looking at the legal boundaries of some of its operations after 11 September 2001. After all, the legal framework in which Security Council operates traditionally deals with the relations between States. The increase in the use of smart sanctions seems to reveal the Council's awareness of new possibilities alongside the measures directed against States. In that respect Resolution 1390 on the measures against terrorism³ seems to herald a completely new development, as any connection with the territory of a State is left out. The term 'smart sanctions' is commonly used to indicate that these measures are not directed at a State (and its entire population), but rather at individual citizens. Although there are no generally accepted definitions, smart sanctions are believed to include the freezing of financial assets, the suspension of credits and aid, the denial and limitation of access to foreign financial markets, trade embargoes on arms and luxury goods, flight bans, and the denial of international travel, visas and educational opportunities.⁴

While all smart sanctions raise questions in relation to the changing international legal order, financial sanctions in particular have triggered debate on existing legal safeguards. The war on terrorism is the best case at hand. The Sanctions Committee that was already installed in 1999 to monitor the implementation of the sanctions against Afghanistan, has been given the competence to maintain a blacklist of individuals and entities designated as associated with the Taliban, Al-Qaida and Osama bin Laden.⁵ 'Listing' and 'de-listing' of persons takes place behind closed doors and the criterion of association with the Taliban, Al-Qaida or Osama bin Laden does not always seem to be used in a strict sense. For some of the names

³ UN Doc. S/RES/1390, 16 Jan. 2002.

⁴ See I. Cameron, 'Targeted Sanctions and Legal Safeguards', *Report to the Swedish Foreign Office*, October 2002, <http://www.jur.uu.se/arkiv/sanctions.pdf>.

⁵ See Res. 1333 (UN Doc. S/RES/1333, 19 Dec. 2000), §§ 8(c) and 16(b). A *Consolidated List* is available at <http://www.un.org/Docs/sc/committees/1267/1267ListEng.htm>.

on the list, it is dubious whether they have a connection with the Al-Qaida network at all.⁶

Available instruments for legal protection may fall short of protecting the citizen when the strict dividing line between international and national law becomes blurred. Although it may be said to form part of a new development in international law – in which the notion that States mainly consist of citizens is increasingly recognised – the increasing power of the UN Security Council in intra-State situations poses new questions as the system starts to reveal some serious shortcomings. When fundamental human rights run the risk of being violated,⁷ one may wonder whether the turn towards smart sanctions is really as smart as the Security Council claims it to be.

2. The Security Council's Competence to Impose Sanctions

In the decentralised international legal order, sanctions are almost the only alternative to military action when all political and diplomatic means have failed. Sanctions may contain measures that are generally considered to be illegal under international law (such as the suspension of treaties), but may also have the character of a retortion. This is defined as a retaliatory act by which a State responds by an unfriendly act not amounting to a violation of international law, to either (a) a breach of international law or (b) an unfriendly act by another State. Retortions may thus include measures ranging from the breaking off of diplomatic relations or the non-recognition of acts of a law-breaking State to the withholding of economic assistance, the discontinuance or reduction of trade and investment,

⁶ The Groupement Islamique Armé (GIA, active in Algeria) and the Abu Sayyaf Group (Philippines) serve as examples of groups of which the association with Al-Qaida is widely disputed.

⁷ See for instance the reports by Human Rights Watch (*September 11: One Year on*, New York, 5 September 2002, available at <http://www.hrw.org/campaigns/september11/>) and Amnesty International (*International Report 2002*, available at <http://www.amnesty.org>). The Council of Europe also expressed its concern and adopted the *Guidelines of the Committee of Ministers of the Council of Europe on Human Rights and the Fight against Terrorism*, 15 July 2002, available at [http://www.coe.int/T/E/Human_rights/h\(2002\)4eng.pdf](http://www.coe.int/T/E/Human_rights/h(2002)4eng.pdf). On human rights concerns in the fight against international terrorism, see also the contributions by I. Cameron, pp. 343-359; D. Cassel, pp. 251-297; P. Lemmens, pp. 223-249; F. Verbruggen, pp. 299-341 and C. Warbrick, pp. 361-408.

or requiring visas for entry into the country.⁸ When a sanction contains measures that would normally be illegal under international law, this illegality may be neutralised when the sanction is decided or authorised or recommended by an international body. The term 'sanction' is not used by the UN Charter,⁹ but Art. 41 of the Charter conveys the competence to the Security Council to 'decide what measures not involving the use of armed force are to be employed to give effect to its decisions, and it may call upon the Members of the United Nations to apply such measures ...'.¹⁰ Although before 1990, the Security Council had only used this competence twice (against Southern Rhodesia in 1966-1979 and South Africa in 1977-1994), the past twelve years not only showed an increase in the use of this instrument, but also in the ways in which it was used.

The sanctions against Southern Rhodesia were the first comprehensive mandatory sanctions imposed by the Security Council under Chapter VII as all States were to break off economic relations with this country.¹¹ The idea of comprehensive sanctions against a State returned in 1990 when the Security Council adopted Resolution 661 prohibiting the export of all commodities and products from Iraq, and the sale and supply of all products and commodities, including weapons and other military equipment, as well as the transfer of funds to Iraq.¹² The only exceptions to the sanctions regime were made for supplies intended strictly for medical purposes and for certain basic foodstuffs. In Resolution 670 the Council even

⁸ A. Cassese, *International Law*, Oxford, Oxford University Press, 2001, p. 244.

⁹ The International Law Commission defined sanctions as 'reactive measures applied by virtue of a decision taken by an international organisation following a breach of an international obligation having serious consequences for the international community as a whole, and in particular ... certain measures which the United Nations is empowered to adopt, under the system established by the Charter, with a view to the maintenance of peace and security'; (1979) II (part 2) *Yb. ILC* 121.

¹⁰ In a number of cases UN sanctions were also recommended by the General Assembly: for instance against Spain (1951), North Korea, China, South Korea and Israel. See B. Conforti, *The Law and Practice of the United Nations*, The Hague, Kluwer Law International, 2000, pp. 214-217.

¹¹ Res. 221 (UN Doc. S/RES/221, 9 Apr. 1966). The earlier sanctions against South Africa on the basis of Resolutions 181 (UN Doc. S/RES/181, 7 Aug. 1963) and 182 (UN Doc. S/RES/182, 4 Dec. 1963) were not adopted under Chapter VII and were recommendations only.

¹² UN Doc. S/RES/661, 6 Aug. 1990.

explicitly confirmed the comprehensive nature of this sanction regime by stating that the sanctions applied to all means of transport, including aircraft, and that States were also to deny permission to any aircraft to take off from their territory if the aircraft would carry any cargo to or from Iraq or Kuwait other than food in humanitarian circumstances.¹³ Moreover, in Resolution 1137 the Council added that States should without delay prevent the entry into or transit through their territories of all Iraqi officials and members of the Iraqi armed forces who were responsible for, or participated in, instances of non-compliance with the earlier resolutions.¹⁴

Apart from this overall regime, however, most sanctions imposed by the Security Council are of a more limited nature and mainly impose arms embargoes.¹⁵ But a range of other measures can be found in these decisions as well, including the reduction and restriction of the activities of the diplomatic and consular missions (Libya, 1992 and Sudan, 1996), restrictions on the travel of members of the military junta and adult members of their family (Sierra Leone, 1997) and the freezing of funds and financial resources of authorities and their immediate families (Haiti, 1993).

One could pose questions as to the scope of Art. 41 for the establishment of smart sanctions. Contrary to the predecessor of Art. 41 – Art. 16(1) of the Covenant of the League of Nations¹⁶ – however, the current provision does not list the

¹³ UN Doc. S/RES/670, 25 Sept. 1990.

¹⁴ UN Doc. S/RES/1137, 12 Nov. 1997.

¹⁵ See for instance Res. 713 (UN Doc. S/RES/713, 25 Sept. 1991) on Federal Republic of Yugoslavia; Res. 748 (UN Doc. S/RES/748, 31 Mar. 1992) on Libya; Res. 751 (UN Doc. S/RES/751, 24 Apr. 1992) on Somalia; Res. 841 (UN Doc. S/RES/841, 16 June 1993) on Haiti; Res. 864 (UN Doc. S/RES/864, 15 Sept. 1993) on UNITA in Angola; Res. 918 (UN Doc. S/RES/918, 17 May 1994) on Rwanda; Res. 788 (UN Doc. S/RES/788, 19 Nov. 1992) on Liberia; Res. 1132 (*supra* note 2) on Sierra Leone and Res. 1160 (*supra* note 2) on the Federal Republic of Yugoslavia, including Kosovo.

¹⁶ 'Should any member of the League resort to war in disregard of its covenants under Article 12, 13 or 15, it shall *ipso facto* be deemed to have committed an act of war against all other Members of the League, which hereby undertake immediately to subject it to the severance of all trade or financial relations, the prohibition of all intercourse between their nationals and the nationals of the covenant-breaking State, and the prevention of all financial, commercial, or personal intercourse between the nationals of the covenant-breaking State and the nations of any other State, whether a Member of the League or not.'

measures in a limitative manner. At the time of drafting Art. 41, the United States and the United Kingdom in particular were against a limitative listing of measures.¹⁷ Thus, the scope was deliberately left open. Furthermore, the League-system was clear about the fact that measures could only be directed at States and not against non-State actors such as individual citizens, although it was equally clear that the nationals of the States would be directly involved. Art. 41 simply leaves this question unanswered, although the examples of possible measures it provides may hint at measures against States. At the same time, it has become clear that the Security Council occasionally takes decisions that have an impact on individuals as well. After all, Art. 41 was (implicitly) used to establish the *ad hoc* tribunals for the former Yugoslavia and for Rwanda, which have as their task to prosecute individuals who are guilty of genocide, war crimes and crimes against humanity. The Appeals Chamber of the ICTY, in the *Tadić* case, claimed that the legality of its creation rested on Art. 41 and that this provision could therefore form the legal basis for the Security Council's competence to create criminal liability or prosecute physical persons.¹⁸ Another argument that is sometimes used concerns the nature of enforcement measures, which – also on the basis of Art. 2(7) of the Charter – may 'intervene in matters which are essentially within the domestic jurisdiction of any state ...'.

On the basis of these arguments it nevertheless remains difficult to construct a general competence for the Security Council to take measures with a possible criminal law dimension against individuals in the fight against terrorism. An important difference between the establishment of the *ad hoc* tribunals and the smart sanctions to suppress terrorism is that the material jurisdiction of the tribunals largely rests on what were already considered to be international crimes under customary international law. The concept of terrorism is much less developed in international law, not the least because of the lack of a commonly accepted definition. Furthermore, in the case of the tribunals, it is not the Security Council, but the tribunal

¹⁷ See B. Simma (ed.), *The Charter of the United Nations: A Commentary*, Oxford, Oxford University Press, 1994, p. 624.

¹⁸ *The Prosecutor v. Duško Tadić a.k.a. 'Dule'*, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, IT- 94-1, 2 Oct. 1995. See also V. Gowlland-Debbas, 'UN Sanctions and International Law: An Overview', in V. Gowlland-Debbas (ed.), *United Nations Sanctions and International Law*, The Hague, Kluwer Law International, 2001, p. 12.

itself that decides on the punishment.¹⁹ Even in the case of the International Criminal Court, where the Security Council has been given the competence to bring cases under the attention of the Court, it is ultimately a judicial organ that takes the decision.²⁰

This interpretation of the scope of Art. 41 thus largely leaves us standing empty-handed. Nevertheless, it is clear that Art. 41 does not exclude a competence of the Security Council to interfere in the rights of individuals. And practice even seems to support a tendency to make use of Art. 41 in this manner.

3. Towards Smarter Sanctions?

This is not to say that, even when we accept a competence of the Security Council to adopt sanctions, these may be imposed at the whim of the Council (possibly under pressure of one or more powerful Member States) in every shape and form. During the past years in particular, sanctions regimes have been judged critically, not only by academics and non-governmental organisations, but also by the UN itself. Already in 1995, in his *Supplement to an Agenda for Peace*, then UN Secretary-General Boutros Boutros Ghali noted:

Sanctions, as is generally recognised, are a blunt instrument. They raise the ethical question of whether suffering inflicted on vulnerable groups in the target country is a legitimate means of exerting pressure on political leaders whose behaviour is unlikely to be affected by the plights of their subjects. Sanctions always have unintended or unwanted effects. They can complicate the work of humanitarian agencies ... They can conflict with the development objectives of the Organisation ... They can have severe effect on other countries. They can also defeat their own purpose by provoking a patriotic response against the international community, symbolised by the

¹⁹ See *Report of the Secretary-General Pursuant to Para. 2 of Security Council Resolution 808 (1993)*, UN Doc. S/25704, 3 May 1993, § 29: 'It should be pointed out that, in assigning to the International Tribunal the task of prosecuting persons responsible for serious violations of international humanitarian law, the Security Council would not be creating or purporting to "legislate" that law. Rather, the International Tribunal would have the task of applying existing international humanitarian law.'

²⁰ See also V. Gowlland-Debbas, *supra* note 18, p. 12.

United Nations, and by rallying the population behind leaders whose behaviour the sanctions are intended to modify.²¹

However, it is above all the violation of the most basic rights that has triggered the discussion on the legality and legitimacy of some aspects of sanctions regimes.²² As solutions for limiting the unintended side-effects and increasing the effectiveness of sanctions are not (solely) to be found in humanitarian exemptions – since these have traditionally formed part of sanctions regimes – the debate started to focus on the possibility of ‘smartening’ sanctions by targeting them. Indeed, at first sight, a smart sanction runs less risk of being questioned for its legitimacy as it seems to overcome the two main problems (unintended effects on the civilian population and ineffectiveness). In that respect it may very well be ‘a policy-maker’s dream: they are not only right, but also more effective’.²³

In 1999/2000 the Swiss Government initiated a round of expert seminars on targeted financial sanctions, known as the ‘Interlaken Process’. This was followed by an initiative of the German Government with a series of meetings on arms embargoes and travel and aviation sanctions (the ‘Bonn-Berlin Process’).²⁴ Indeed, these forms of sanctions are generally considered to be the primary examples of smart sanctions. In 2000, five years after the *Supplement to an Agenda for Peace*, the UN Secretary-General noted that there was indeed an:

emerging consensus among Member States, that the design and implementation of Security Council sanctions need to be improved and their adminis-

²¹ UN Doc. A/50/60 – S/1995/1, 3 Jan. 1995, available at <http://www.un.org/Docs/SG/agsupp.html>.

²² For a survey of views see for instance W. van Genugten and G.A. de Groot (eds.), *United Nations Sanctions: Effectiveness and Effects, Especially in the Field of Human Rights*, Antwerpen etc., Intersentia, 1999. See also D. Cortright and G.A. Lopez, ‘Assessing Smart Sanctions. Targeting Sanctions: Lessons from the 1990s’, in M. Brzoska (ed.), *Smart Sanctions: The Next Steps*, Baden-Baden, Nomos Verlagsgesellschaft, 2001, p. 19.

²³ M. Craven, ‘Humanitarianism and the Quest for Smarter Sanctions’, (2002) 13 *EJIL* 47.

²⁴ Results of the Interlaken Process can be found at <http://www.smartsanctions.ch>; many contributions to the Bonn-Berlin Process have been collected in M. Brzoska, *supra* note 22.

tration enhanced to allow a more prompt and effective response to present and future threats to international peace and security. Future sanctions regimes should be designed so as to maximise the chance of inducing the target to comply with Security Council resolutions, while minimising the negative effects of the sanctions on the civilian population and neighbouring and other affected States.²⁵

Ironically, the 1990s had not shown a record of sanctions inflicting severe social hardship on entire societies. Out of the 14 sanctions cases in that period, only three enhanced comprehensive trade sanctions. Two of these sanctions regimes indeed seem to have at least caused an increase in infant mortality and serious damage to the health care system (Haiti and Yugoslavia), but it is above all the catastrophe in Iraq, causing widespread malnutrition, disease, and sharply increased rates of morbidity, that seems to have triggered the call for smarter sanctions.²⁶

Research has shown that selective sanctions indeed have fewer humanitarian consequences than comprehensive sanctions, but it has equally shown that there are always humanitarian costs.²⁷ Apart from the societal effects of the blocking of commercial and financial transactions (which may result in an expansion of criminal networks and black market activity) and of travel sanctions and diplomatic isolation (often prompting a brain drain and the emigration of the opponent of the political regime), the recent decisions of the Security Council in reaction to the terrorist attacks on the United States on 11 September 2001 brought the effects of the sanctions closer to the citizens once again. This time it is not the nameless Iraqi who is suffering from the socio-economic impact of sanctions against his country, but rather the individual whose name has been put on a list of persons that are no longer allowed to travel or to have access to their financial assets. This precise targeting of victims of the sanctions and their shaky legal position raises new questions about the legitimacy of this type of sanctions. We seem to be witnessing a shift towards individual criminal responsibility as the basis for the system in which

²⁵ *Report of the Secretary-General on the Work of the Organisation*, UN Doc. A/55/1, 30 Aug. 2000, New York, 2000, p. 13 (also available at <http://www.un.org/documents/sg/report00/a551e.pdf>).

²⁶ See D. Cortright and G.A. Lopez, *supra* note 22, p. 19. In the case of Angola, one could argue that the range of different sanctions (arms and oil in 1993, travel and diplomatic in 1997 and diamonds in 1998) amounted to an almost comprehensive regime.

²⁷ *Id.*, p. 22.

the Security Council, through its Sanctions Committee, decides on limiting the individual civil rights of citizens. As one observer noted: 'The Security Council has thus opened itself out to accusations of using sanctions for the infliction of punishment, in the sense of the creation of irreversible damage to the target State concerned.'²⁸ This infliction of punishment seems to be shifting from the State to some nationals within the State.

4. The Consequences of Smart Sanctions for Individual Citizens: The Case of Afghanistan

By adopting Resolution 1267 on 15 October 1999, the Security Council insisted 'that the Afghan faction known as the Taliban ... comply promptly with its previous resolutions and in particular cease the provision of sanctuary and training for international terrorists and their organisations ...'.²⁹ The Security Council also demanded 'that the Taliban turn over Osama bin Laden without further delay ...'.³⁰ In addition, the measures included an air embargo against the Taliban as well as the freezing of its financial resources. Thus the core of the regime consists of so-called *financial sanctions*. Financial sanctions purport to freeze the financial assets of persons or entities and aim to block all financial transactions with these persons or entities in order to undermine possible terrorist activities. For the persons involved, these sanctions have far-reaching consequences as they can no longer even make use of their own bank accounts.³¹ A Sanctions Committee was established to watch over the practical functioning of the sanctions regime.³² Resolution 1333 of 19 December 2002 extended the financial embargo to Osama bin Laden and individuals and entities associated with him and the Al-Qaida movement and requested the Sanctions Committee to 'establish and maintain updated lists, based on information provided by States and regional organisations, of individuals and entities

²⁸ V. Gowlland-Debbas, *supra* note 18, p. 12.

²⁹ UN Doc. S/RES/1267, 15 Oct. 1999, § 1.

³⁰ *Id.*, § 2.

³¹ See also M. Bulterman, 'De Financiële Strijd tegen het Terrorisme en de Mensenrechten', (2002) 7 *NJCM-Bulletin* 834-848.

³² *Supra* note 29, § 6.

designated as associated with Osama bin Laden'.³³ Following the regime change in Afghanistan, the Security Council on 16 January 2002 adopted Resolution 1390 to renew the Taliban/Al-Qaida blacklists and extend travel and arms embargo sanctions to the listed persons.³⁴ The lists on the basis of Resolutions 1333 and 1390 are combined.

The Security Council thus delegated its competences to take binding decisions under Art. 25 to the Sanctions Committee. The impact of the decisions of the Sanctions Committee – the freezing of all assets and economic resources of people whose names appear on the list – seems unprecedented as it is usually the UN Member States that translate the decisions of the Security Council in concrete measures affecting individual citizens.³⁵ The procedure to maintain the list is also striking, as the Sanctions Committee takes decisions behind closed doors and on the basis of consensus.³⁶ As one observer notes, 'evidence' that the named person is engaged in activities involving a threat to international peace and security is rarely, if ever, evaluated. The activities are never defined, and so there are no criteria to measure the 'evidence' against, even if it is submitted to the Sanctions Committee.³⁷ Indeed, the delegation of the competence to take decisions with far-reaching legal effects for individual citizens to a sanctions committee may give rise to questions of legality as legal protection for those involved was not developed along the same lines. Burci described sanctions committees as follows:

³³ Res. 1333, *supra* note 5, § 16(b).

³⁴ Res. 1390, *supra* note 3.

³⁵ In addition to Res. 1333 (*supra* note 5), the Security Council established a more general sanctions regime against terrorism on 28 September 2001. This Res. 1373 (UN Doc. S/RES/1373, 28 Sept. 2001) orders Member States to impose all kinds of financial sanctions against terrorists, but leaves the decision who falls under the Resolution to the Member States.

³⁶ See the reference to the 'Guidelines of the Committee' adopted 1 Feb. 2000 (*press release SC/6802*, 8 February 2000) in the *Report of the Security Council Committee Established Pursuant to Resolution 1267 (1999) Concerning Afghanistan, Containing an Account of the Committee's Activities Since Its Establishment*, 29 Dec. 2000, UN Doc. S/2000/1254, § 12 (the latter report is available at <http://www.un.org/Docs/sc/committees/1267/1267AnnComm.htm>).

³⁷ I. Cameron, *supra* note 4, p. 8. In addition the report by Cameron reveals that the main (or exclusive) source of the names on the Afghanistan/Al-Qaida lists appears to have been the United States (*id.*, p. 6).

Sanctions committees are political/administrative bodies whose practice and procedures can be quite complex, prone to politicisation and at times bewildering to the observer. They meet in private sessions, thus the records of their meetings and their working documents are mostly restricted and beyond public scrutiny. The committees have until recently nurtured the secrecy of their proceedings as essential to ensure the effectiveness of their role. Decisions of the Committees are addressed to their requestors by a confidential communication, normally without further publicity or circulation. Decisions are remarkably laconic and generally do not provide any justification. Largely for political reasons, key members of the committees have always claimed the importance of a case-by-case approach to requests for advice or exceptions, to the cost of inconsistencies within and between sanctions regimes. This attitude, and the virtual lack of any mechanism of accountability, have generated a rather haphazard and unpredictable jurisprudence, which sometimes reflects shifting political attitudes by individual members against the target State. Another distinguishing feature of the committees' work is decision-making by consensus. This gives a virtual veto to every member, but in practice ensures the leverage of the main sponsors of the sanctions, which can block requests for exceptions to an otherwise complete ban.³⁸

This development underlines the existence of legislative powers of the Security Council and calls for a fresh look at the debate on the possibilities for judicial control of Security Council decisions (and decisions of organs established by it).³⁹ It is still debated whether the International Court of Justice has competence to review the legality of Security Council resolutions,⁴⁰ but one can at least conclude

³⁸ G.L. Burci, 'Interpreting the Humanitarian Exceptions through the Sanctions Committees', in V. Gowlland-Debbas, *supra* note 18, pp. 144-145.

³⁹ See on this discussion for instance E. Yemin, *Legislative Powers in the United Nations and Specialised Agencies*, Leyden, A.W. Sijthoff, 1996 and F.L. Kirgis, 'The Security Council's First Fifty Years', (1995) 89 *AJIL* 520.

⁴⁰ See for some of the reasons, B. Graefrath, 'Leave to the Court What Belongs to the Court: The Libyan Case', (1993) 4 *EJIL* 184 *et seq.*; M. Bedjaoui, *The New World Order and the Security Council: Testing the Legality of Its Acts*, Dordrecht, Martinus Nijhoff Publishers, 1994; J.E. Alvarez, 'Judging the Security Council', (1996) 90 *AJIL* 1-39; D.W. Bowett, 'The Court's Role in Relation to International Organisations', in V. Lowe and M. Fitzmaurice (eds.), *Fifty Years of the International Court of Justice:*

that the present mechanism, either in advisory opinions or in contentious cases, is very limited and rarely used.⁴¹ To the list of arguments in favour of enlarged possibilities for the Court to review Security Council Resolutions,⁴² one can now add the fact that individual citizens that happen to be the direct subject of legislative acts of the Security Council find themselves in a 'legal limbo'. While few people in Western States indeed would have any objections to ordering the freezing of Osama bin Laden's assets, this may not be the case for all of the other individuals and entities on the blacklist of Resolution 1333/1390. They may or may not be terrorist sympathisers or financiers, but inclusion on the list certainly implies that they are engaged, wittingly or unwittingly, in criminal activity.⁴³ The main consequence of the current regime is that potentially innocent individuals can be put on the list and remain there for an unlimited period of time. Removal from the list can be prevented by the objection of one single member (members of the Security Council also have a seat in the Sanctions Committee). Following a Statement of the Chairman of the 1267 Committee of 15 August 2002 the current system for removal of persons or entities from the list remains political; there are no possibilities for legal redress and in the end any 'de-listing request' risks being blocked by one of the members of the Committee or the Security Council.⁴⁴ Apart from the

Essays in Honour of Sir Robert Jennings, Cambridge, Cambridge University Press, 1996, pp. 181-192 and J. Dugard, 'Judicial Review of Sanctions' in V. Gowlland-Debbas, *supra* note 18, pp. 83-91.

⁴¹ See T. Sato, 'The Legitimacy of Security Council Activities under Chapter VII of the UN Charter Since the End of the Cold War', in J.-M. Coicaud and V. Heiskanen (eds.), *The Legitimacy of International Organisations*, Tokyo etc., United Nations University Press, 2001, pp. 309-352.

⁴² D.W. Bowett, *supra* note 40, for instance listed three reasons: 1) in democratic societies legislative acts are reviewable by courts – this should also be the case with the acts of the United Nations; 2) after the Cold War the political controls have been decreased in practice; and 3) States not represented in organs should have some means to ensure that what is done in their name is constitutional.

⁴³ I. Cameron, *supra* note 4, p. 12.

⁴⁴ See press release SC/7487, AFG/203, 16 Aug. 2002, available at <http://www.un.org/Docs/sc/committees/1267/1267PressEng.htm>:

Without prejudice to available procedures, a petitioner (individual(s), groups, undertakings, and/or entities on the 1267 Committee's [the Committee] consolidated list) may petition the government of residence and/or citizenship to request review of the case. In this regard, the petitioner should provide justification for the de-listing request, offer relevant information and request support for de-listing.

fact that there are no possibilities for appeal in case of a negative decision and that the 'evidence' which caused the particular individual to be put on the list in the first place is not made public, it is up to the 'suspect' or the Government wishing to submit a request for de-listing to prove that the individual is innocent. Respect for the principle of the presumption of innocence seems to be absent here.

Apart from several attempts by citizens to be removed from the list through the de-listing procedure,⁴⁵ the absence of legal remedies in the sanctions regime caused several citizens to seek redress on either the national or European level as that is

The government to which a petition is submitted ('the petitioned government') should review all relevant information and then approach bilaterally the government(s) originally proposing designation ('the designating government(s)') to seek additional information and to hold consultations on the de-listing request.

The original designating government(s) may also request additional information from the petitioner's country of citizenship or residency. The petitioned and the designating government(s) may, as appropriate, consult with the Chairman of the Committee during the course of any such bilateral consultations.

If, after reviewing any additional information, the petitioned government wishes to pursue a de-listing request, it should seek to persuade the designating government(s) to submit jointly or separately a request for de-listing to the Committee. The petitioned government may, without an accompanying request from the original designating government(s), submit a request for de-listing to the Committee, pursuant to the no-objection procedure.

The Committee will reach decisions by consensus of its members. If consensus cannot be reached on a particular issue, the Chairman will undertake such further consultations as may facilitate agreement. If, after these consultations, consensus still cannot be reached, the matter may be submitted to the Security Council. Given the specific nature of the information, the Chairman may encourage bilateral exchanges between interested Member States in order to clarify the issue prior to a decision.

⁴⁵ A case at hand is formed by the three Swedish/Somalian citizens who were innocent according to the Swedish National Criminal Investigation Department. A request for de-listing of these persons by the Swedish Government was rejected by the Sanctions Committee (see 'Government Request Revision of UN Sanctions List', Ministry of Foreign Affairs Press Release, 22 Jan. 2002, available at <http://www.regeringen.se>). By now the evidence concerning the innocence of the three individuals has resulted in their removal from the list (<http://www.un.org/Docs/sc/committees/1267/1267ListEng.htm>). See also the agreement laid down in UN Doc. SC/7490, 27 Aug. 2002, available at <http://www.un.org/Docs/sc/committees/1267/1267PressEng.htm>.

where the measures were implemented.⁴⁶ Within the European Union, financial measures of the Member States have to be taken in the EU framework to prevent conflicts with the free movement of capital and the EU has taken a number of decisions to either implement the UN resolutions or to establish a sanctions policy of its own.⁴⁷ The implementation of the policy of the UN Sanction Committee through the European legislator implies that citizens may question the validity of

⁴⁶ Thus the three Swedish citizens mentioned above, whose names were on the list, were also subjected to sanctions by the European Community. They initiated proceeding before Swedish Courts and the Court of First Instance of the EU (Case T-306/1 R, *Aden and others v. Council and Commission*). Other cases have been brought before the Court of First Instance by the PKK and KNK (Case T-229/02), the Kurdish National Congress (Case T-206/02) and the Organisation of Mujahedeen of the People of Iran (Case T-228/02). An English case at hand is *R. (on the application of Olthman) v. Secretary of State for Work and Pensions*, [2001] EWHC Admin. 1022 (QB 2001).

⁴⁷ See e.g. Council Regulation (EC) No. 467/2001 of 6 March 2001 Prohibiting the Export of Certain Goods to Afghanistan, Strengthening the Flight Ban and Extending the Freeze of Funds and Other Financial Resources in Respect of the Taliban of Afghanistan, 2001 *OJ L* 67/1, repealed by Council Regulation (EC) No. 881/2002 of 27 May 2002 Imposing Certain Specific Restrictive Measures Directed against Certain Persons and Entities Associated with Osama bin Laden, the Al-Qaida Network and the Taliban, and Repealing Council Regulation (EC) No. 467/2001 Prohibiting the Export of Certain Goods to Afghanistan, Strengthening the Flight Ban and Extending the Freeze of Funds and Other Financial Resources in Respect of the Taliban of Afghanistan, 2002 *OJ L* 139/9, as repeatedly amended; Council Regulation (EC) No. 2580/2001 of 27 December 2001 on Specific Restrictive Measures Directed against Certain Persons and Entities with a View to Combating Terrorism, 2001 *OJ L* 344/70, as amended by Commission Regulation (EC) No. 745/2003 of 28 April 2003 Amending Council Regulation (EC) No. 2580/2001 on Specific Restrictive Measures Directed against Certain Persons and Entities with a View to Combating Terrorism, 2003 *OJ L* 106/22 and Council Decision of 27 December 2001 Establishing the List Provided for in Article 2(3) of Council Regulation (EC) No. 2580/2001 of 27 December 2001 on Specific Restrictive Measures Directed against Certain Persons and Entities with a View to Combating Terrorism (2001/927/EC), 2001 *OJ L* 344/83, as later repealed and replaced by, most recently, Council Decision of 12 Sept. 2003 Implementing Article 2(3) of Regulation (EC) No. 2580/2001 on Specific Restrictive Measures Directed against Certain Persons and Entities with a View to Combating Terrorism and Repealing Decision 2003/480/EC (2003/646/EC), 2003 *OJ L* 229/22. See for more details the contributions by M. Klichling, pp. 212-215 and by J. Wouters and F. Naert ('Police and Judicial Cooperation in the EU and Counterterrorism'), pp. 135-137. For the latest amendments, see the index of authorities.

these measures before the European Court of First Instance or before their national courts, which after all are to apply EU law as well. While none of these courts is of course competent to invalidate UN Security Council Resolutions, they are at least under the obligation to take human rights into consideration.⁴⁸

5. Limits to the Security Council's Powers to Impose Sanctions

International legal doctrine generally holds that the Security Council does not operate in a legal vacuum. Using the words of the International Court of Justice, the 'political character of an organ cannot release it from the observance of the treaty provisions established by the Charter when they constitute limitations on its powers or criteria for its judgment'.⁴⁹

The possible limits to the Council's powers regained attention as the effects of the comprehensive sanctions regime against Iraq in particular triggered a discussion on both the effectiveness and the humanitarian consequences of this type of sanction.⁵⁰ After twelve years the complex sanctions regime against Iraq has not really achieved its goals, while the 'collateral damage' has been enormous. In an informal paper the UN Secretariat admitted:

As shown by the experience gained by the Secretariat in administering the various sanctions regimes, the application of comprehensive sanctions often causes unintended hardships to the civilian population in the target State. In the case of Iraq, the comprehensive sanctions measures had a serious negative impact on the civilian population.⁵¹

Along the same lines, the UN Committee on Economic Social and Cultural Rights (CESCR) held that collective sanctions:

⁴⁸ See on this also the contribution by J. Wouters and F. Naert ('Police and Judicial Cooperation in the EU and Counterterrorism'), pp. 147-151.

⁴⁹ *Admission of a State to the United Nations*, ICJ Rep., 1948, p. 65.

⁵⁰ See for a recount of this debate: M.E. O'Connell, 'Debating the Law of Sanctions', (2002) 13 *EJIL* 63-79.

⁵¹ *A Brief Overview of Security Council Applied Sanctions*, Informal Background Paper prepared by the Department of Political Affairs United Nations Secretariat, to the second Interlaken conference (see <http://www.smartsanctions.ch>), p. 150.

often cause significant disruption in the distribution of food, pharmaceuticals and sanitation supplies, jeopardise the quality of food and the availability of clean drinking water, severely interfere with the functioning of basic health and education systems, and undermine the right to work.⁵²

These consequences of sanctions are not new. From the outset the Security Council included humanitarian exemptions in the sanctions regimes. Thus, in the case of Rhodesia a wide range of materials, including educational equipment, publications and news material, was excluded from the regime,⁵³ whereas the sanctions regime against Iraq exempts supplies intended for medical purposes and certain basic foodstuffs, but also supplies for essential civilian needs, including not only agricultural and educational supplies, but also parts for the oil exploitation infrastructure and water and sanitation supplies.⁵⁴ These exemptions can also be found in less comprehensive sanctions regimes.⁵⁵

However, these exemptions are believed not to have always produced the intended effects,⁵⁶ and unlike the rules on the use of force and humanitarian law which are clearly spelt out, international law is not completely clear on the standards to be used in imposing sanctions regimes. Nevertheless, the ongoing discussion in legal circles seems to reveal an increasing consensus on a number of limits on the powers of the Security Council, based on arguments of either legality or legitimacy.⁵⁷ While smart sanctions are generally seen as an adequate response to the negative side-effects of the more comprehensive sanctions regimes, the regime used in the war against terrorism shows that even in the case of smart sanctions, a debate on the limits of the Security Council's powers is imminent.

⁵² General Comment No. 8 of the CESCR, 1997, § 3.

⁵³ Res. 253 (UN Doc. S/RES/253, 29 May 1968).

⁵⁴ Resolutions 661 (*supra* note 12), 687 (UN Doc. S/RES/687, 3 Apr. 1991) and 1302 (UN Doc. S/RES/1302, 8 June 2000).

⁵⁵ See for instance Res. 1127 (*supra* note 2) which mentions cases of medical emergency or flights carrying food, medicine or supplies for essential humanitarian needs, as exceptions to the embargo on flights by or for UNITA rebels in Angola.

⁵⁶ General Comment No. 8 of the CESCR, 1997, § 5.

⁵⁷ See for instance N. Angelet, 'International Law Limits to the Security Council', in V. Gowlland-Debas, *supra* note 18, pp. 71-82; B. Fassbender, 'Review Essay: *Quis judicabit?* The Security Council, Its Powers and Its Legal Control', (2000) 11 *EJIL* 219 *et seq.*

5.1. Procedural Charter-Based Limitations

The purposes of the United Nations can be found in Art. 1 of the UN Charter. The first purpose reads:

To maintain international peace and security, and to that end: to take effective collective measures for the prevention and removal of threats to the peace, and for the suppression of acts of aggression or other breaches of the peace, and to bring about by peaceful means, and in conformity with the principles of justice and international law, adjustments or settlement of international disputes or situations which might lead to a breach of the peace.

Thus, international peace and security may be maintained in two ways: through a peaceful settlement of disputes and by using enforcement measures. A limitation to the powers of the Security Council – ‘in conformity with the principles of justice and international law’ – is only mentioned in relation to the first possibility. The drafters of the Charter were not ready to limit enforcement measures along the same lines.⁵⁸

Chapter VII also reflects the notion that infringements on the (sovereign) rights of States are allowed. Using the words of Gill:

[in case] the Council is acting in the context of maintaining or restoring international peace and security, particularly in the determination whether a threat to the peace exist, or a breach of the peace has occurred, and is deciding which measures are necessary to remove the threat or restore the situation it is not bound by legal considerations and, clearly, any enforcement measures it may decide upon will necessarily affect the rights of the transgressing State, as well as the rights of third States. These rights do not disappear, since the Council cannot impose a permanent settlement of a dispute or allocation of rights on any State, but they do come into abeyance to the degree and for as long as the Council determines is necessary to remove the threat, or restore the peace.⁵⁹

⁵⁸ B. Simma, *supra* note 17, p. 52.

⁵⁹ T. Gill, ‘Legal and Some Political Limitations on the Power of the UN Security Council to Exercise its Enforcement Powers under Chapter VII of the Charter’, (1995) 26 *NYIL* 67-68.

But, what about the rights of individuals that are directly affected by smart sanctions? In 1950, Kelsen taught us that the purpose of enforcement action 'is not: to maintain or restore the law, but to maintain, or restore peace, which is not necessarily identical with law'.⁶⁰ Indeed, the systematics of Chapter VII of the Charter call for the Security Council to determine the 'existence of any threat to the peace, breach of the peace, or act of aggression', prior to any enforcement measure. In that respect Art. 39 already seems to limit the actions of the Council to those necessary for the maintenance of peace and security, leaving out actions that 'merely' aim to maintain or restore the law. Nevertheless, by now everyone is used to decisions of the Security Council which – using the words of Gowlland-Debbas – produce 'recognisable legal patterns which change the legal positions, not only of States, but also of individuals, engendering legal consequences and making possible new normative expectations'.⁶¹ Thus, determinations on the basis of Art. 39 have been linked to alleged breaches of international law, and are often linked to ethnic cleansing, genocide and other gross violations of human rights and breaches of humanitarian law. Many of the measures that followed have far-reaching legal effects on individuals (including the qualification of private transactions, the refusal of municipal law benefits or the grant of immunity as illegal, or the exclusion from cultural relations and sports).⁶² The so-called subsequent practice of the UN thus seems to point to more possibilities for the Security Council to make use of its enforcement competence. Also in the case of the antiterrorism sanctions, the Security Council confirmed that 'horrifying terrorist attacks ... like any act of international terrorism', are to be seen as 'a threat to international peace and security'.⁶³

The freezing of assets of individuals who were allegedly involved in international terrorism was based on Chapter VII, and most probably Art. 41 was used as the legal basis of these measures. It would indeed seem that no procedural rules have been violated as both Resolutions 1267⁶⁴ and 1333,⁶⁵ as well as Resolution

⁶⁰ H. Kelsen, *The Law of the United Nations: a Critical Analysis of Its Fundamental Problems*, London, Stevens & Sons, 1950, p. 294.

⁶¹ V. Gowlland-Debbas, *supra* note 18, p. 9.

⁶² *Id.*, p. 10.

⁶³ Res. 1368 (UN Doc. S/RES/1368, 12 Sept. 2001).

⁶⁴ *Supra* note 29.

⁶⁵ *Supra* note 5.

1390⁶⁶ which extended the original measures against it, refer to the Taliban's continued provision of sanctuary and training for international terrorists and their organisations as a threat to international peace. Also the establishment of a Sanctions Committee to monitor the sanctions regime and to take implementing decisions does not seem to conflict directly with any Charter provision.

Nevertheless, the familiar problem of the 'accountability deficit' with regard to the actions of the Security Council becomes even more compelling when the undisputed discretionary powers the Council has on the basis of Art. 39 are used for criminal charges against individual citizens.⁶⁷ Smart sanctions may be the appropriate solution to the problems of ineffectiveness and 'collateral damage' of comprehensive sanctions regimes. They do, however, entail a danger of institutionalising a system of individual criminal responsibility without basic rights for the individuals concerned.

5.2. Limits Set by Human Rights

Primarily, on the basis of Art. 24(2), the Security Council's powers seem to be limited to the purposes and principles of the United Nations as laid down in Arts. 1 and 2 of the Charter. The problem here results from potentially conflicting objectives, such as the maintenance of peace and security and the promotion of respect for human rights.⁶⁸ In this respect one purpose of the UN comes to mind: 'To achieve international cooperation ... and in promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion' (Art. 1 (3) UN Charter). Although this provision does not explicitly create a duty for the UN to respect human rights, this obligation is often derived from other provisions in the Charter, in particular Arts. 24, 55 and 56.⁶⁹

Doctrine presents different possible lines of argumentation in binding the Security Council to human rights. Some authors argue that human rights treaties concluded within the UN framework may be said to give effect to these broad

⁶⁶ *Supra* note 3.

⁶⁷ See on the possibilities for judicial review of Security Council actions for instance: J. Dugard, *supra* note 40.

⁶⁸ See M. Craven, *supra* note 23, p. 51.

⁶⁹ T. Gill, *supra* note 59, p. 77.

purposes of the UN and hence bind the organs as such.⁷⁰ In the same line of reasoning it is sometimes pointed out that the Security Council is increasingly involved in the protection of human rights, as gross human rights violations are considered to form a threat to peace and security. Others claim that at least a number of fundamental human rights (including for instance the right to life and the right to health, but also the right of access to a fair hearing) impose serious limits on the powers of the Security Council to maintain or restore peace and security, because some of these rights – or at least elements of them – are non-derogable even in emergency situations and may have the character of *ius cogens*.⁷¹

What could be seen as a rather new development, however, is that some smart sanctions come close to what we normally would consider to be criminal charges against individuals. In that respect the right to a fair trial seems particularly relevant. While other human rights (such as the freedom of movement, the freedom from unlawful attacks on one's reputation, the right to family life or certain property rights) may also run a danger to be violated in the course of the war against terrorism, one of the most obvious rights which may be violated is the right to fair trial, including the right of access to court.⁷² One could argue that in exercising its competencies in relation to smart sanctions, the Security Council should take account of the regular guarantees concerning a fair trial, in order to secure (at least)

⁷⁰ *Id.*, p. 77: 'The duty of the Security Council to respect essential human rights and humanitarian values – including nearly all of the rules of the humanitarian law of armed conflict – can be derived from a number of Charter provisions, specifically Articles 24, 1(3), 55 and 56, from UN practice and from the subsequent development of human rights and humanitarian law since the Charter came into force in 1945.' See also I. Cameron, *supra* note 4, p. 16: 'Simply put, the approach that nothing stands in the way of the maintenance of international peace and security is untenable. The UN has been telling States for fifty years that they must obey human rights. It is bizarre that arguments are being made that the Security Council is not bound by the standards that the UN organisation has been going on about.'

⁷¹ See for instance E. de Wet, 'Human Rights Limitations to Economic Enforcement Measures Under Article 41 of the United Nations Charter and the Iraqi Sanctions Regime', (2001) 14 *Leiden JIL* 277-300 and A. Nollkaemper and E. de Wet, *Judicial Review of Security Council Decisions by National Courts*, unpublished paper, 2002. The 'special status' of human rights is also mentioned by Bulterman (*supra* note 31, p. 844) when she claims that national judges should at least take human rights into consideration whenever they are faced with the duty to implement UN decisions.

⁷² See I. Cameron, *supra* note 4, p. 26.

the legitimacy of its actions. In the *Tadić* case, the Appeals Chamber of the ICTY even went as far as implying a *ius cogens* status of the core elements of a right to a fair trial, on the basis of which it claimed it essential for a judicial body such as the ICTY to respect that right.⁷³ Art. 14(1) of the International Covenant on Civil and Political Rights (ICCPR)⁷⁴ provides that in the determination of any ‘criminal charges’ against individuals, or their rights and obligations in a suit of law, everyone should be entitled to a fair and impartial hearing by a competent, independent tribunal established by law. It has been submitted that this includes the right of access to a fair trial hearing, since any other conclusion would allow States to deny justice to individuals very easily.⁷⁵ The question, however, is whether the antiterrorism sanctions imply a ‘criminal charge’. In that respect it may be noted that the legal human rights doctrine seems to have accepted the definition of ‘criminal charge’ by the European Court of Human Rights (ECtHR) in relation to the right to fair trial (under Art. 6 of the European Convention on Human Rights (ECHR)⁷⁶). According to the Court it is not so much the purpose of the measure that matters, but rather the effect it has on the individual to which it is directed: ‘... the nature and severity of the threatened sanction, as well as the type of sanctioned offence is to be drawn upon in evaluating whether a criminal charge exists’.⁷⁷ Thus, the right to a fair trial would apply whenever an individual is brought into a ‘criminal law’ situation.⁷⁸

⁷³ *Prosecutor v. Duško Tadić*, 2 Oct. 1995, *supra* note 18, § 42

⁷⁴ International Covenant on Civil and Political Rights, 19 Dec. 1966, 999 *UNTS* 171.

⁷⁵ See for instance D. Weissbrodt, *The Right to a Fair Trial under the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights*, The Hague, Martinus Nijhoff Publishers, 2001, p. 130.

⁷⁶ (European) Convention for the Protection of Human Rights and Fundamental Freedoms, Rome, 4 Nov. 1950, *ETS* No. 5, available at <http://conventions.coe.int>.

⁷⁷ *Lauko v. Slovakia*, Appl. No. 26248/95, 2 Sept. 1998, § 56, available at <http://www.echr.coe.int>. See A. Nollkaemper and E. de Wet, *supra* note 71, p. 18. For Article 6 to apply in virtue of the words ‘criminal charge’, it suffices that the offence in question should have made the person concerned liable to a sanction which, due to its nature and degree of severity, places it within the ‘criminal’ sphere. See also ECtHR, *Lutz v. Germany*, Appl. No. 9912/82, 25 Aug. 1987, § 55, available at <http://www.echr.coe.int>.

⁷⁸ ECtHR, *Lutz v. Germany*, *supra* note 77, § 55. See also the criteria developed in *Engel and Others v. The Netherlands* (30 Apr. 1976, available at <http://www.echr.coe.int>) and the application in *Oztürk v. Germany* (Appl. No. 8544/79, 25 Jan. 1984, available at <http://www.echr.coe.int>), § 55: ‘On this point the Court would simply refer back to its

Irrespective of the general discussion on the limits to Security Council powers, one could argue that we indeed seem to be dealing with punitive sanctions against individuals, placing the regime in a 'criminal' sphere.⁷⁹ If one would be willing to accept the non-derogable status of basic elements of the right to a fair hearing (in which case an appeal to an emergency situation would not hold)⁸⁰ as well as the fundamental nature of this right and its applicability to the UN organs themselves, the current measures raise serious questions. In that case, the UN Security Council – as well as committees established by it – would be subject to these restrictions. Financial sanctions against individuals, and in particular the impossibility for those individuals to make use of their right to challenge such sanctions in a fair hearing, may conflict with Art. 14(1) ICCPR. The current system in which the list of individuals is managed by the Sanctions Committee does not seem to meet the procedural guarantees provided in Art. 14(1) as rights and obligations are not heard by a competent, independent and impartial tribunal established by law.⁸¹ Moreover, suspects do not have a right to see the evidence presented against them and the current situation closely resembles a reversal of the presumption of innocence. One could also mention the absence of the possibility of reviewing the decision.⁸² Finally, an

well-established case law holding that "charge", for the purpose of Article 6, may in general be defined as "the official notification given to an individual by the competent authority of an allegation that he has committed a criminal offence", although "it may in some instances take the form of other measures which carry the implication of such an allegation and which likewise substantially affect the situation of the suspect".

⁷⁹ *Contra* I. Cameron, *supra* note 4, p. 30. At the same time Cameron claims that whether or not freezing of assets constitutes a 'criminal charge', it is incontrovertible that disputes over property, as is the case here, fall under the concept of a 'civil right', which would also activate the right to access to court.

⁸⁰ According to Art. 4(1) ICCPR derogations from the right to fair trial in times of emergency are allowed. However, there is increasing support for the proposition that core elements of the rights to a fair trial are to be considered as non-derogable. See A. Nollkaemper and E. de Wet, *supra* note 71, p. 21.

⁸¹ According to the European Court of Human Rights in the case *Golder v. United Kingdom* Art. 6 includes 'a right to invoke legal procedures consistent with the article when a person faces a loss of rights or an imposition of obligations'. See *Golder v. United Kingdom*, Appl. No. 4451/70, 21 Feb. 1975, §§ 26-36, available at <http://www.echr.coe.int>.

⁸² See Art. 14(5) ICCPR and Art. 2, Protocol 7 ECHR (Protocol No. 7 to the Convention for the Protection of Human Rights and Fundamental Freedoms, Strasbourg, 22 Nov. 1984, *ETS* No. 117, available at <http://conventions.coe.int>).

unjustifiable listing of persons or entities could trigger a claim for ‘compensation for miscarriage of justice’,⁸³ but procedures to materialise such a claim are absent in the current regime. Apart from the question of whether the Security Council is indeed bound by these principles (the question of the *legality* of its measures), it is quite clear that the procedure developed by the Sanctions Committee in no way meets the criteria for a fair trial, whereby at least the *legitimacy* of the measures could be questioned.

A way out of the problem that it is not always clear whether the Security Council is bound to the same rules that were originally agreed upon to limit the powers of States, is to argue that at least the implementation of sanctions is to be undertaken by individual Member States. There is no doubt that these States are bound by conventional as well as customary human rights obligations. The main flaw in this line of reasoning seems to be that those same States have accepted obligations under the UN Charter to give the organisation every assistance in any action it takes in accordance with the Charter (Art. 2(5)), in good faith (Art. 2(2)) and even give priority to Charter obligations in case of a conflict with obligations they may have under any other agreement (Art. 103). Nevertheless, some authors have argued that this conflict rule would not be applicable when the Security Council itself has acted in contravention of the Charter or violated a norm of *ius cogens*,⁸⁴ or that simply there is no conflict because mechanisms *can* be created at the level of the Security Council and, hence, there is no *logical* incompatibility between the obligations under the human rights treaties and the Security Council sanctions.⁸⁵

5.3. Humanitarian Law Arguments

Other arguments in the debate on the limits to the powers of the Security Council frequently have the familiar ring of the rules defining the law of armed conflict. On this line of reasoning, the competencies of the Security Council regarding the imposition of sanctions are explicitly linked to humanitarian law standards, in the sense that the balance between military necessity and humanity is thought to be equally applicable to sanctions regimes. If the impact of some comprehensive sanctions are taken into account, there is indeed some logic behind the comparison with a military intervention. While there is an inherent danger that by introducing

⁸³ Art. 14 ICCPR and Art. 3, Protocol 7 ECHR (*supra* note 82).

⁸⁴ A. Nollkaemper and E. De Wet, *supra* note 71, p. 41.

⁸⁵ I. Cameron, *supra* note 4.

'humanitarianism' in the institution of sanctions, the legitimacy of the instrument as such is less questioned,⁸⁶ this nevertheless seems to be happening. Frequently a balance is sought between the necessity to impose sanctions and the demands of proportionality and effectiveness. As far as proportionality is concerned, we have already seen that attention is increasingly paid to the side-effects of sanctions.⁸⁷ While some sanctions indeed intend to inflict harm on the civilian population in order to trigger pressure against the official regime (as for instance was the case with the sanctions against South Africa), the unintentional side-effects ('collateral damage') can be considered to have become a danger to the legitimacy of sanctions. This problem becomes even more apparent when the sanctions regimes fail to reach their political objectives (as in the case of Iraq). Unlike Art. 42 UN Charter (on military enforcement measures), however, Art. 41 UN Charter does not reflect the principle of proportionality. On the other hand, Art. 42 reveals that the principle of proportionality lies behind the system of enforcement measures as a whole: 'Should the Council consider that measures provided for in Article 41 *would be inadequate or have proved to be inadequate*, it may take such action by air, sea, or land forces as may be *necessary* to maintain or restore international peace and security'.⁸⁸

With a proper balance between objectives and means in mind, comparisons are sometimes made to the rules concerning the legality of countermeasures, as this regime also aims to set the boundaries of reactions against illegal acts of other parties. Apart from the fact that countermeasures cease to be legal once the illegal act of the other party is ended, they also face limitations set by human rights and humanitarian law. By the same token, the principle of subsidiarity calls for less far-reaching measures to be used whenever possible. Thus, one could argue that, for instance, introducing elements of the fair trial principles into the regime of smart sanctions would hardly harm the effectiveness of the measures.

⁸⁶ *Id.*, pp. 59-60.

⁸⁷ See for instance M. Bossuyt, *The Adverse Consequences of Economic Sanctions on the Enjoyment of Human Rights*, working paper prepared for the UN Sub-Commission on the Promotion and Protection of Human Rights, 21 June 2000, UN Doc. E/CN.4/Sub.2/2000/33, available at <http://www.unhchr.ch>.

⁸⁸ Emphasis added. See more extensively: N. Angelet, *supra* note 57, pp. 72-74.

6. Concluding Observations

The international legal system is changing. States are no longer sole actors and we have grown accustomed to the presence of non-State actors, such as liberation movements, non-governmental organisations, multinationals, international organisations and individuals. National systems have been aware of the emergence, as well as of the use, of 'private' actors in 'public' areas. They have even sometimes changed their public administration from a system based on 'government' to one departing from 'governance'.⁸⁹ The international legal system is increasingly confronted with its own origin: most rules are made to regulate the behaviour of States and do not account for non-State actors, such as international organisations, to be part of the game. At the same time, however, these international organisations gradually started to play a role, not only in facilitating cooperation between States, but also in setting new rules and standards that sometimes have effects within the legal orders of their Member States.⁹⁰ The European Union is of course the primary instance, but examples can be found elsewhere as well. During the last decade of the 20th century, the United Nations has shown an equal interest in citizens, ranging from human rights abuses as threats to peace and security, to the almost full-fledged administration of territories and the establishment of tribunals to try individual war criminals.

The use of smart sanctions can be explained in this context and seems to reveal a change in the law of sanctions. Indeed, as noted by O'Connell, 'the Security Council's own current practice, statements of the Secretary-General, commentary of international lawyers, and the positions adopted by relevant non-governmental organisations have coalesced around this consensus. The law of sanctions has changed after 10 years of measures against Iraq.'⁹¹ Be that as it may, the problem remains that we are not quite sure in what way it has changed. The 'normalisation' of sanctions, boosted by a shift towards smart sanctions, may be a first answer to

⁸⁹ This is reflected in the theme of the 2003 Hague Joint Conference on Contemporary Issues of International Law: *From Government to Governance? The Growing Impact of Non-State Actors on the International and European Legal System*, 2-5 July 2003.

⁹⁰ See I.F. Dekker and R.A. Wessel, 'Governance by International Organisations: Rethinking the Source of International Decisions', in I.F. Dekker and W. Werner (eds.), *Governance and International Legal Theory*, The Hague, Kluwer Law International, 2003 (forthcoming).

⁹¹ M.E. O'Connell, *supra* note 50, p. 79.

calls for legitimacy, but it has been clear from the outset that smart sanctions regimes in turn raise new questions. International law is trying to cope with a development in which international organisations that were created as cooperation frameworks between States increasingly use their autonomous powers to directly address and affect the nationals within the States. Serious international incidents, such as the terrorist attacks of 11 September 2001, trigger the acceptance of this role of international organisations. However, shifts in governance from the State level to the level of the international organisation bring about 'accountability deficits' whenever they are not met by parallel shifts in accountability regimes. The rule of law was invented to protect citizens against improper behaviour by their own Government. However, when States – often for good reasons – decide to transfer competencies to international organisations, or to create new competencies on that level, traditional guarantees may become less effective. In particular when individuals are placed in a criminal law setting through Resolutions of the Security Council, this may affect the carefully built-up system of human rights protection. In a recent speech before the UN Human Rights Commission, the UN High Commissioner, Mary Robinson, addressed this problem:

Some have suggested that it is not possible to effectively eliminate terrorism while respecting human rights. This suggestion is fundamentally flawed. The only long-term guarantor of security is through ensuring respect for human rights and humanitarian law. The essence of human rights is that human life and dignity must not be compromised and that certain acts, whether carried out by State or non-State actors, are never justified no matter what the ends. At the same time human rights and humanitarian law are tailored to address situations faced by States, such as a public emergency, challenges to national security, and periods of violent conflict. This body of law defines the boundaries of permissible measures, even military conduct. It strikes a fair balance between legitimate national security concerns and fundamental freedoms. ... The right to fair trial is also explicitly guaranteed under international humanitarian law. The principles of legality and rule of law require that the fundamental requirements of fair trial must be respected even under an emergency.⁹²

⁹² Speech during the 58th session of the UN Human Rights Commission, 20 Mar. 2002.

Legal Instruments in the Fight against International Terrorism

International law will have to come up with solutions while accepting the consequences of the emergence of other, autonomous, actors on the international scene. A new legal framework within which the various considerations – humanitarianism, rule of law, effectiveness – are thought to come into play,⁹³ seems in particular imminent when international organisations directly affect the rights of individual citizens. Smart sanctions may indeed be ‘a policy maker’s dream’, but we have to prevent the new developments from becoming ‘a human rights lawyer’s nightmare’.

⁹³ See M. Craven, *supra* note 23, p. 60. For a number of options to ameliorate the present system, see I. Cameron, *supra* note 4.