

# The Policy Effects of the Decisions of European Courts on Targeted Sanctions

## Whither Human Rights?

*Kushtrim Istrefi\**

Judges, too, must display that doubt, caution, and prudence, that not being 'too sure' of oneself.

Justice Breyer

### 1 Introduction

Decades ago, Sir Hersch Lauterpacht argued that 'international courts not only give a decision in a particular dispute, but that they are also fundamental to making international law a more complete and effective law'.<sup>1</sup> Philippe Sands maintains that international courts should also contribute to raising public consciousness and contribute to offering working, effective solutions backed up by the special authority of the law.<sup>2</sup>

This role of international courts also applies, at times, in the context of national and regional courts. This can be said of cases where courts respond to issues of international community interest,<sup>3</sup> or where they examine, even if indirectly, laws

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<sup>1</sup> Hersch Lauterpacht, *The Function of International Law in the International Community* (Clarendon Press 1933) 423–5.

<sup>2</sup> Philippe Sands, 'Climate Change & Rule of Law' (lecture held at the UK Supreme Court, 17 September 2015) <<https://www.supremecourt.uk/news/climate-change-and-the-rule-of-law.html>> accessed 28 April 2019.

<sup>3</sup> C/09/295241/HA ZA 07-2973 (The Hague District Court 2014) <<http://uitspraken.rechtspraak.nl/inziendocument?id=ECLI:NL:RBDHA:2014:8748>> accessed 28 April 2019; C/09/456689/HA ZA 13-1396 (The Hague District Court 2015) <<http://uitspraken.rechtspraak.nl/inziendocument?id=ECLI:NL:RBDHA:2015:7196&keyword=urgenda>> accessed 28 April 2019.

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or policies affecting other legal regimes.<sup>4</sup> Such judicial responses may have a two-fold purpose. According to Dworkin, by applying arguments of principle, courts aim to establish an individual right and, by applying arguments of policy, they aim to establish a collective goal.<sup>5</sup> While arguments of principle may be relevant to the individual concerned and the domestic legal order, arguments of policy may aim to reach other legal regimes or the international community as a whole.

Such legal and policy significance can be seen in the European jurisprudence of Security Council targeted sanctions, as the measures triggering the respective proceedings were rooted in another legal order, namely, that of the United Nations. Through their findings in such cases, the European courts have conveyed certain messages to the UN and other legal regimes. They have also contributed to the debate on the value-based system of international law, given that the proceedings concerned international security and human rights.<sup>6</sup> They have raised global awareness about human rights, particularly in the context of counterterrorism. As ‘megaphones of the truth,’<sup>7</sup> they have courageously pointed to the flaws of Security Council sanctions decision-making, even when unable to uphold human rights in the normative realm.<sup>8</sup> As Eyal Benvenisti observed:

the ways in which [ ... ] courts have reacted to their executive’s security-related claims since 11 September 2001, ... speak of a new phase in the way democracies are addressing the threat of terrorism: executive unilateralism is being challenged by [ ... ] courts in what could perhaps be a globally coordinated move.<sup>9</sup>

At the same time, ‘all litigation runs the risk of unintended consequences and this is true too in respect of restrictive measures.’<sup>10</sup> Such consequences have largely been discussed through the notions of hierarchy of norms, constitutional pluralism, and the autonomy of legal regimes.<sup>11</sup> However, this contribution does not add to those

<sup>4</sup> *Al-Jedda v The United Kingdom* App No 27021/08 (ECHR, 7 July 2011); *Nada v Switzerland* App No 10593/08 (ECtHR, 12 September 2012); Joined Cases C-402/05 P and C-415/05 P *Kadi and Al Barakaat International Foundation v Council and Commission* ECLI:EU:C:2008:461.

<sup>5</sup> Ronald Dworkin, ‘Hard Cases’ (1975) 88(6) *Harvard Law Review* 1067.

<sup>6</sup> See Erika de Wet, ‘The Emergence of International and Regional Value Systems as a Manifestation of the Emerging International Constitutional Order’ (2006) 19 *Leiden Journal of International Law* 611–32.

<sup>7</sup> Philip Allott, ‘The Idealist’s Dilemma: Re-Imagining International Society’ (*EJIL Talk!*, 9 June 2014) <<http://www.ejiltalk.org/the-idealists-dilemma-re-imagining-international-society/#more-11047>> accessed 28 April 2019.

<sup>8</sup> See, e.g., *Kadi and Al Barakaat International Foundation v Council and Commission* ECLI:EU:C:2008:461, *supra* note 4; *Al-Jedda v The United Kingdom*, *supra* note 4; *Youssef Nada v State Secretariat for Economic Affairs and Federal Department of Economic Affairs* [2007] BGE 133 II 450, 1A 45/2007, para. 8.

<sup>9</sup> Eyal Benvenisti, ‘United We Stand: National Courts Reviewing Counterterrorism Measures’ in Andrea Bianchi and Alexis Keller (eds), *Counterterrorism: Democracy’s Challenge* (Hart Publishing 2008) 254.

<sup>10</sup> Cian C. Murphy, ‘Counter-terrorism Law and Judicial Review: The CJEU’ in Fergal Davis and Fiona de Londras (eds), *Critical Debates on Counter-Terrorism Judicial Review* (CUP 2014) 301.

<sup>11</sup> See, e.g., Andre Nollkaemper, ‘Rethinking the Supremacy of International Law’ (2010) 65 *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* 65–85; Erika de Wet and Jure Vidmar

discussions. Instead, it aims to examine the policy effects of the European courts on Security Council due process reform and genuine realization of human rights, the two concerns which triggered their judicial responses. To determine these policy effects, the assessment is consequentialist<sup>12</sup> in nature as it aims to (i) identify the ultimate value and (ii) encourage actions that maximize the value in question.<sup>13</sup> With respect to the former, the present chapter considers that genuine protection of human rights is the ultimate value. Following this, it considers actions which advance Security Council due process reform to be those which maximize that value. The review mechanism within the Security Council remains, in the author's view, an essential avenue capable of maximizing the value of genuine human rights protection.<sup>14</sup>

European judicial responses to Security Council measures are scrutinized in the context of targeted sanctions, in particular those regarding counterterrorism, which, at the time of writing, seem to have no endpoint. In order to justify harsh measures affecting individual rights, executive and legislative bodies have referred to terrorism, whether real or perceived, as a crisis and emergency.<sup>15</sup> Against this background, discussion of the policy effects of decisions by European courts regarding due process reveals the broader role of courts and human rights in times of crisis.

The chapter commences by examining the question whether Security Council due process reform has been stimulated by a more courageous response by the CJEU in *Kadi II* or the cautious response of the ECtHR in *Al-Dulimi*. Then, in the light of the latter judgment, the chapter looks at the role

(eds), *Hierarchy in International Law: The Place of Human Rights* (OUP 2012); Antonios Tzanakopoulos, *Disobeying the Security Council Countermeasures against Wrongful Sanctions* (OUP 2013); Ramses A. Wessel and Steven Blockmans, *Between Autonomy and Dependence: The EU Legal Order Under the Influence of International Organizations* (T.M.C. Asser Press 2013); Matej Avbelj, Filippo Fontanelli, and Giuseppe Martinico (eds), *Kadi on Trial: A Multifaceted Analysis of the Kadi Trial* (Routledge 2014); Inge Govaere, 'The Importance of International Developments in the Case-law of the European Court of Justice: Kadi and the Autonomy of the EC Legal Order' (2009) *Research Papers in Law of the College of Europe No. 1/2009*; Gráinne de Búrca, 'The European Court of Justice and the International Legal Order After Kadi' (2010) 51 *Harvard International Law Journal* 1–49.

<sup>12</sup> For the purpose of this contribution, consequentialism is not employed to adhere to or engage with a strict theory of moral philosophy. It is applied, as Paul Hurley writes, 'beyond philosophy consequentialism' in the area of contemporary jurisprudence to assess, *inter alia*, the right strategy taken to maximize the overall benefit. As Justice Breyer argues, the focus on consequences 'allows us to gauge whether and to what extent we have succeeded in facilitating workable outcomes'. See Paul Hurley, *Beyond Consequentialism* (OUP 2009) 2; Stephen Breyer, *Active Liberty: Interpreting Our Democratic Constitution* (Alfred A. Knopf 2005) 115.

<sup>13</sup> Paul Hurley, 'Consequentializing and Deontologizing: Clogging the Consequentialist Vacuum' in Mark Timmons (ed.), *Oxford Studies in Normative Ethics: Vol. III* (OUP 2013) 127.

<sup>14</sup> The assessment of policy effects of European jurisprudence on targeted sanctions through the notion of consequentialism is not applied to deny the existence of other ultimate values, or actions that could maximize them. Furthermore, the author rejects a radical reading of consequentialism by which any action or policy that achieves the desired aim could be justified.

<sup>15</sup> Oren Gross and Fionnuala Ní Aoláin, *Law in Times of Crisis* (CUP 2006) 4; Mary Dudziak, *War Time* (OUP 2013) 4.

of courts in pressing national authorities to further such due process reform and to ensure the practical realization of human rights. Finally, the concluding remarks highlight the correlation between judicial activism and the desired policy impact by European courts on due process reform and genuine realization of human rights.

## 2 EU Courts—The Rise and Fall of Their Impact on Due Process Reform

### 2.1 A Brief Overview of *Kadi II*

Before the CJEU rendered its judgment in *Kadi II*, Mr Kadi had been delisted from the UN sanctions list upon the recommendation of the Office of the Ombudsperson. In that light, Advocate General Bot invited the CJEU to take into account, *inter alia*, procedural improvements within the Office of the Ombudsperson.<sup>16</sup> Bot proposed that the CJEU should perform a lower intensity and not full judicial review of Security Council measures.<sup>17</sup>

The CJEU in *Kadi II* disregarded the calls of Advocate General Bot and decided to reinforce its earlier position on two issues.<sup>18</sup> First, it reiterated that Security Council measures when implemented at the European level were subject to the primacy of EU constitutional guarantees, and, second, that it would continue to perform a full judicial review of such measures for at least as long as Security Council sanction mechanisms lacked effective judicial protection.<sup>19</sup> On the latter issue, the Court made it clear that Security Council due process reform was incomplete and without effect as long as a court was lacking. The CJEU held:

[t]he essence of effective judicial protection must be that it should enable the person concerned to obtain declaration from a court, by means of a judgment ordering annulment whereby the contested measure is retroactively erased from the legal order and is deemed never to have existed, that the listing of his name, or the continued listing of his name, on the list concerned was vitiated by illegality, the recognition of which may re-establish the reputation of that person or constitute for him a form of reparation for the non-material harm he has suffered.<sup>20</sup>

<sup>16</sup> Joined Cases C-584/10 P, C-593/10 P, and C-595/10 P *European Commission and Others v Yassin Abdullah Kadi (No. 2)* ECLI:EU:C:2013:176. Opinion of AG Bot, paras 5, 61, 67, 76, 80, 81.

<sup>17</sup> *Ibid.*, paras 10, 68, 69, 71, 81.

<sup>18</sup> Joined Cases C-584/10 P, C-593/10 P, C-595/10 P. Appeals brought on 10 December 2010.

<sup>19</sup> Joined Cases C-584/10 P, C-593/10 P, and C-595/10 P *European Commission and Others v Yassin Abdullah Kadi (No. 2)* ECLI:EU:C:2013:518, paras 22 and 119.

<sup>20</sup> *Ibid.*, para. 134 (emphasis added).

It has been argued that the CJEU in *Kadi II* transformed the ‘act of rebellion by the ECJ in *Kadi I*’ into an enduring normative approach.<sup>21</sup> In maintaining this approach, the CJEU did not accept context-based procedures that could be suitable for other organizations, including the United Nations.

## 2.2 Policy Effects

A challenge is inherent in identifying individuals supporting terrorism due to the secret nature of their operation. By targeting ‘unknowns’, the Security Council inevitably runs the risk of erroneous designations. As Lord Rodger observed in *Ahmed*, ‘sooner or later, someone will be designated who has not actually been committing or facilitating terrorist acts.’<sup>22</sup> These concerns have been realized, and the Security Council Al-Qaeda sanctions regime has recognized that erroneous or toxic designations have occurred.<sup>23</sup> In addition, the Council has also blamed the wrong organization for terrorist attacks.<sup>24</sup>

In response to these challenges, there is a growing consensus in the Security Council that the individuals and entities concerned should have access to a review mechanism that is independent and impartial.<sup>25</sup> The earlier jurisprudence of the EU courts has contributed to the formation of this consensus and to the initiative on establishing the Office of the Ombudsperson.<sup>26</sup> However, since the establishment of the Office of the Ombudsperson, the impact of decisions by the EU courts appears to have diminished. This is in part due to the position of the EU courts differing from not only that of the Security Council but also from some of the UN actors working on due process reform, including the Special Rapporteur on counterterrorism and human rights, the Group of Like-Minded States, and the Office of the Ombudsperson.<sup>27</sup>

<sup>21</sup> Devika Hovell, ‘Kadi: King-Slayer or King-Maker? The Shifting Allocation of Decision-Making Power between the UN Security Council and Courts’ [2016] *Modern Law Review* 160.

<sup>22</sup> *Her Majesty’s Treasury (Respondent) v Mohammed Jabar Ahmed and others (FC) (Appellants)*; *Her Majesty’s Treasury (Respondent) v Mohammed al-Ghabra (FC) (Appellant)*; *R (on the application of Hani El Sayed Sabaai Youssef) (Respondent) v Her Majesty’s Treasury (Appellant)* [2010] UKSC 5 (hereinafter *Ahmed*), para. 174.

<sup>23</sup> See SC Res. 1822 (2008) paras 15, 25, 26 regarding the review of ‘toxic designations’. In its two-year work of reviewing so-called toxic designations, the Security Council 1267 Sanctions Committee identified forty-five names of individuals and entities listed erroneously.

<sup>24</sup> The Security Council in its Resolution 1530 (2004) mistakenly identified the Basque group ETA as responsible for the 2004 Madrid bombings. See also Therese O’Donnell, ‘Naming and Shaming: The Sorry Tale of Security Council Resolution 1530 (2004)’ (2007) 17 *European Journal of International Law*.

<sup>25</sup> See SC Res. 1989 (2011) para. 21; SC Res. 2083 (2012), para. 19.

<sup>26</sup> Kimberly Prost, Ombudsperson of the Security Council Al-Qaida Sanctions Committee, Remarks to the 49th meeting of the Committee of Legal Advisors on Public International Law (CAHDI) of the Council of Europe (Strasbourg, 20 March 2015) <<https://www.un.org/securitycouncil/sites/www.un.org/securitycouncil/files/cahdi.pdf>>.

<sup>27</sup> *Ibid.* See also ‘Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism: Report to the General Assembly’ (26 September 2012) UN Doc A/67/396; ‘Report of the United Nations High Commissioner for Human Rights on

According to the EU courts, the Security Council should establish nothing short of a full-blown court.<sup>28</sup> It is, however, clear that for Security Council and UN actors working on human rights, the due process reform may only go as far as modifying and enhancing the mandate of the Office of the Ombudsperson.<sup>29</sup> It has been noted that ‘full judicial review is not always within reach.’<sup>30</sup> The entrenchment of these positions has resulted in a debate which ‘increasingly resembles a conversation of the deaf.’<sup>31</sup>

Devika Hovell has recently suggested that the EU courts should overcome the fixation on a court-based adjudicatory model of due process for Security Council sanctions. Since due process is not a ‘one-size-fits-all’ principle, the Security Council may legitimately require ‘different procedural standards and operate according to different principles and values.’<sup>32</sup> Hovell rightly argues that a ‘formalist legal approach has failed to persuade the Security Council, a body that operates in a setting in which the relationship between law and politics is notoriously complex.’<sup>33</sup>

The fixation of the EU courts on the notion of a court has been viewed as counterproductive to due process reform. In her speech delivered in March 2015 in Strasbourg, the then UN Ombudsperson, Kimberly Prost, explained that one of the key reasons for setbacks of her institution at the time emanated from the EU courts. She stated that the absence of recognition by the CJEU in *Kadi II* of the Office of the Ombudsperson ‘[had] had a damaging effect in terms of the motivation at the political level to maintain and to expand the Ombudsperson position.’<sup>34</sup> The Ombudsperson found it regrettable that ‘the [CJEU] [would] independently decide on what [was] necessary in terms of fair process according to its analysis and law.’<sup>35</sup> The position of the CJEU, according to Prost, could only

the protection of human rights and fundamental freedoms while countering terrorism’ (15 December 2010) UN Doc A/HRC/16/50; Letter dated 17 April 2014 from the Permanent Representatives of Austria, Belgium, Costa Rica, Denmark, Finland, Germany, Liechtenstein, the Netherlands, Norway, Sweden, and Switzerland to the United Nations addressed to the President of the Security Council, S/2014/286 <<https://digitallibrary.un.org/record/769545>>.

<sup>28</sup> T-85/09 *Kadi v Commission* ECLI:EU:T:2010:418; Joined Cases C-584/10 P, C-593/10 P, and C-595/10 P *European Commission and Others v Yassin Abdullah Kadi* [2013] ECR 00000 (hereinafter *Kadi II*), 13.

<sup>29</sup> Report of the Special Rapporteur, *supra* note 27; UN General Assembly Res 60/1 ‘World Summit Outcome’ of 24 October 2005; Non-paper of the Secretary General referred to in the debate on ‘Strengthening international law: rule of law and maintenance of peace and security’ (22 June 2006) UN Doc S/PV.5474. The International Commission of Jurists has also advocated the establishment of an ‘independent or quasi-judicial complain mechanism’ into Security Council targeted sanctions. See International Commission of Jurists, *Assessing Damage, Urging Action: Report of the Eminent Jurists Panel on Terrorism, Counter-Terrorism and Human Rights* (2009).

<sup>30</sup> Katja Creutz, ‘Balancing Targeted Sanctions: Effectiveness Through a Climate of Legality’ (2015) *FIIA Briefing Paper* 169, 8.

<sup>31</sup> Devika Hovell, *The Power of Process* (OUP 2016) 1–2.

<sup>32</sup> *Ibid.*

<sup>33</sup> *Ibid.*, 3.

<sup>34</sup> Ombudsperson Prost, *supra* note 26, 4.

<sup>35</sup> *Ibid.*

encourage the Security Council to consider its reform independently from the EU courts.<sup>36</sup>

These remarks reveal a concern about the future impact of EU jurisprudence on Security Council due process reform. While the initial rebellion of the EU courts might have had a positive impact by raising awareness at the UN of the need to have an adequate review mechanism, the courts entrenchment now runs the risk of losing that impact. As Antonios Tzanakopoulos argued, ‘after procuring some progress, ... [the EU courts are] now sending the [Security Council] into regression and may end up being counterproductive.’<sup>37</sup> Thus, by taking a consequentialist assessment, the ability of the Herculean approach to maximize due process reform and human rights protection appears to be limited.

### 3 Strasbourg Court—Revitalizing UN Due Process Reform through National Authorities

#### 3.1 Al-Dulimi Test on Arbitrariness of UN Listings: Regime Compatibility under Limited Judicial Supervision

On 21 June 2016, the Grand Chamber of the Strasbourg Court confirmed the Chamber judgment that Switzerland had violated Article 6 of the ECHR.<sup>38</sup> However, the legal reasoning of the individual judges differed substantially. Unlike the Chamber, it found ‘the question [of] whether the equivalent protection test should be applied’ to be nugatory,<sup>39</sup> given that the case did not concern a conflict of obligations under the UN Charter and the Convention system. The Grand Chamber maintained its *Al-Jedda* presumption ‘that the Security Council does not intend to impose any obligation on Member States to breach fundamental principles of human rights’<sup>40</sup> Despite this presumption, it noted that ‘sanctions imposed by the Security Council entails practical interferences that may be extremely serious for the Convention rights’<sup>41</sup> and, for that reason, courts must perform adequate judicial review to ensure that sanctions are applied in close harmony with the Convention. In particular:

<sup>36</sup> *Ibid.* Prost argued that the purpose of her Office and Security Council due process reform is not ‘to satisfy any individual Court or body ... [but] to ensure that the use of the Security Council powers is in conformity with Article 1 of the Charter, which includes respecting international law and human rights principles.’

<sup>37</sup> Antonios Tzanakopoulos: ‘The Solange argument as a justification for disobeying the Security Council in the *Kadi* judgments’ in Avbelj et al., *supra* note 11, at 134.

<sup>38</sup> *Al-Dulimi and Montana Management Inc. v Switzerland* App No 5809/08 (ECtHR 21 June 2016).

<sup>39</sup> *Ibid.*, para. 149.

<sup>40</sup> *Ibid.*, para. 140.

<sup>41</sup> *Ibid.*, para. 145.

in view of the seriousness of the consequences for the Convention rights of those persons, where a resolution such as that in the present case, namely Resolution 1483, [did] not contain any clear or explicit wording excluding the possibility of judicial supervision of the measures taken for its implementation, it must always be understood as authorising the courts of the respondent State to exercise sufficient scrutiny so that any arbitrariness can be avoided. By limiting that scrutiny to arbitrariness, the Court takes account of the nature and purpose of the measures provided for by the Resolution in question, in order to strike a fair balance between the necessity of ensuring respect for human rights and the imperatives of the protection of international peace and security.<sup>42</sup>

As regards application of the new arbitrariness test, the Grand Chamber indicated that the national authorities:

had a duty to ensure that the listing was not arbitrary ... The applicants should ... have been afforded at least a genuine opportunity to submit appropriate evidence to a court, for examination on the merits, to seek to show that their inclusion on the impugned lists had been arbitrary.<sup>43</sup>

Overall, the Grand Chamber left unanswered the normative concern regarding the place in the Convention system of Article 103 of the UN Charter. However, the judgment deserves a closer assessment for its policy objectives. As Anne Peters observes, '[t]he functions of the domestic courts as stop-gaps for securing the legitimacy of Security Council action will be crucially strengthened by *Al-Dulimi*?<sup>44</sup>

### 3.2 Implementation of the *Al-Dulimi* Judgment by Switzerland

In November 2016, the Swiss Government submitted an action report to the Committee of Ministers of the Council of Europe outlining the measures they had undertaken with a view to executing the *Al-Dulimi* judgment.<sup>45</sup> The measures included submission of the *Al-Dulimi* judgment to the relevant national authorities, including the Federal Tribunal before which three sets of proceedings were

<sup>42</sup> *Ibid.*, para. 146.

<sup>43</sup> *Ibid.*, paras 150–151.

<sup>44</sup> Anne Peters, 'The New Arbitrariness and Competing Constitutionalisms: Remarks on ECtHR Grand Chamber *Al-Dulimi*' *EJIL Talk!* 30 June 2016 <<http://www.ejiltalk.org/the-new-arbitrariness-and-competing-constitutionalisms-remarks-on-ecthr-grand-chamber-al-dulimi/#comments>> accessed 28 April 2019.

<sup>45</sup> Communication de la Suisse concernant l'affaire *Al-Dulimi* et Montana Management Inc. contre Suisse (Requête n° 5809/08), Bilan d'action 22 November 2016, para. 3 <[https://search.coe.int/cm/Pages/result\\_details.aspx?ObjectId=09000016806d4af7](https://search.coe.int/cm/Pages/result_details.aspx?ObjectId=09000016806d4af7)> accessed 28 April 2019.



pending at the time with regard to implementation of the *Al-Dulimi* judgment. The action report indicated that the domestic authorities and tribunals would give full effect to the *Al-Dulimi* judgment, and, therefore, no additional measures appeared necessary.<sup>46</sup> At the same time, the Swiss Government referred to some further measures aimed at improving due process guarantees in the context of Security Council targeted sanctions, in particular:

le Conseil fédéral a chargé, en mars 2016, l'administration fédérale d'entamer des réflexions portant sur l'amélioration des garanties procédurales dans le cadre de la mise en œuvre des sanctions adoptées par le Conseil de sécurité de l'ONU, les conclusions devant lui être soumises dans un délai échéant douze mois après l'arrêt de la Grande Chambre dans la présente affaire.<sup>47</sup>

While these further measures have not yet concluded, two early observations can be drawn from the action report on the execution of the *Al-Dulimi* judgment. First, the Government did not consider that application of the arbitrariness test by national courts would be at odds with the state's commitment to implement Security Council measures. The Government sent a clear signal to the national institutions, including the courts, to give full effect, *comme d'habitude*, to the judgment.<sup>48</sup> Second, the Swiss Government saw the *Al-Dulimi* principles as a call for proactive engagement in improving procedural guarantees in the context of targeted sanctions.

### 3.3 Policy Effects

Unlike the CJEU, the Strasbourg Court has been more cautious about the wider implications of its judgments. In the *Al-Dulimi* judgment, the Grand Chamber omitted a firm position on whether a court in the UN was necessary in order to ensure due process guarantees with regard to targeted sanctions.<sup>49</sup> The Strasbourg Court appears to have left that issue to the UN itself, as it avoided the notion of a court. It also made no reference to full or intensive judicial review as a precondition for due process in the context of targeted sanctions.<sup>50</sup> This approach, however, does not mean that the ECtHR would rubber stamp decisions on sanctions or leave

<sup>46</sup> *Ibid.*, para. 3.3.

<sup>47</sup> *Ibid.* EN: 'In March 2016, the Federal Council commissioned the federal government to initiate reflections on improving procedural safeguards in the framework of the implementation of the sanctions adopted by the UN Security Council, the conclusions to be submitted within a period of 12 months after the judgment of the Grand Chamber in this case.'

<sup>48</sup> *Ibid.*

<sup>49</sup> *Al-Dulimi and Montana Management Inc.*, *supra* note 38.

<sup>50</sup> *Ibid.*, para. 153. The deficiencies of the current delisting procedure in the UN are looked at through the reports of the UN Special Rapporteurs as well as other actors.

the matter of procedural guarantees unaddressed. The Strasbourg Court has reiterated ‘very serious . . . and consistent criticisms’ about the current review mechanism and has sent a clear message that adequate procedural guarantees should be put in place.<sup>51</sup> Judge Pinto de Albuquerque, joined by three other judges, noted ‘if the legal reasoning [in *Al-Dulimi*] is fragile, the message is not: the Court is determined not to accept UN sanctions without adequate procedural guarantees.’<sup>52</sup>

The strength of *Al-Dulimi* lies in the arbitrariness test established by the ECtHR therein, for the policy developments it prompts. According to this test, national courts should perform a limited review of whether individuals were given ‘at least a genuine opportunity to submit appropriate evidence to a court, for examination on the merits, to seek to show that their inclusion on the lists had been arbitrary.’<sup>53</sup> This, in turn, urges not only the national courts but also executives and legislatures, as appropriate, to request and provide evidence for listings. In addition to this action, national executives may apply political pressure on a designating state and legislatures may adopt laws that limit the effects of certain Security Council measures at the domestic level. It is through these actions that the desired policy consequences of judicial action—that is, due process reform and human rights protection—may be realized.

With regard to the approach adopted by the Strasbourg Court in *Al-Dulimi*, it is relevant to note that a similar type of pressure by national authorities has, in some cases, proved to be effective. In the cases concerning Mr Sayadi, Ms Vinck, and Mr Nada, examined later in this chapter, the national courts prompted the national executives and legislatures to condition—by reference to procedural guarantees—their cooperation with the Security Council in the area of targeted sanctions.

### 3.3.1 The role of national authorities in the delisting of Mr Sayadi and Ms Vinck

Mr Sayadi and Ms Vinck, a couple of Belgian nationality, were placed on Security Council targeted sanctions in January 2003.<sup>54</sup> At the European level, the Security Council measures against Mr Sayadi and Ms Vinck were implemented through an EU regulation<sup>55</sup> and a Belgian ministerial order.<sup>56</sup> Mr Sayadi and Ms Vinck challenged their listing before the UN Human Rights Committee<sup>57</sup> and the Belgian

<sup>51</sup> *Ibid.*

<sup>52</sup> *Ibid.* Concurring opinion of Judge Pinto de Albuquerque, joined by Judges Hajiyev, Pejchal, and Dedov, para. 58.

<sup>53</sup> *Al-Dulimi and Montana Management Inc.*, *supra* note 38, para. 151.

<sup>54</sup> Concerning the facts of the case see Communication No. 1472/2006 [2008], UN Doc CCPR/C/94/D/1472/2006, para. 2.

<sup>55</sup> Commission Regulation (EC) No. 145/2003 of 27 January 2003 amending Regulation (EC) No. 881/2002.

<sup>56</sup> Belgian Ministerial Order of 31 January 2003 amending the ministerial order of 15 June 2000 implementing the Royal Decree of 17 February 2000 concerning the restrictive measures directed against the Taliban in Afghanistan.

<sup>57</sup> The UN Human Rights Committee found violations of Arts 12 and 17 ICCPR in Communication No. 1472/2006 [2008], *supra* note 54, para. 11.

courts. In 2005, the Belgian courts ordered the Government to ‘urgently initiate a de-listing procedure with the United Nations Sanctions Committee.’<sup>58</sup>

Following this judicial decision, the Belgian Government requested the Security Council Sanctions Committee to delist their two nationals.<sup>59</sup> After the Sanctions Committee rejected that request, the Belgian Ambassador to the UN met a few times with diplomats of the designating state, namely the United States, to discuss the delisting of Mr Sayadi and Ms Vinck. The confidential communication between the two diplomats, subsequently disclosed by *Wikileaks*, showed the significance of political factors which eventually led to the delisting of Mr Sayadi and Ms Vinck.<sup>60</sup>

In 2008, the Belgian Ambassador, who at the time was Chairman of the 1267 Sanctions Committee, noted to a US diplomat that a negative response could have certain consequences for the efficacy of targeted sanctions. In particular, he:

underscored that representatives of many UN [M]ember [S]tates have told him that they are reluctant to submit names to the Committee for sanctions because they perceive the Committee takes little action to remove parties from the list, even when warranted, and that there is little likelihood of reversing sanctions once a party had been listed.<sup>61</sup>

The Belgian Ambassador signalled that cases such as that of Mr Sayadi and Ms Vinck may prompt a wave of political distrust in the area of targeted sanctions which could result in unwillingness on the part of states to submit new names to the Sanctions Committee.

In view of these remarks, the US diplomat recommended:

[the Belgian Ambassador’s] ... point that [S]tates are increasingly unwilling to submit new listings to the Committee because 1267 sanctions are viewed as a life-sentence is worth consideration. The 1267 Monitoring Team has found in consecutive reports that the list is becoming increasingly outdated as the threat of [A]-Qaeda and the Taliban evolves. Without new listings, the 1267 regime will become increasingly irrelevant to global counter-terrorism actions. Appropriate delistings could serve as an important incentive to keep [S]tates engaged in improving the 1267 list.<sup>62</sup>

<sup>58</sup> *Sayadi & Vick v l’Etat Belge* [2005] Decision of the Tribunal de Première Instance de Bruxelles.

<sup>59</sup> Communication No. 1472/2006, *supra* note 54, para. 2.5.

<sup>60</sup> ‘Belgium reluctant to take CTC or 1267 Chairs’, Canonical ID: 06USUNNEWYORK2182\_a (*Wikileaks*, 22 November 2006) <[https://www.wikileaks.org/plusd/cables/06USUNNEWYORK2182\\_a.html](https://www.wikileaks.org/plusd/cables/06USUNNEWYORK2182_a.html)> accessed 28 April 2019; ‘UN/1267 Sanctions: Belgians request U.S. reconsider case to delist Sayadi and Vinck’, Canonical ID: 08USUNNEWYORK209\_a (*Wikileaks*, 6 March 2008) <[https://www.wikileaks.org/plusd/cables/08USUNNEWYORK209\\_a.html](https://www.wikileaks.org/plusd/cables/08USUNNEWYORK209_a.html)> accessed 28 April 2019.

<sup>61</sup> *Ibid.* *Wikileaks* ‘UN/1267 Sanctions: Belgians request U.S. reconsider case to delist Sayadi and Vinck’.

<sup>62</sup> *Ibid.*

A few months later the Security Council delisted Mr Sayadi and Ms Vinck and established the Office of the Ombudsperson.<sup>63</sup> Given the lack of clear reasons by the Security Council Sanctions Committee for the delisting of the Belgian couple, it is hard to identify whether it was the national courts, public opinion, diplomacy, or other factors that had a decisive impact. However, the aforementioned diplomatic documents show that the Belgian executive, pressurized also by the national courts and the public, triggered the delisting of Mr Sayadi and Ms Vinck. They also reveal that the US diplomat may have been receptive to the idea of delisting after having realized that active participation by states in the sanctions regime is dependent on the existence of due process guarantees. In light of these consequences, the *Sayadi and Vinck* case reveals the role that national authorities may have in advancing sanctions decision-making reform.

### 3.3.2 The role of national authorities in delisting Mr Nada

The influence of national authorities on the processes of the Security Council Sanctions Committee can also be revealed through the case of Mr Nada.

Mr Nada was listed by the Security Council Sanctions Committee two months after 9/11.<sup>64</sup> He brought a case before the Swiss courts in 2007 in relation to this listing. Although the Swiss courts gave effect to Article 103 of the UN Charter, they noted that sanctions decision-making lacked sufficient procedural guarantees.<sup>65</sup> The Swiss and Italian authorities requested the Sanctions Committee to delist Mr Nada, without success.

Unexpectedly, in 2009 the Sanctions Committee decided to delist him. It is interesting to observe that it was precisely during that time that there was an important legislative initiative within the Swiss Parliament. On 12 June 2009, the Swiss Council of States—the upper house of the Federal Parliament—adopted a motion urging the state to refrain from implementing Security Council sanctions in certain cases:<sup>66</sup>

to cease implementing sanctions against individuals included on the 1267 Consolidated List in cases where the individual: (1) has been on the list for more than 3 years and not been brought before the court, (2) has not had the possibility to resort to an independent institution for a remedy, (3) has had no indictment

<sup>63</sup> See Decision of the Security Council Al-Qaida and Taliban Sanctions Committee SC/9711 of 21 July 2009 <<http://www.un.org/press/en/2009/sc9711.doc.htm>> accessed 28 April 2019.

<sup>64</sup> For more details regarding the arrest and transfer, travel ban and asset freeze of Mr Nada and his company see *Nada v Switzerland*, *supra* note 4, paras 21–25.

<sup>65</sup> *Youssef Nada v State Secretariat*, *supra* note 8, para. 8.

<sup>66</sup> Motion 09.3719 Submitted to the Swiss Council of States by Dick Marty (12 June 2009) passed in the upper house on 8 September 2009. The motion was adopted by the lower chamber on 1 March 2010. See also *Nada v Switzerland*, *supra* note 4, paras 54 and 56.

issued, and (4) has not had new incriminating evidence brought forward since listing.<sup>67</sup>

The Swiss Council of States referred to the case of Mr Nada to justify non-implementation of Security Council targeted sanctions.<sup>68</sup> It is significant that, three months after the motion, the Sanctions Committee delisted Mr Nada. These events are a further demonstration of the power that national authorities may have with regard to the work of the Sanctions Committee.

### 3.3.3 The inherent limitations of national courts

Yuval Shany observed that 'the more the executive is likely to adopt counterterrorism policies which are under-protective of the rights and interests of terror suspects, the more it is likely to try to render courts and other oversight bodies incapable of serving as effective corrective mechanisms.'<sup>69</sup> Such an observation is poignant in the present context.

Given the aforementioned relationship between national executives and judiciary, and the subordinate position of courts, the latter may have unavoidable limitations in achieving the desired results. By way of example, the UK Supreme Court faced such limitations in cases concerning the freezing of Mr Ahmed's assets and the revocation of Al-Jedda's citizenship.<sup>70</sup> In the case of *Ahmed*, on 27 January 2010, the UK Supreme Court decided that Government measures were *ultra vires*. The decision clarified that the measures including an asset freeze on, *inter alia*, Mr Ahmed had been imposed without authority and were of no effect in law. In practice, this meant that Mr Ahmed could access his funds held in UK banks. A week later, the UK Government applied for suspension of the quashing of the asset-freezing legislation until Parliament introduced new primary legislation.<sup>71</sup>

<sup>67</sup> Cited in Thomas Biersteker and Sue Eckert, 'Addressing Challenges to Targeted Sanctions', An Update of the Watson Report, October 2009, 9. It is interesting to note that in July 2009, the Dutch Parliament received proposals for amendment of the Constitution, in particular on the place of the international legal order in the Dutch Constitution. The proposal explicitly referred to the 1267 regime as an example of international rules that were drafted outside a proper rule of law context. See *Staatscourant* 10354, 9 July 2009.

<sup>68</sup> *Nada v Switzerland*, *supra* note 4, para. 63.

<sup>69</sup> Yuval Shany, 'Guarding the Guards in the War on Terrorism' in Christopher A. Ford and Amichai Cohen (eds), *Rethinking the Law of Armed Conflict in an Age of Terrorism* (Lexington Books 2012) 118.

<sup>70</sup> Then UK Home Secretary Theresa May 'told the House of Commons that she had decided the laws needed to change after losing a long-running court case to strip the Iraqi-born Hilal al Jedda of his British citizenship'. She further stated 'since we saw the result of the al Jedda case ... I specifically asked officials whether there was anything that we could do to ensure that we would be able to take action against people whose activities, particularly those related to terrorism, were seriously prejudicial to the [S]tate. See Alice Ross and Olivia Rudgard, 'How one man was stripped of his UK citizenship—twice', *OpenDemocracy*, 11 July 2014) <<https://www.opendemocracy.net/opensecurity/alice-ross-olivia-rudgard/how-one-man-was-stripped-of-his-uk-citizenship%E2%80%94twice>> accessed 28 April 2019.

<sup>71</sup> *Her Majesty's Treasury (Respondent) v Mohammed Jabar Ahmed and others (FC) (Appellants); Her Majesty's Treasury (Respondent) v Mohammed al-Ghabra (FC) (Appellant)*; R (on the application of Hani

The Government submitted to the UK Supreme Court that ‘refusing a suspension would give rise to the risk of those assets being disbursed and used for the purposes of terrorism, with the attendant risk of causing serious and irreparable harm to the national interest of the United Kingdom.’<sup>72</sup>

The UK Supreme Court did not suspend operation of the orders and considered that granting the Government’s request would ‘obfuscate the effect of its judgment.’<sup>73</sup> While the UK Supreme Court made efforts to preserve the effects of its judgment, it subsequently became apparent that the UK Government had utilized EU legislation to limit its effects. In that regard, in the *Youssef* judgment Lord Carnwath, with whom Lord Neuberger, Lord Mance, Lord Wilson, and Lord Sumption agreed, noted:

[f]rom the victim’s point of view it may seem strange that a process which, as applied under domestic legislation, was found to involve an unacceptable interference with his property rights, should be capable of automatic and immediate reinstatement by the indirect route of a European regulation. Indeed, it is unclear from the substantive judgments in *Ahmed* to what extent the court was made aware of the limited practical effects of its decision.<sup>74</sup>

The *Ahmed* case demonstrates the limitations inherent in the role of courts in upholding human rights in cases of targeted sanctions. Despite the possibilities of restrained judicial activism prompting due process reform, when national executives turn out to be uncooperative such activism falls on deaf ears and reform is prevented.

## 4 Conclusions

The jurisprudence of the European courts reveals their mixed blessing effect on Security Council due process reform and genuine realization of human rights. When examining the effects of *Kadi II* it appears that bold and formalistic legal assessments may not always lead to the desired effects of the court decision,<sup>75</sup> and in the long run may weaken the EU courts’ authority<sup>76</sup> and effectiveness.<sup>77</sup>

*El Sayed Sabaei Youssef* (Respondent) v *Her Majesty’s Treasury* (Appellant) [2010] UKSC 2 of 27 January 2010 (hereinafter *Ahmed II*).

<sup>72</sup> Press Summary of *Ahmed II*, available at <<https://www.supremecourt.uk/cases/docs/uksc-2009-0015-press-summary.pdf>> accessed 28 April 2019.

<sup>73</sup> *Ahmed II*, *supra* note 71, Lord Philips, with whom Lord Rodger, Lord Walker, Lady Hale, Lord Brown and Lord Mance agree, para. 8.

<sup>74</sup> *Youssef v Secretary of State for Foreign and Commonwealth Affairs* [2016] UKSC 3, para. 48.

<sup>75</sup> Ombudsperson Prost, *supra* note 26.

<sup>76</sup> Karen J. Alter, Laurence R. Helfer, and Mikael Rask Madsen, How Context Shapes the Authority of International Courts (2016) 79 *Law and Contemporary Problems* 1–36, 7.

<sup>77</sup> Report of the Special Rapporteur, *supra* note 27, para. 22.

With regard to the authority of the courts, Alter, Helfer, and Madsen have argued that de facto authority can be measured by ‘two key components—(1) recognising an obligation to comply with court rulings, and (2) engaging in meaningful action pushing toward giving full effect to those rulings’. Application of these criteria to the context of European courts illustrates the limited effect of the approach by the EU court. The latter component, engagement in giving effect to the rules, which according to the authors is particularly essential, can hardly be seen in the actions of EU Member States taken with regard to *Kadi II*.<sup>78</sup> Despite initial success, continued Herculean judicial activism muted the response and engagement of the Security Council.

In addition, the *Kadi* approach also has consequences for the Courts’ effectiveness. Ben Emmerson has rightly observed that national or regional courts are unable to carry out an effective judicial review of measures emanating from the Security Council as long as the designating state does not reveal information concerning the listing.<sup>79</sup> In the *Kadi* case the CJEU’s lack of access to the evidence for the listing of Mr Kadi represents such an undermining of effectiveness.

The result of these challenges to the EU courts’ authority and effectiveness may be that affected persons are discouraged from bringing claims before the Court. The absence of litigation following from such discouragement may bring an end to judicial dialogue in the field of targeted sanctions. Such a cessation of judicial dialogue highlights the possibility of counterproductivity of the approach.

The limited effects of *Kadi II* raise the question whether, in the long run, a form of judicial restraint could prove to be more successful. Such an approach, according to Justice Breyer, ‘will take account of the constitutional role of other institutions, including their responsibilities, their disabilities and the ways in which they function.’<sup>80</sup> This would allow the courts to consider the various actors which have a role within the sanctions regime and seek ways to impact the due process reform through such actors in so far as possible.

Such a cautious approach, as seen in the ECtHR *Al-Dulimi* judgment, preserves the authority and effectiveness which hinders the courageous approach. Switzerland has acknowledged the binding effect of the *Al-Dulimi* judgment. It has also committed to undertake further measures to improve procedural guarantees concerning implementation of Security Council targeted sanctions. These may be seen as engagement in meaningful actions pushing towards giving full effect to the judgment, attesting to the continued authority of the court.

<sup>78</sup> *Ibid.*, they argue that ‘[a] simple public statement that a judgment is legally binding is, without more, inadequate’.

<sup>79</sup> The Special Rapporteur Ben Emmerson considers that ‘even if [domestic judicial review is considered ... an adequate substitute for due process at the United Nations level] ... it may not have the designating State’s consent to reveal the information. This can obstruct the ability of national or regional courts to carry out an effective judicial review.’ See Report of the Special Rapporteur, *supra* note 27, para. 22.

<sup>80</sup> Stephen Breyer, *America’s Supreme Court* (OUP 2010) 216.

In so far as the effectiveness of the ECtHR's judicial review is concerned, there are still limitations to the approach. The arbitrariness test introduced in *Al-Dulimi* may prove to be ineffective if a designating state chooses not to provide evidence for listing. Despite this possible limitation of effectiveness, *Al-Dulimi* seeks to overcome obstacles to judicial review by calling on states to secure the evidence for listing. Furthermore, its observations with regard to the sanctions regime encourage states to work on improving procedural guarantees. Thus, through greater restraint, the approach of the ECtHR may ultimately preserve the effectiveness of its judicial review.

While the Security Council is the ultimate authority to decide on due process reform, continual judicial activism revitalizes the concerns of the legitimacy and legality deficit within the Security Council. A setback to such due process reform may discourage states from submitting new listings and lead to resistance on the part of national authorities to give effect to certain Security Council measures. As the analysis in this chapter has shown, a Herculean judicial approach may ultimately result in such a setback. In contrast, a more cautious approach may be preferable, as it preserves the authority and effectiveness necessary to achieving a productive dialogue which actuates the desired Security Council due process reform and genuine realization of human rights.