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CHAPTER FIVE

MR KADI AND MRS PROST: IS THE UN OMBUDSPERSON GOING TO FIND HERSELF BETWEEN A ROCK AND A HARD PLACE?

Laurence Boisson de Chazournes and Pieter Jan Kuijper

1. Introduction

Karel Wellens has devoted quite an important part of his academic and professional life to working inside the ILA on the vital issue of the accountability and responsibility of international organisations.¹ Some years ago he dedicated a perceptive study to this subject.² One of the important themes in this field of study is the question if and how international organisations can be made accountable for their alleged breaches of fundamental rights of individuals. Ironically this question has come to the surface recently inter alia as a consequence of the fact that UN economic sanctions which traditionally were directed against States and thus hit the whole population of States, were considered to be of doubtful legality and political legitimacy insofar as they also hurt – and often in disproportionate fashion – vulnerable groups in society, such as children and sick people.³

This led to the rise of individualised sanctions or 'smart sanctions,' that is to say sanctions that were directed originally against members of the government, or high civilian or military personnel of the government, of the sanctioned country and later, after the rise of Al Qaeda, the Taliban and international terrorist groups, also against individuals without government affiliation, but with a link to such terrorist groups.⁴ The sanctions imposed on the persons listed in the annexes to the relevant resolutions were mostly of economic or financial nature, principally so-called asset freezes, which made it...
impossible for them to dispose of their financial resources except insofar as they were necessary for their basic subsistence.\(^5\)

As is well known from the literature,\(^6\) these sanctions were imposed without any warning or hearing on the facts which were supposed to show that the persons targeted belonged to, supported, financed, delivered arms to, or were otherwise affiliated with such terrorist groups. If that was still considered acceptable, given that the money that was going to be blocked could be removed in a second, as soon as the person concerned would have been advised of the reasons for the incipient freezing of his/her assets,\(^7\) it was highly doubtful if, once the measures had been imposed, such persons should also remain bereft of any opportunity to be heard about the reality of such links or even about such a simple issue as a possible confusion of identities. Even if such “hearing” was granted, the information to be had was often minimal, since the various national intelligence agencies that originally pushed for inclusion of these persons on the sanctions list, were very intent on protecting their sources.\(^8\)

It is remarkable that many of the court cases concerning the breach of fundamental rights by international organisations in the course of imposing individual sanctions come from the courts of regional organisations or from courts charged with interpreting a regional international agreement, such as the European Court of Human Rights and the Court of Justice of the European Union. In this way, these cases also raise the issue of the relationship of the jurisdictions of regional organisations to organisations at the world level, in particular the UN and its organ for the maintenance of international peace and security, the Security Council.

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\(^5\) See, for instance, paragraph 4 (b) of UNSC res. 1267, which reads: “[All states shall] freeze funds and other financial resources, including funds derived or generated from property owned or controlled directly or indirectly by the Taliban, or by any undertaking owned or controlled by the Taliban, as designated by the Committee established by paragraph 6 below, and ensure that neither they nor any other funds or financial resources so designated are made available, by their nationals or by any persons within their territory, to or for the benefit of the Taliban or any undertaking owned or controlled, directly or indirectly, by the Taliban, except as may be authorized by the Committee on a case-by-case basis on the grounds of humanitarian need.”


\(^7\) This was normally justified by the Courts that had to decide such issues on the basis of the provisional or conservatory nature of the asset freezing technique, see Case T-315/01 Yassin Abdullah Kadi v. Council of the European Union and Commission of the European Communities [2005] ECR II-3649, par. 248, 274 (hereafter, Kadi 2005); see also Joined Cases C-402/05 & C-415/05 P, Kadi and Al Barakaat International Foundation v. Council and Commission [2008] ECR I-06351, par. 101, 358 (hereafter, Kadi 2008).

\(^8\) The reluctance to disclose the information on the basis of which an individual or an entity was added to the list is confirmed by the arguments raised by the EU institutions and the intervening Member States in the recent *Kadi* judgment of the General Court; see in particular par. 97–111. As to the answer provided by the Court, see particularly par. 132–137, 157–164, Case T-85/09, *Kadi v. Commission* [2010], Judgment of the General Court of 30 September 2010 (hereafter, *Kadi 2010*).
For these reasons, it is fitting to contribute this paper on questions of accountability of international organisations, questions which at the same time raise issues of hierarchy between international organisations, to this volume in honour of Karel Wellens. We hope that it will also shed some light on the direction in which these fundamental questions will evolve.

In the following we will first recall the situation as it evolved through different cases until the end of the summer of 2010. This will be done briefly and cursorily, since we believe that these cases are widely known. This will result in an evocation of the situation as it was in September 2010. Secondly, we will then analyse the further developments during autumn and winter of 2010 with a view to assessing the situation at present and to discussing in which direction it is likely to evolve. This will cause us to review in particular the creation of the office of the UN Ombudsperson and the first steps of Mrs Kimberley Prost who was appointed to this new office, as well as the judgment of the EU General Court in the Kadi 2010 case and what might be the likely consequences of these developments.

2. The Varying Approaches of the European Court of Human Rights and the European Court of Justice to Sanctions Measures

Both the European Court of Justice and the European Court of Human Rights have taken positions in respect of sanctions decided by the Security Council, which have varied over time. The European Court of Human Rights (ECtHR) has taken two somewhat different approaches to measures of the Security Council, but both showing degrees of deference varying between moderate and total.

Insofar as it concerned sanctions measures taken by the Security Council and implemented by the European Community – at the time not yet in the nature of individual sanctions - the ECtHR has applied a kind of variant of the so-called “so lange” approach practiced by the German Constitutional Court (Bundesverfassungsgericht) in respect of European Community measures with human rights dimensions. In the so-called Bosphorus case, the ECtHR took the position that, as long as (in German “solange”)9 the European Court of Justice broadly afforded a level of judicial protection equivalent to that provided by the ECtHR itself, it would presume such implementing measures to be in conformity with the Convention, unless there was a reason in an

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9 In respect of the solange doctrine of the German Constitutional Court, see Solange I, 29 May 1974, BVerGe 37, 271 and Solange II, 22 October 1986, BVerGe 75, 339. As to an application of this doctrine between European regional courts, see for instance Nikolaos Lavranos, “The Solange-dialogue between the ECJ and ECtHR” (2008) 11 European Law Reporter, p. 384.
individual case to review the taking of such measures in detail for reasons of human rights.\textsuperscript{10}

However, in a later case concerning the responsibility for serious accidents resulting from the omission by UNMIK to clear unexploded anti-personnel weapons and excessively long detention by French and Norwegian troop contingents of KFOR\textsuperscript{11}, the ECtHR constructed the line of command between these national troop contingents and the UN so generously that only the UN might ultimately be held responsible for these actions and omissions. Since the ECtHR had no jurisdiction \textit{ratione personae} over the UN, the practical result was total judicial indulgence in respect of the two national troop contingents. All the more so, since the national jurisdictions of the countries involved in the Kosovo operation would in all likelihood follow the example of a Dutch Court which declared an action of the so-called “Mothers of Srebrenica” against the state inadmissible, precisely because the Dutch contingent in Srebrenica during the Bosnian actions was under UN command and the UN enjoyed immunity in the Dutch courts.\textsuperscript{12}

It is also important to recall that the ECtHR devoted specific reasoning to its lack of jurisdiction over the UN beyond the simple consideration that the UN as organisation was not a party to the European Convention. The Court advanced the view that actions within the framework of UN authorized operations were vital for the accomplishment by the Security Council of its specific tasks that it was charged with under chapter VII of the Charter. Thus they were vital to the achievement of the fundamental objective of the UN to maintain international peace and security.\textsuperscript{13} The Court suggested here that its ‘solange test’ as applied in the \textit{Bosphorus} case was not applicable in the framework of chapter VII operations. In other words: fundamental rights can be abridged by the UN Security Council in certain situations.\textsuperscript{14}

The Court of Justice of the European Union, in its different incarnations as the Court of First Instance and the European Court of Justice as \textit{cour de cassation}, also showed different degrees of deference to the European implementation of “smart sanctions” taken by the Security Council for reasons linked to

\textsuperscript{10} See \textit{Bosphorus Airways v Ireland} no. 45036/98, para. 155, ECHR 2005-VI.

\textsuperscript{11} See \textit{Behrami and Behrami v. France, Saramati v France, Germany and Norway, (dec.) [GC]}, Nos. 71412/01 and 78166/01, 2 May 2007 (hereafter, \textit{Behrami}).

\textsuperscript{12} See \textit{Mothers of Srebrenica v. Netherlands}, Hague Court of Appeals, 30 March 2010, see www.haguejusticeportal.net/Cache/DEF/7/776.html, last visited 20 February 2011.

\textsuperscript{13} See \textit{Behrami} (n 11) para. 149.

the latter’s fundamental responsibility for the maintenance of peace and security in the world.

In the famous Kadi case, concerning the implementation of Security Council (UNSC) sanctions that demanded the freezing of Mr Kadi’s assets, the Court of First Instance (CFI, now called the General Court since the entry into force of the Lisbon Treaty) went even further than the ECtHR in accepting that measures taken for the implementation of Security Council resolutions under chapter VII of the Charter would be exempt from judicial review in case of alleged breaches of fundamental rights. The CFI struggled mightily with the relationship between the Security Council resolution placing Mr Kadi on the so-called sanctions list and the Community acts implementing this resolution, because it believed that they were de facto indistinguishable and that quashing the EC implementation measure implied that the Security Council resolution was also undermined. The CFI felt that even by implication it should not review a Security Council resolution, except possibly on the basis of ius cogens to which in its view the Security Council was bound just as much as any subject of international law.15 Where the CFI went further than the ECtHR in Behrami & Saramati was in giving great weight to articles 25 and 103 of the Charter as creating obligations (even if indirectly through the Member States) for the Community. In this way the binding character of the resolution (article 25) and the supremacy of the resolution of the Security Council over not just other treaties, but also over Community primary law, would weigh just as much on the Community as on UN Member States. This recognizes the Community on the one hand as a separate entity under the UN system16 but on the other hand makes it entirely subservient to the UN policy on peace and security, even if that policy has been laid down in Security Council resolutions in a manner so as to put in peril the fundamental rights of Community citizens.

It is this conception of the Community as, on the one hand, autonomous to a certain degree, but on the other hand, as subservient to the UN Security Council that became an issue in the appeals procedure before the European Court of Justice launched by Mr Kadi. Stimulated by the radical position of its Advocate-General, Miguel Poiares Maduro, the ECJ took the view that the

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15 See Kadi 2005 (supra n. 7) par. 226. It should be noted in passing that the CFI gave an extra-ordinarily broad interpretation to the notion of ius cogens, including in it by implication the right to property and the fundamental rights of procedure of Mr Kadi, only to come to the conclusion that even in this (overly) broad conception of ius cogens these rights had not been violated.

16 This is in contrast to the conception of article 103 of the Charter, which sees this provision essentially as a principle determining the hierarchy of treaties and according to which the obligations under chapter VII fall on the member states. This would have to leave Community law, including its fundamental rules of a primary nature, to one side under the edict of article 103 in favour of the UN Charter and the UNSC resolutions based on it.
relative autonomy of the European Community/Union in respect of the UN ought to have consequences for its acceptance of implementing measures of Security Council resolutions, which breached the fundamental rights of Mr Kadi, where it concerned his right to a proper procedure and his right to property.\textsuperscript{17} Here the Court relied on the formal distinction that the CFI had so struggled with, namely the distinction between the UNSC resolution and the Community implementation measures. The Court emphasized that it confined its judgment strictly to the legality of the Community implementation measures and that this was no reflection on the Security Council resolution, even if the contents of the latter were in reality largely identical to those of the former. However, as Mr Maduro had already stressed, there was no alternative to taking one's own legal order seriously and, at least within it, protecting the Community citizens against any breach of their fundamental rights. Thus in the end the maintenance of individual rights within a “regional” organisation\textsuperscript{18} should prevail over the claims to the maintenance of world order issuing from the United Nations. There is little doubt that this can create great tensions between the regional and world-wide levels of the international legal order. We will come back to this below.

3. From ‘Avoidance’ to ‘Engagement’: The Political and Judicial Dialogue between the UN and Regional Institutions on the Implementation of Sanctions

As we have seen, the judicial decisions reviewed so far seem to be premised on different approaches, ranging from subordination to autonomy. Yet, independently of the approach taken, courts have tended to avoid tackling the legal issues raised by the chapter VII resolutions of the Security Council. Indeed, whether we take the ECJ’s rhetoric on the autonomy of the EU legal order – inspired by the position of Advocate General Maduro – or we look at the ECtHR’s and CFI’s attitude of (more or less nuanced) subordination towards the norms or values enshrined in the international legal order, we end up confronted with a number of legal techniques crafted to avoid entering into a dialogue between the regional and the UN legal order.\textsuperscript{19} That has entailed a dearth of reflection as to the possible ways to reach systemic coherence and to

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\textsuperscript{17} See Kadi 2008 (supra n. 7) par. 334, 361, 368–370.

\textsuperscript{18} The authors use the word ‘regional’ here strictly in a factual sense and express no viewpoint on whether the EC/EU in the past or the EU at present can be regarded as a ‘regional organisation’ within the meaning of article 53 Charter, which entails a consequential subordination \textit{ab initio} to the Security Council for the organisation in question.

\textsuperscript{19} Although certain passages of the ECJ’s Kadi 2008 decision may hint at a sort of dialogue between the regional and the UN legal order; see particularly paras. 321 and 374.
preserve a balance among those values fundamental for a smooth functioning of the international legal system.\textsuperscript{20}

In the light of the foregoing, a reflection as to the causes of such an attitude of avoidance seems to be warranted. Could this attitude be due to the limited competence of regional courts? The articulation of a framework for judicial review of Security Council action (even if only indirectly by review of regional implementation measures) meets obstacles of a systemic character, having to do with the shaping of the international judicial space. Regional courts by their nature can only act within the confines of their (regional) competence. Therefore, almost by definition they cannot fully apprehend and judge the totality of the measures ordered by the Security Council and their underlying rationale. Thus they retreat behind formal mechanisms of avoidance.

This is, however, not entirely satisfactory as an explanation. It suffices to note that a similar attitude of avoidance surfaces also in the \textit{Sayadi} decision taken by the Human Rights Committee.\textsuperscript{21} The review of national measures exercised by the Committee is potentially universal in scope and based on a set of uniform standards. That offers an advantage compared to the circumscribed protection afforded by regional judicial instances. Yet, the Committee seems to have been reluctant to fully grasp this opportunity. The reasoning expounded in \textit{Sayadi} is rather simplistic: the Committee confines itself to analyzing the conduct of the defendant State in light of its obligations under the International Covenant on Civil and Political Rights (hereinafter: ICCPR), glossing over the issue of normative conflict between the Covenant and the UN Charter and, even more tellingly, omitting any reference to article 103 of the Charter. In the end, one is left with another missed opportunity to spell out the relationship between the UN legal order and norms for the protection of human rights.\textsuperscript{22}

\textsuperscript{20} In this respect, it has been noticed that principles such as those of subsidiarity and of complementarity may help in addressing the incoherence stemming from the growing complexity of the international legal order. This goal may also be fostered through a number of legal techniques, such as that of the national margin of appreciation or that of formal equivalence. On this point, see for instance Mirelle Delmas-Marty, ‘Avant-propos’ in: Edouard Dubout and Sébastien Touzé (eds.), \textit{Les droits fondamentaux: charnières entre ordres et systèmes juridiques}, Paris: Pedone 2009, p. 9.

\textsuperscript{21} See, \textit{Sayadi v. Belgium}, CCPR/C/94/D/1472/2006 (29 December 2008) (hereafter: \textit{Sayadi}). The applicants had been blacklisted by the 1267 Sanctions Committee on the basis of their alleged ties with Al-Qaeda. The request to the Human Rights Committee has come after a series of proceedings intended in Belgian domestic courts.

4. The Strategy of ‘Conforming Interpretation’

In spite of the remarks made above, the Sayadi case offers some clues on a more elaborate strategy, aimed at addressing the legal issues posed by the practice of the Security Council’s blacklists. We refer in particular to the position on conforming interpretation contained in Sir Nigel Rodley’s Individual Opinion attached to the Sayadi decision. According to Sir Nigel, the Committee should pronounce itself on the existence of a normative conflict between the obligations under the UN Charter and those under the Covenant. On the basis of this analysis, it shall be decided whether article 103 has to be applied or not. The crucial point here is how to define a normative conflict.

Sir Nigel puts forward four main criteria for such a definition, formulated as interpretative presumptions about the Council’s intention of derogating from human rights norms. To start with, he refers to a general presumption of conformity between human rights norms and Security Council resolutions if their wording does not exclude such conformity explicitly. Next, he posits a presumption of conformity between Security Council resolutions and ius cogens and with the non-derogable rights contained in the Covenant. Finally, a presumption of strict necessity and proportionality is invoked, when it comes to the restriction of rights from which derogation is not allowed under the Covenant. As it appears, it is particularly through the third and fourth criteria that Sir Nigel attempts to spell out the relationship between the ICCPR and the UN Charter. Indeed, by making reference to the non-derogable character of certain rights and to the standards governing the possibility to derogate from certain other rights, he seems to take into account the situation of emergency arising in connection with international terrorist activities.

23 On conforming interpretation, see Marko Milanovic, ‘Norm Conflict in International Law: Whither Human Rights?’ (2009) 69 Duke Journal of Comparative and International Law, p. 98–102. See also Andrea Bianchi, ‘Assessing the Effectiveness of the UN Security Council’s Anti-Terrorism Measures: The Quest for Legitimacy and Cohesion’ (2006) 17 European Journal of International Law, p. 881, p. 912–914, p. 916. The notion of conforming interpretation has also been employed in the Al-Adsani case before the ECHR. According to the Court “(…) [t]he Convention should so far as possible be interpreted in harmony with other rules of international law of which it forms part, including those relating to the grant of State immunity’, see par. 55, Al-Adsani v. United Kingdom, No. 35763/97, par. 24, ECHR 2001-XI. It is important to stress that this interpretative presumption can refer to the conformity of national/regional measures vis-à-vis international law and UN law or to the conformity of universal measures vis-à-vis regional rules on human rights protection. This type of interpretation may come close an implicit amendment of the measure at stake. On this point, Tzanakopoulos makes reference to the interpretation by the English High Court in Regina (on the application of Othman) v. Secretary of State for Work and Pensions [2001] EWHC Admin 1022, par. 57; see Antonios Tzanakopoulos, ‘From Interpretation to Defiance: Abdelrazik v Canada and United Nations Sanctions in Domestic Courts’, (2010) 8 Journal of International Criminal Justice, p. 249, p. 253–254, p. 260–261.
In our view, Sir Nigel Rodley’s approach goes to the heart of the complex relationship between the Security Council and regional judicial organs engaged in the protection of human rights provoked by the Council’s action against international terrorism. Indeed, it demonstrates the importance of respecting the rule of law at the UN level. When applied to the Security Council, this means that, above all, the Council must accept that its action is subject to the legal limits imposed by fundamental rights. Indeed, as recalled by the ICTY in the 

\[ \text{\textit{Tadić}} \text{ case ‘In any case, neither the text nor the spirit of the Charter conceives of the Security Council as legibus solutus’ (un bound by law).}\]

Even more importantly, the 2005 World Summit Outcome envisages that:

Sanctions should be implemented and monitored effectively with clear benchmarks and should be periodically reviewed, as appropriate, and remain for as limited a period as necessary to achieve their objectives and should be terminated once the objectives have been achieved.

5. The ‘Carrot and Stick’ Strategy

The requirement to guarantee the respect for the rule of law has inspired a further ‘positive’ strategy, emerging in the pronouncements of a few domestic courts and in a series of diplomatic initiatives taken within the Council of Europe. We could speak of it as a ‘carrot and stick’ approach.

\[ \text{\textit{ICTY, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction \textit{Prosecutor v. Dusko Tadić ‘Dule’ IT 94-1-AR72 A. Chamber, 2 October 2005, para. 28 (italics supplied).}}}
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\[ \text{\textit{World Summit Outcome, GA Doc. A/60/L. 1, 20 September 2005, para. 107 (see also para 108–109).}}
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A number of national tribunals have explored indirect forms of control over Security Council resolutions, by reviewing the measures transposing them into domestic law. A telling example is provided by the *Abdelrazik v. Canada* decision rendered by the Canadian Federal Court. Before dealing with the impugned domestic act, the Court indulged in a harsh critique of the sanctions regime imposed by resolution 1267 and deemed it ‘a denial of basic legal remedies’ and ‘untenable under the principles of international human rights’. As it appears, this reasoning entails a twofold dimension. While criticising the Council, the Court finally opts for a review of the domestic measure of implementation only, omitting to deal with the legality of the resolution at stake. The blending of these two attitudes suggests the endorsement of a ‘carrot and stick’ approach, though in the concrete case the stick comes first. This approach has found an echo also in other decisions of national courts and has not been overlooked by the Security Council. On the contrary, it is likely that these pronouncements have triggered the improvements to the sanctions regime recently made by the Council.

Leaving aside the judicial context, a ‘carrot and stick’ approach has surfaced also in the Council of Europe, especially through the expert reports dealing with the Council’s practice of blacklisting. The Marty Report, for instance, proposes that the Secretary General of the Council of Europe shall require information from Member States as to the application of the ECHR. Additionally, the report calls upon the Parliamentary Assembly “à prendre directement et à loisir aux résolutions du Conseil qu’elle jugerait contraires aux droits de l’homme” and to exercise its influence over the states responsible for the elaboration of resolutions that might have even more direct and immediate effects.

Admittedly, this ‘carrot and stick’ approach is somewhat heterodox. A more conventional way for regional organisations to communicate their position would have entailed a direct exchange of views between them and the UN during the period of conception of the sanctions regime. That could have happened on numerous occasions, such as the meetings between the Security Council and regional organisations or the high-level meetings among the UN, regional and other intergovernmental organisations organized by the

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28 See *Abdelrazik v. Canada* (supra n. 26) par. 50–52.
30 See *Marty Report* (supra n. 27), p. 32.
31 The first meeting gathering the UNSC and representatives of regional organisations took place in 2003, see S/PV.4739, 11 April 2003 (*The Security Council and regional organisations: facing the new challenges to international peace and security*); a second meeting was held in 2010, see S/PV.6257, 13 January 2010 (Cooperation between the United Nations and regional and sub-regional organisations in maintaining international peace and security).
However, these opportunities have repeatedly been missed and today the Council is caught into an indirect dialogue, obliging it to react to the allegations of illegality coming from domestic jurisdictions and from regional political fora. A response by the Council, in fact, becomes urgent, since the very respect for the measures adopted by it is put in question and, therefore, potentially hampered.


In response to the above-mentioned critiques and to a number of other diplomatic initiatives, the Security Council has adopted resolution 1904 (2009), which potentially heralds a new era in the implementation of anti-terror sanctions. The rationale behind this resolution is fairly straightforward: the functioning of the sanctioning regime is seen as depending not only on the effectiveness of the adopted measures, but also on the existence of procedures guaranteeing their pertinence in casu. Along these lines, resolution 1904 innovates from previous resolutions by introducing an Ombudsperson, charged with examining the requests for delisting submitted by sanctions-affected individuals and entities. The Ombudsperson, in fact, has more powers than the so-called Focal Points set up by resolution 1730.

As is well known, the Focal Points mainly operate within an interstate framework; which is confirmed by the following elements. First, any request for delisting received by a Focal Point has to be communicated to the government(s) responsible for the complainant’s inscription on the list as well as to the State of nationality and of residence of the listed person or entity (a). Any of these States can recommend the removal of the complainant’s name from the list. If, after a certain time, none of these States has taken an initiative in this sense, any member of the Sanctions committee can take over and

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32 Between 1994 and 2006, the SG has conveyed seven meetings entailing the participation of other international organisations. These meetings have covered a broad range of substantive issues concerning the relations between the UN and regional organisations.


34 UNSC res. 1904, 17 December 2009.

35 As to previous attempts of amelioration of the sanctioning regime, see Irène Couzigou, ‘La lutte du Conseil de sécurité contre le terrorisme international et les droits de l’homme’, (2008) 43 Revue générale de droit international public, p. 49–84.

36 UNSC/Res/1730, par. 5 and 6 (a).
recommend the removal of the complainant’s name from the list.\textsuperscript{37} If, after one month from the receipt of the request, no Committee member recommends such de-listing, it shall be deemed rejected and the Chairman of the Committee shall inform the Focal Point accordingly.\textsuperscript{38}

The provisions of resolution 1904 (2009) on the Ombudsperson improve this process in several respects. Overall, the tasks entrusted to the Ombudsperson are designed to foster the efficacy of the information gathering process and to improve the interaction among the actors involved in the phase of decision-making. The work of the Ombudsperson, after receipt of a de-listing request is divided into three parts of each two months’ duration.\textsuperscript{39}

First there is a period of information gathering, during which the Ombudsperson does not need to rely exclusively on information given to her by the complainant and the States concerned, but can also herself search for additional information.\textsuperscript{40} The second two months’ period is devoted to dialogue and engagement. The Ombudsperson will establish a dialogue with the complainant and can also act as go-between between the complainant and the States concerned.\textsuperscript{41} At the end of the second period – which may, if necessary, be prolonged with another two months – the Ombudsperson will issue a so-called comprehensive report on the request for delisting.\textsuperscript{42} This report will be drawn up with the help of the Monitoring Team, but since it concerns matters that require an independent assessment, is written by and issued under the responsibility of the Ombudsperson alone.\textsuperscript{43} Given the way it has been prepared, this report to the Committee gives access to a broader range of information than was hitherto the case, thus allowing a more accurate analysis of each case.

After this second period, a third period follows during which the Sanctions Committee must arrive at a decision on the request for de-listing. This will involve intensive discussions with the Ombudsperson, who will herself present her report to the Sanctions Committee. “After the Committee consideration, the Committee shall decide whether to approve the delisting request through its normal decision-making procedures.”\textsuperscript{44} In this way, the fate of a request is less dependent on the discretion of the Committee members entitled to take action according to resolution 1730. Indeed, since the Committee

\textsuperscript{37} UNSC/Res/1730, par. 6 (c).
\textsuperscript{38} Ibid.
\textsuperscript{39} For this procedure, see Annex II, UNSC res. 1904.
\textsuperscript{40} See ibid., Annex II, par. 1–4.
\textsuperscript{41} See ibid., Annex II, par. 6.
\textsuperscript{42} See ibid., Annex II, par. 7.
\textsuperscript{44} Annex II, UNSC res. 1904, par. 10.
is bound to take a formal decision, silence in case of inaction by any of the Committee members is no longer enough to quash a request for de-listing. On the whole one can say that the functions vested in the Ombudsperson are conceived so as to create an independent third party, enjoying a certain freedom in the collection of information and thereby giving the impression of acting according to a transparent and fair procedure.

7. The Reaction of National Courts, the EU General Court and a UN Special Rapporteur to the Creation of the Office of the Ombudsperson

It is to be noted at the outset of this section that the European national courts and the Court of First Instance (later the General Court) had been much more at ease in judging cases concerning people placed on the lists linked to UNSC resolution 1373. In that system of sanctions resolutions, relating to international terrorism other than Al Qaeda and the Taliban, the UN list was ultimately based on requests from national governments, which had to use official criminal investigations, accusations or convictions (in absentia) as the basis for communicating names to the UN. This made it much easier for national courts or quasi-judicial authorities to insist on full review and criticise or even delegitimize the actions of the national authorities. This, in turn, made it much simpler for the CFI and later the General Court, basing themselves on such rulings at the national level, to wipe cases, in which national authorities just went on placing the persons or organisations concerned again on the list, off the table with some gusto. This was the case with Mr Sison in the Netherlands and with the PMOI/OMPI in the UK and France. Such cases also did not carry the same risk of inexorably opposing the EU to the UN Security Council decision to put somebody on the list, as in the Al Qaeda and Taliban sanctions system. In such cases the General Court was at ease using more stick than carrot.

45 In the UK for example the authority referred to in the PMOI cases, the Proscribed Organisations Appeals Commission (POAC), see Lord Alton of Liverpool and others v. Secretary of State for the Home Department [2008] EWCA Civ 443; [2008] WLR (D) 141.
46 See Case T-341/07, Sison v. Council [2009] ECR II-03625. In this case the CFI could rely on a judgment of the Council of State, which related to Mr Sison’s status as a refugee, but was in no way proof of his terrorist links.
47 See Case T-256/07, PMOI v. Council, [2008] ECR II-03019, in which the CFI could rely on the fact that in the UK the POAC (see n. 45 supra) had ruled that the PMOI could no longer be regarded as a terrorist organisation.
48 It is remarkable to see how this tendency changes if the national authorities, for instance a prosecutor’s office, insist on regarding somebody as a suspect in a terrorist case. Deference to that national authority seems to be the reaction prevailing in such cases. This was the case in the case of Sofiane Fahas, against whom a provisional arrest warrant for terrorist activities had been issued by the prosecuting judge (juge d’instruction) in Naples, see Case T-49/07 Sofiane Fahas v. Council, Judgment of the General Court (Second Chamber) 7 December 2010, n.y.r.
The same lack of patience with the Union's institutions that meekly accepted again and again such flawed proposals for the terrorist list from some Member States, can also be felt in the General Court’s reactions, when it was called upon to rule again on Mr Kadi’s continued placing on the Al Qaeda terrorist list (Kadi 2010). This was after the Union’s authorities had gone through the motions of following the Court of Justice’s negative judgment of 2008 (Kadi 2008) by subjecting Mr Kadi to a new procedure in response to his request to be taken off the list, at least in Brussels.

The General Court initially followed the Court of Justice’s judgment in Kadi 2008 only reluctantly and protesting a bit too much, but later in its judgment it saw many parallels between how the Court of Justice dealt with Kadi 2005 and how it itself threw out the PMOI II case. Thus the General Court did not hesitate to draw the conclusion that Kadi’s rights of defence had been infringed once again. This was based on the fact that Mr Kadi was put through a new procedure both at the UN and at the EU level before the Office of the Ombudsperson became operational. Therefore his procedure followed the Focal Points mechanism in the UN, which had already been implicitly rejected by the Court of Justice in Kadi 2008 as inadequate. Moreover, he had only be advised of a summary of the reasons why he was placed on the list. The General Court also pointed to the important difference between the procedures followed in cases based on resolution 1373 (terrorist activities other than Al Qaeda and the Taliban), such as the OMPI and PMOI cases, where at least judicial review at the national level had been possible, and the present case where the procedure at Community level is marked by an absence of effective judicial review that can remedy or sanction the lack of a guarantee of the rights of defence at the level of the administrative procedure.

In the end the General Court thus came easily to the conclusion that Mr Kadi had once more been the victim of a breach of his rights of defence.

49 If one reads par. 112–122 of the General Court’s judgment full of implicit and not so implicit barbs at the Court of Justice, one is inevitably reminded of President’s Sarkozy’s snide remark in another context, “Elle a raté une occasion de se taire” (“It lost an opportunity to stay silent”). One may wonder, moreover, by what (mal)chance it fell to the same President of Chamber and Judge rapporteur to be in charge of this judgment as had been dealing with the same case at the outset in 2005.

50 Kadi 2010, par. 138.

51 Kadi 2010, par. 176–184.

52 Kadi 2010, par. 186–187. This confirms our earlier remark in footnote 46 above to the effect that the General Court felt very reassured by such review at the national level, even if exercised by somewhat unconventional judicial authorities such as POAC in the UK, but essentially showed deference when the competent national authorities, such as a prosecutor or a judge, persisted in their assessment of a person as being linked to terrorism. Only the wish to show deference to the national courts in procedures linked to resolution 1373 can explain the difference in tone and outcome as between the Fahas case and the judgments in PMOI II and Kadi 2010.
and of judicial protection and that also his right to property had been infringed in breach of the principle of proportionality.

The impression that also in Kadi 2010 the General Court was wielding the stick rather than proffering the carrot to the UN is confirmed by a number of other pronouncements by the Court relating directly or indirectly to the office of the Ombudsperson and its functioning.

First of all, the Court recalled what it said in PMOI II about communication to the Court of elements contained in the national file communicated by a Member State to the Council and/or the Commission. The Court repeated that if the Member State in question is not willing to authorize the communication of such file to the Community judicature whose task it is to review the lawfulness of the Community decision based on that file, and even rejects communication to the Court alone, the ineluctable conclusion must be that the Court is unable to review the lawfulness of that decision and thus the right to judicial protection is denied. On the positive (carrot) side, it can be noted that it would seem that the Union’s judicial authorities are at least considering the possibility of ex parte communication of the national file.

The Court made another interesting remark of principle. It put in doubt whether after the more than 10 years during which Mr Kadi had been subject to an asset freezing decision, it and other courts could still continue to rely on the preventative, provisional and temporary character of such asset freezing.

Finally – and here it is again the stick that dominates the General Court’s approach – it thinks fit to give a shot across the bow of the Office of the Ombudsperson at a time when the occupant of that Office, Mrs Kimberley Prost, a former ad litem judge in the ICTY, had been in office for barely four months. The Court notes that, in spite of the Ombudsperson’s presence, the removal of a person from the list still takes consensus, even if now a positive vote is necessary, as signalled above. The disclosure of the evidence to the person on the list remains a matter entirely in the hands of the Member State who proposed the person for inclusion in the list in the first place. The person in question has no right to even know the name of the proposing State and there is no guarantee that the information, if it is given, is sufficient for the person to mount his defence effectively. “For those reasons”, the Court concluded, “the creation of (…) the Office of the Ombudsperson cannot be equated with the provision of an effective judicial procedure for review of the decisions of the Sanctions Committee.”

53 PMOI II, par. 76–78.
54 Italics added.
55 Kadi 2010, par. 145.
56 Ibid., par 150.
57 Here the Court relies on the UK Supreme Court’s Judgment in the Case of HM Treasury v. Mohammed Jabar Ahmed et al, Judgment given on 27 January 2010, that is to say slightly over two months after the adoption of UNSC resolution 1904 (2009). In fact the Supreme Court
Finally, the UN Special Rapporteur on the promotion and protection of human rights while countering terrorism, Martin Scheinin, also expressed doubts about the adequacy of the office of the Ombudsperson from a perspective of fundamental rights. This is linked to the opinion he already expressed in his 2008 report, namely that the listing of a person because of the severity of the sanction (the indefinite freezing of one's assets) amounted to a criminal charge.\textsuperscript{58} Even though the Special Rapporteur welcomed the creation of the Office of the Ombudsperson in his 2010 report, given his view of the regime based on SC Res 1267 (1999) he could not possibly be fully satisfied with the powers granted to this Office by SC Res 1904 (2009). In his opinion, it is necessary, as a minimum, to give the Ombudsperson quasi-judicial powers. This would imply that she would have the power to overturn a listing decision by the Committee established pursuant to SC Res 1267 (1999). But that, of course, is not what SC Res 1904 (2009) decided: the Ombudsperson cannot even make formal recommendations to the Committee and in the end it is that Committee, a political organ, that decides on the basis of confidentiality and by consensus and without much transparency vis-à-vis the listed person or the general public whether a person will be delisted. There is no guarantee that the report of the Ombudsperson on a case will be published.\textsuperscript{59}

These considerations bring Special Rapporteur Scheinin to the conclusion that the sanctions regime of SC Res 1267 (1999) is based on an \textit{ultra vires} act of the Security Council, exceeding its powers under chapter VII of the Charter. That will remain the case unless and until the Ombudsperson or the Council itself is equipped with quasi-judicial powers. As long as the Ombudsperson is not equipped with decision-making power, she “cannot be regarded as a tribunal within the meaning of article 14 of the International Covenant on Civil and Political Rights.” In the meantime, individuals and entities listed have no other remedies than those provided by domestic or regional judicial review of the national or regional implementing measures, such as that provided by the UK courts and by the European Court of Justice.\textsuperscript{60}

8. \textit{The First Months of the Office of the Ombudsperson}

On 3 June 2010 Mrs Prost was appointed by the UN Secretary-General to the Office of the Ombudsperson. In late October she unveiled a bit of her approach to her office in a briefing to an informal meeting of the legal advisors of the

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  \item judges could not do much more than signal that the Ombudsperson did not guarantee the equivalent of a judicial review procedure at the UN level. For the rest the Supreme Court was largely on the line of the Court of Justice in the \textit{Kadi 2008} judgment.
  \item UN doc. A/63/223, par. 16.
  \item Un doc. A/65/258 par. 55–56
  \item Ibid., par. 57–58
\end{itemize}
Member States, in late January 2011 she published her first biannual report on her activities to the Security Council and in late February she planned to finalise her first comprehensive report to the Sanctions Committee on the first case of the seven that have been submitted to her so far.

From Mrs Prost’s statement to the legal advisors and from her first report to the Security Council it is clear that she has a robust approach to her office. She quite rightly takes the Supreme Court of England and Wales and the EU General Court to task for having declared her office inadequate at a moment that it was not or only barely functioning and without giving her a fair hearing. Thus the dialogue with the national and regional courts seems to begin with an exchange of stick strokes. It is interesting to note, however, that she does not react to the criticism contained in Martin Scheinin’s report.

In reality, the dialogue has been well engaged, since Mrs Prost is clearly aware where the difficult points in the Sanctions Committee procedure are located according to the national and regional courts in question. From her briefing and her report to the Security Council one gets the strong impression that she hopes that, perhaps in an unorthodox fashion and with herself as intermediary, she can achieve the equivalent of a fair hearing for people who apply to be de-listed under the regime of Security Council resolution 1267. She fully realizes that if she does not succeed in this, the Security Council regime of ‘smart sanctions’ may be in peril. Thus, she hopes to extend a carrot to the courts that have rejected her Office seemingly out of hand, which they might find difficult to refuse.

Mrs Prost is trying to get the Member States, particularly those which have regularly proposed persons or entities to be placed on the list, to move on two points that have been important, for instance, to the General Court in Kadi 2010. First of all, from her Report it transpires that she is trying to make these States budge on their policy of refusing the disclosure of their identity to the person who seeks to be de-listed. She states that this policy puts the listed person at a disadvantage in answering the case against him and that disclosure may even be useful to other Member States in helping them to obtain more information on the case. If the Ombudsperson is not in a position to reveal the proposing State’s identity, “it constitutes a potential impediment to due process” in her view. There can indeed be little doubt about that.

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61 See www.un.org/en/sc/ombudsperson/presentations.shtml, last visited 16 February 2011 (hereinafter, Briefing). Note that late October is normally the time that the chief legal advisers from the Foreign Offices of Member States congregate at UN Headquarters in New York for the meetings of the General Assembly’s Sixth, legal, Committee.

62 See Report Ombudsperson (supra n. 43).

63 This report is confidential and will only be published if the Committee established pursuant to SC Res 1267(1999) will so decide.

64 See Briefing, p. 7.

65 See Briefing, p. 5.

66 See Report Ombudsperson (supra n. 43) par. 51–52.
Secondly, Mrs Prost is seeking a way to gain access to classified and confidential information from the proposing States. To this end, she is looking for mechanisms that will give these States assurances that such information will be sufficiently protected by her Office, while enabling her to form the best possible answer to the question: “Is this individual or entity on the list today on a sufficient basis?”

The big question is, of course, whether she will succeed in all of this, and as proof of that success, on the one hand get a certain number of the petitioners delisted, and on the other hand be put in the position by the Committee to publish a convincing report in those cases where persons are not delisted. If the Ombudsperson succeeds in doing all of that, will it all be enough, as she put it in her briefing? She will certainly have provided a number of answers to the qualms of the General Court in Kadi 2010. That Court also seemed willing to entertain the idea of contemplating ex parte information under protective arrangements. Would it be willing to do so with information received under protective orders by the Ombudsperson, ex parte once removed, so to say? That is uncertain, but at least the dialogue seems to be well and truly engaged.

9. Conclusions

Thus the dialogue between the regional level and the worldwide level is continuing. It is now the turn of the UN level, through the Ombudsperson, to proffer a carrot to the regional level. Whether she will be able to do so remains uncertain at the time of writing and will only become really clear after she has treated a number of cases. If the proposing States do not give her a chance to succeed (by not collaborating in protective mechanisms under which the Ombudsperson can consult classified information from their files and by not consenting that their identity shall be made known to the petitioner), the conclusion is foregone and the UN sanctions system will be in dire straits, as the national and regional courts will see no reason to show flexibility on their part.

If Mrs Prost succeeds, however, the question is whether the regional and national courts must keep to their strict approach, according to which only full judicial control at Security Council level is enough. If such judicial control were to remain limited to cases where the rights of individuals are at stake, it might not be entirely outside the realm of the possible. The possibility of full

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[67] Briefing, p. 6. It is interesting to note that in her Report, at par. 25, she states that she is still seeking for a defined standard by which this question can be answered and that “properly reflects the serious nature and particular context of decisions of the Al Qaeda and Taliban Sanctions Committee and at the same time recognizes the significant effect of the sanctions on the listed individuals and entities”. This promises to be a difficult balancing test.
judicial control in such cases has been introduced for example in the EU’s Common Foreign and Security Policy. Nevertheless, even such a system may be a bridge too far for the Security Council. Would the regional courts then take the risk of blowing up de facto the Security Council system of sanctions against individuals, which has been set up for reasons related to modern day terrorism on an international scale? If the UN system of sanctions is indeed, as Mrs Prost has put it, unique and therefore deserves to be treated as such, also by the judicial powers of Member States and regional organisations, why should these Courts not look for a system providing an “adequate level of protection”, if this can be guaranteed in practice by the Office of the Ombudsperson and possibly a further exchange of information between the Ombudsperson and the national and regional courts?

The crucial point in all of this is that the dialogue between the regional level and the universal level should contribute to establishing a working system that demonstrates that the accountability of the international organisations and the courts involved in the system at both levels is seriously improved. This includes the necessary minimum transparency. It is submitted that even a less than perfect system that does not deliver full judicial review of sanctions imposed on individuals under full transparency, may still contribute to a degree of accountability that would meet the requirement of an ‘adequate level of protection’.

On the other hand, a cleaner solution may well be the one suggested, though as yet a bit sotto voce, by Special Rapporteur Martin Scheinin. Is it worth it to continue to tinker with the ‘unique’ Security Council system of freezing of assets, whilst the International Convention for the Suppression of the Financing of Terrorism of 1999 has now been ratified by 173 States and provides for a normal criminal law approach to this phenomenon? Perhaps the time is there to drop the Security Council approach to the financing of terrorism and revert to the Convention that was created at about the same time as SC Res 1267 was adopted.

As stated above, the dialogue between the regional and universal level on the protection of the fundamental rights of individuals in the process of the fight against the kind of terrorism that constitutes a threat to international

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68 See Art. 24(1) of the Treaty on European Union and Art. 275 of the Treaty on the Functioning of the European Union.
69 The term ‘adequate level of protection’ comes from EU data protection law and indicates that the EU will only be able to exchange electronic data with third States that have an ‘adequate level’, but not an ‘identical’ level of data protection laws on the books. See Directive of the Council and Parliament No. 95/46/EC, Art. 25(1). It is obvious that this would be an approach that is again close to the ‘solange’ test.
70 UN doc. A/65/258, par. 52
72 This requires a careful further study of the Convention in relation to the SC sanctions regime, which might well benefit from Karel Wellens’ expertise.
peace and security is well and truly engaged. It is difficult to predict the outcome. Above we have referred to a number of elements that could play a role in the solution. However, there can be little doubt that, whatever happens, the Ombudsperson will be for some time between a rock and a hard place and that it will require all Mrs Prost’s skill to extricate herself from there and bring us closer to a satisfactory solution.