

# The United Nations Security Council Targeted Sanction and Its Impact on Economic, Social and Cultural Rights \*

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## Abstract

*The Security Council has imposed a number of sanctions on targeted individuals and states. These days it has preferred targeted sanctions<sup>1</sup> to the general ones. These targeted financial sanctions and travel bans were also imposed on the families of the targeted and designated individuals. This article focuses on the impact of the smart or designer sanctions on the economic, social and cultural rights of targeted individuals and their families. It discusses the legality of these measures taken against the targeted individuals and their respective family members. The substantive human rights of targeted individuals and their families, inter alia, the right to property, health, work, and the right to education of targeted individuals and their families can be violated. Because of the absence of procedural guarantees in the area targeted individuals cannot defend themselves against the Security Council's action. The author will discuss how these procedural and substantive human rights are violated and the related issue of the right to effective remedies.*

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<sup>1</sup> Targeted sanctions are also referred to as smart sanctions. “These sanctions directly target supposed violators of international law instead of the innocent population.” Andrew Hudson, Not a Great Asset: The UN Security Council's Counter-Terrorism Regime: Violating Human Rights, *Berkeley Journal of International Law*, Vol. 25, Issue 2, ,2007, p. 205. “[I]n addition to freezing of assets, other smart sanctions include suspension of aid, the denial and limitation of access to foreign financial markets, trade embargoes on arms and luxury goods, flight bans and the denial of international travel, visas and educational opportunities.)” *Ibid*, Jane Boulden and Thomas Weiss eds., 2004, as quoted by Andrew Hudson.

**Key Terms:** Listing and Delisting of targeted individuals, Security Council, Socio Economic and Cultural Rights, Targeted Sanction

## Introduction

When the United Nations was established in 1945 as an international organization the *raison d'etre* was the maintenance of international peace and security.<sup>2</sup> The United Nations system was designed to deal with states which are the principal subjects of international law and the Security Council was empowered to take actions against states in response to threats to international peace and security.<sup>3</sup> Therefore, it had never been thought to sanction individuals during the San Francisco Conference. Financial sanctions, commodity boycotts, arms embargoes, and travel bans, replaced general trade sanctions as the preferred instruments of the United Nations policy.<sup>4</sup> The Security Council in its campaign against international terrorism adopted Resolution 1373(2001) as a tool of targeted sanctions to freeze the funds of Al-Qaeda terrorists and their allies, and to block “the travel of designated individuals.”<sup>5</sup> It has to be noted that before the period of the mentioned resolution, the United Nations had already adopted such tools in its different sanction regimes. For example, sanctions through S/RES/1173(1998) which imposed targeted financial sanctions against the UNITA political movement in Angola, its senior officials and their immediate families, and sanctions

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<sup>2</sup> Grant L. Willis, Security Council Targeted Sanctions, Due Process and the 1267 Ombudsperson, from the Selected Works of Grant L. Willis, 2010, Available at: [http://works.bepress.com/grant\\_willis/1](http://works.bepress.com/grant_willis/1)

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

<sup>4</sup> David Cortright and George A. Lopez, Reforming Sanctions, in David M. Malone (ed.), *The Security Council from the Cold War to the 21<sup>st</sup> Century*, Lynne Reiner Publisher, Colorado, London, 2004, P.169.

<sup>5</sup> *Ibid.*

against targeted Taliban officials and their immediate families through Security Council Resolution 1267(1999) and Security Council Resolution 1333(2000).

An attempt is made by the Security Council to exempt some humanitarian transactions or basic needs of both the targeted individuals and their families from the targeted sanctions.<sup>6</sup> But the effort of exemption has another problem with regard to the substantive rights of targeted individuals and their family members. Can victims of targeted sanctions challenge the acts of regional organizations, like the Council of the European Union, as the acts of the Council not as the acts of Security Council (when the former implements the resolutions of the latter), or member states? This is another point of discussion.

Security concerns and the maintenance of international peace and security are some of the reasons for imposing such targeted sanctions. Regional human rights courts (especially the European Human Rights Court) fail to review substantively cases of listings for security reasons. But what about the aforementioned rights of individuals? Would the maintenance of international peace and security, and the security of the nations be endangered simply because targeted individuals are allowed to challenge the acts of the United

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<sup>6</sup> Here we can come up with different kinds of exemptions adopted in the United Nation's sanction regime.

For example in case of : S/RES/1333 (2000) - exemptions can be granted from the imposed travel ban if it would promote discussion of a peaceful resolution. S/RES/1452 (2002)-exemptions can be granted to frozen funds or other financial assets or economic resources to cover "basic expenses" or "extraordinary expenses" of the targeted individual.

Nations and regional organizations? It is a well-developed jurisprudence that victims of human rights violations including victims of economic, social and cultural rights violation should have access to a court and claim remedies. This question calls another issue – the proportionality of the measures taken.<sup>7</sup> To what extent can the Security Council limit economic social and cultural rights of targeted individuals and their families when imposing (economic) sanctions?

Another important and related point is the issue of effective remedy. As targeted individuals (victims) do not have standing before the International Court of Justice and because of the functional immunity of the Security Council, victims will obviously not be able to bring the question of remedy before the international, regional or domestic courts.<sup>8</sup>

This article is divided into sections and concluding remarks. The Security Council and its relation to human rights protection in general will be discussed in the first section. This section examines the duty of the Security Council and comprising states to observe human rights when taking enforcement actions (imposing sanctions) . The second section addresses the issues around the impact of the Security Council sanction on the economic, social and cultural rights of the targeted individuals and their families. Issues

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<sup>7</sup> Erika de Wet, Human Rights Limitations to Economic Enforcement Measures under Article 41 of the United Nations Charter and the Iraqi Sanctions Regime, *Leiden Journal of International Law*, Vol.14, No.2, 2001, P.293.

<sup>8</sup> It has to be noted that currently legal challenges have been presented to the national courts of Belgium, Switzerland, the Netherlands, Pakistan, Turkey, the United States and the United Kingdom. See the Report of the Analytical Support and Sanctions Monitoring Team appointed pursuant to Security Council resolutions 1617 (2005) and 1735 (2006) concerning Al-Qaida and the Taliban and associated individuals and entities (hereinafter the Report of the Analytical Support and Sanctions Monitoring Team).

of effective remedies for violations of economic, social and cultural rights will be raised in the third section which shall be followed by concluding remarks.

## 1. The Security Council and Human Rights

This section focuses on what some scholars call “the human rights paradox”.<sup>9</sup> Since the 1990s human rights have been one of the reasons for the Security Council to impose sanctions regimes. Here, human rights violations are taken as the threat to international peace and security in the language of Article 39 of the United Nations Charter. However, even if human rights reasons can be causes for the Security Council to impose sanctions regimes, its act may also lead to violations of human rights of individuals. Even if scholars call these facts the human rights paradox, it does not seem that there is a real contradiction between them. Except for some human rights that are non-derogable<sup>10</sup>, there are justifiable grounds for limiting human rights. Protecting

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<sup>9</sup> August Reinisch, Developing Human Rights and Humanitarian Law : Accountability of the Security Council for the Imposition of Economic Sanctions, *the American Journal of International Law*, Vol. 95, No.4, 2001, as Quoted at Note 14, P.852.

<sup>10</sup> According to Article 4(2) of the International Covenant on Civil and Political Rights the following are non-derogable human rights: the right to life article, prohibition of torture or cruel, inhuman or degrading punishment, or of medical or scientific experimentation without consent, prohibition of slavery, slave-trade and servitude, prohibition of imprisonment because of inability to fulfill a contractual obligation, the principle of legality in the field of criminal law, the recognition of everyone as a person before the law, and freedom of thought, conscience and religion. The nature of these non-derogable human rights has been described by the Human Rights Committee as follows:

*The rights enshrined in these provisions are non-derogable by the very fact that they are listed in article 4, paragraph 2. The same applies, in relation to States that are parties to the Second Optional Protocol to the Covenant, aiming at the abolition of the death penalty, as prescribed in article 6 of that Protocol. Conceptually, the qualification of a Covenant provision as a non-derogable one does not mean that no limitations or restrictions would*

the rights and freedoms of others can be raised as a ground of limitation. Therefore, these two conflicting interests must be reconciled at some point. It is imperative to establish the Security Council's human rights obligations first before arguing that it should respect human rights of the innocent population at large in the targeted state or the human rights of targeted individuals and their families while imposing sanctions. So, in this regard, it is imperative to establish that the Security Council is bound by human rights.

The following sub-sections will discuss whether the Security Council (its member states) is bound by human rights institutionally as an international organization.

### **1.1. Accountability and Responsibility of the Security Council as an International Organization and the Liability of Member States**

We can address the issue of liability of the Security Council from the perspective of the responsibility of international organizations: whether international organizations in general are bound by human rights. In this sub-section the question of whether or not members (comprising states) of the Security Council would be liable for the acts of the Council will be examined.

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*ever be justified. The reference in article 4, paragraph 2, to article 18, a provision that includes a specific clause on restrictions in its paragraph 3, demonstrates that the permissibility of restrictions is independent of the issue of derogability. Even in times of most serious public emergencies, States that interfere with the freedom to manifest one's religion or belief must justify their actions by referring to the requirements specified in article 18, paragraph 3. On several occasions the Committee has expressed its concern about rights that are non-derogable according to article 4, paragraph 2, being either derogated from or under a risk of derogation owing to inadequacies in the legal regime of the State party. (Human Rights Committee, General Comment 29, States of Emergency (article 4), U.N. Doc. CCPR/C/21/Rev.1/Add.11, paragraph 7, 2001)*

### **1.1.1 Accountability and Responsibility of the Security Council as an International Organization**

By virtue of Article 7(1) of the Charter of the United Nations, the Security Council is one of the six principal organs of the United Nations.<sup>11</sup> As provided in Articles 24, 39-41, and other pertinent provisions of the Charter, the Security Council is primarily responsible for the maintenance of international peace and security. As it has been clearly provided under Article 23(1) of the Charter the Security Council consists of fifteen members of the United Nations, five permanent members and ten non-permanent members.<sup>12</sup>

International organizations including the United Nations as international legal persons possess rights and duties distinct from their member states.<sup>13</sup> The International Law Commission (ILC) also provides that “[e]very international wrongful act of an international organization entails the international responsibility of the international organization.”<sup>14</sup> According to the Commission, the internationally wrongful act of an international organization consists of either an action or omission and: (a) is attributed to the international organization under international law; and (b) constitutes the

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<sup>11</sup> These six principal organs of the United Nations are the General Assembly, the Security Council, the Economic and Social Council, the Trusteeship Council, the International Court of Justice, and the Secretariat.

<sup>12</sup> The Republic of China, France, Russia, the United Kingdom of Great Britain and Northern Ireland, and the United States of America are permanent members of the Security Council. The General Assembly elects ten other Members of the United Nations to be non-permanent members of the Security Council.

<sup>13</sup> C.F. Amerasinghe, *Principles of the Institutional Law of International Organizations*, Second Edition, Cambridge University Press, Cambridge, 2005, P.10.

<sup>14</sup> ILA Committee on the Accountability of International Organizations, as quoted by Nigel D. White, *Infra* at Note 20, P. 94.

breach of an international obligation.<sup>15</sup> As a matter of principle, an international organization that has an international legal personality is responsible for its acts.<sup>16</sup> Therefore, the United Nations as an international person has its own rights and duties.

### **1.1.2. The purposes and the principle of the United Nations**

One can also see the liability of the Security Council from the angle of the purposes and the principle of the United Nations. The Security Council is bound by the fundamental principles and values as enshrined in the Charter and the Universal Declaration of Human Rights.<sup>17</sup> The preamble of the Charter makes it clear that the United Nations reaffirms fundamental human rights, and the dignity and worth of the human person. Moreover, the achievement of “[...] international cooperation in solving international problems of an economic, social, cultural or humanitarian character are also some of the purposes of the United Nations.”<sup>18</sup> Therefore, as an international organization with rights and duties, the Security Council is in general bound by human rights and in particular when it imposes sanctions regime.

### **1.1.3. The Liability of Member States**

The most important question to be addressed here is whether members of the Security Council (both permanent and non-permanent members) are liable for violations of human rights as a state apart from the liability of the Security Council? The distinction between the organization and its member states

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<sup>15</sup> *Ibid.*

<sup>16</sup> *Ibid.*

<sup>17</sup> *Id.*, P. 93.

<sup>18</sup> The Charter of the United Nations, 1945, Article 1(3).



with regard to powers, rights, duties and liabilities is the character of international organizations.<sup>19</sup> So, the act of the Council (including imposing sanctions regimes) will not be taken as the act of member states. In addressing this issue, Nigel D. White argues that:

*At the level of organizational decision making though, human rights obligations are directly applicable to the Security Council. The fact that it is made up of states and that the permanent members may have too great an influence on particular decisions does not shift responsibility for Security Council decisions from the organ to the states. Once a decision of the Council is made it is a reflection of its will, not just an amalgamation of member states.*<sup>20</sup>

Therefore, institutionally speaking it is only the United Nations not its members that will be liable for human rights violations. But there are cases in which members of the Security Council may be liable for human rights violations. For instance if we take economic, social and cultural rights, as almost all members of the Security Council are also parties to the Covenant on Economic, Social and Cultural rights, by virtue of Article 2(1) of the Covenant, they are liable for economic, social and cultural rights violations of their nationals and residents.

According to the European Court of Human Rights in the *Bosphorus* judgment, state action in taking measure to discharge its obligation under international organizations is justified if the relevant organization protects

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<sup>19</sup> *Id.*, P. 82.

<sup>20</sup> Nigel D. White, Applicability of Economic and Social Rights to the UN Security Council; in Baderin, M., and Corquodale R., (eds.) *Economic, Social and Cultural Rights in Action*, Oxford University Press, New York, First Edition, 2007, PP., 96-97.

fundamental rights and the measures taken are equivalent to what the European Charter on Human Rights provides.<sup>21</sup> Even if this is the jurisprudence of a regional human right system, we can argue by the same analogy that one of the purposes and objectives of the United Nations Charter is the promotion of human rights. International human right instruments like the International Covenant on Economic, Social and Cultural Rights, the Universal Declaration of Human Rights and others that protect the economic, social and cultural rights of targeted individuals and targeted family members, are adopted by the organs of the United Nations. Therefore, members of the Security Council cannot invoke their obligation in the United Nations for violating human rights if their measures are not “proportional and equivalent” and in line with Article 2(1) of the International Covenant on Economic, Social and Cultural Rights. At this juncture another important point can be raised: what about the obligation of member states of the Security Council as provided under the United Nations Charter? The Charter, under Article 103, provides:

*In the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligation under any international agreement, their obligations under the present Charter shall prevail.*

Does this article contravene the case law in the *Bosphorus* judgment? Can member states invoke this article to violate economic, social and cultural rights in the targeted state? The intention of the drafters does not seem to

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<sup>21</sup> European Court of Human Rights, Grand Chamber, *Bosphorus Hava Yollari Turim Ve Ticaret Anonim Sirketi Vs.Ireland* ,Para.155.

envisage the “primary” purposes and objectives of the Charter (promotion of human rights is one of the purposes and objectives of the Charter).<sup>22</sup> But it seems to envisage other “secondary” obligation imposed by the Council, under Articles 25 and 41 of the Charter.<sup>23</sup> For instance, member states must accept their obligation under the Charter over conflicting obligations in trade agreements.<sup>24</sup>

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<sup>22</sup> Nigel D. White, *Supra* note 20, P.100.

<sup>23</sup> *Ibid.* However, some scholars argue that according to the teleological interpretation of Article 103 of the United Nations Charter the Security Council’s decisions are binding on member states over conflicting conventional human right obligations. See Maurizio Arcari, Limits to Security Council Powers under the UN Charter and Issues of Charter Interpretation, *Polish Year Book of International Law*, 32, 239, 2012, p. 248.

<sup>24</sup> *Ibid.* According to the view of the Human Rights Committee there are cases under which a state party may not be duty bound to comply with the resolutions of the Security Council. The Human Rights Committees states:

*As to the merits, the State party must take responsibility for the implementation of Security Council resolution 1267 (1999) and related resolutions. It is not correct to say that the State party is bound to implement sanctions imposed by the Security Council. Article 103 of the Charter does not apply because the Security Council was acting ultra vires in adopting the resolutions that imposed the sanctions. Thus, the resolutions are not "obligations" within the meaning of Article 103. In imposing sanctions on individuals as part of its efforts to combat terrorism, the Security Council has exceeded its powers under the Charter. While the resolutions setting out the sanctions regime were adopted under Chapter VII, that does not mean that they are binding on Members of the United Nations, since a body must adopt decisions that are within its powers. The oversight of Member States and legal precedent are now the only constraints on the Security Council preventing it from imposing its will through a contrived finding of a threat to international peace and security. The Security Council must act in accordance with the purposes and principles of the United Nations, with the customary interpretation of the Charter and with international legal precedent. The authors in this case are not a threat to international peace and security as defined in Article 39 of the Charter of the United Nations. Recourse to Chapter VII is admissible where a situation has massive cross-border repercussions. In the alternative, recourse to Chapter VII has always been contested by certain States, indicating a lack of opinio juris. Given the lack of opinio juris, resolution 1267 (1999) and related resolutions are contra legem: the fight against an "invisible" enemy does not dispense with the obligation to respect the Charter as currently interpreted. ( Views the Human Rights Committee under Article 5, Paragraph 4, of the*

## 1.2. Legal Basis for the Liability of the Security Council

The question of the liability of the Security Council for human rights violations can be answered by taking into account the fundamental principles of the United Nations, peremptory norms of international law, and general principles of law.

### 1.2.1 Fundamental Principles of the United Nations

As it is provided under Chapter VII of the Charter of the United Nations, the Security Council is responsible for the maintenance and restoration of international peace and security. Article 39 of the Charter provides:

*The Security Council shall determine the existence of any threat to the peace, breach of the peace, or act of aggression and shall make recommendations, or decide what measures shall be taken in accordance with Articles 41 and 42, to maintain international peace and security.*

Accordingly, the Security Council has been using sanctions regimes as tools to maintain and restore international peace and security. There is no clear provision in the Charter of the United Nations that shows whether in doing so the Security Council is bound by human rights. In this regard White argues that even if the Security Council and other organs of the United Nations are duty bound to promote and protect [economic, social and cultural rights] “there is little in the Charter that suggests it is itself bound by human rights.”<sup>25</sup>

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Optional Protocol to the International Covenant on Civil and Political Rights, Communication No. 1472/2006, Para. 5.6)

<sup>25</sup> *Id.*, P.92.

Even Article 41 of the Charter, which is about non-military measures of the Security Council including imposing sanctions regimes, is silent on the duty of the Security Council to respect human rights in imposing sanctions regimes. But does the absence of a clear provision in the Charter mean that the Security Council is allowed to violate human rights? Before making conclusion, it is important to closely examine other pertinent provisions of the Charter in light of Article 41 of the Charter.

Some provisions of the Charter (Articles 1(1) and 55) are pertinent to the issue at hand.<sup>26</sup> From the reading of Article 1(1) of the Charter we can understand that one of the purposes of the United Nations is the maintenance of international peace and security. In doing so, the United Nations (the Security Council as one of its principal organs)<sup>27</sup> has to observe principles of justice and international law. Here as an international organization, the Security Council is duty bound to observe human rights enshrined in different international and regional human rights instruments. It is also important to note the achievement of international cooperation in promoting and encouraging respect for human right and for fundamental freedoms as the other purpose of the United Nations in general and the the Security Council in particular.<sup>28</sup> According to Article 55 of the Charter, the United Nations is

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<sup>26</sup> Roger Normand, A Human Rights Assessment of Sanctions: The Case of Iraq, 1990-1997, in: Van Genugten, Willem J.M. and de Groot, Gerard A.(eds.) *United Nations Sanctions*, Intersentia, Antwerpen-Groningen-Oxford, 1999, PP. 24-25.

<sup>27</sup> Article 7(1) of the Charter establishes seven principal organs. One of these seven principal organs is the Security Council.

<sup>28</sup> The Charter of the United Nations , *Supra* note 18, Article 1(3).

duty bound to promote higher standards of living, full employment, and conditions of economic and social progress and development. From the close reading of the aforementioned articles of the Charter we can understand that, in one way or another, the United Nations is duty bound to respect and even to protect human rights.

Article 24(2) of the Charter is pertinent to the issue at hand. According to this article the Security Council in discharging its duties provided in paragraph 1 of the same article should act in accordance with the purposes and principles of the United Nations. This is supported by Roger Normand who wrote as follows:

*[...], under both the Charter and international law, the Security Council's enforcement powers are limited by human rights and humanitarian standards. Article 24 of the Charter directs the Council 'to act in accordance with the Purposes and Principles of the United Nations' in the use of its authority to maintain peace and security. Among the most fundamental 'Purposes and Principles' listed in Article 1 is the promotion of human rights. Indeed, the Preamble to the Charter begins by stating its determination 'to reaffirm faith in fundamental human rights and in dignity and worth of human person'.<sup>29</sup>*

Therefore, according to Article 24(2) of the Charter (even without resorting to other articles of the Charter ) we can conclude that the Security Council must be abided by by human rights when it imposes sanctions according to Article 41 of the Charter.

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<sup>29</sup> Roger Normand, *Supra* note 26, PP. 24-25.

We can also address this issue from the perspective of the duty of the United Nations to promote human rights. Promotion and violation of human rights cannot go hand in hand. The United Nations cannot promote human rights if at the same time it violates these rights. Therefore, even if the primary responsibility of the United Nations is the promotion of human rights, it is also duty bound not to infringe upon human rights in general, and when it imposes sanctions regimes in particular. As Roger Normand points out the Security Council should act in accordance with humanitarian and human rights principles.<sup>30</sup>

### 1.2.2. General Principles of Law

The liability of the Security Council for human rights violations, in general, and in imposing sanctions regimes in particular can be established from the perspective of general principles of law. As the International Law Commission (ILC) states:

*Human rights obligations, which are increasingly becoming an expression of the common constitutional traditions of states, can become binding upon [organizations] in different ways: through the terms of their constituent instruments; as customary international law;*

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<sup>30</sup> *Id.*, P.25. Roger Normand argues that:

*The Security Council's human rights obligations are not identical to those of a state. [...] [W]hen confronting threats to peace and security the Council may require some latitude of action beyond allowed to states. Yet by either standard, the Security Council obliged to act in accordance with human rights and humanitarian principles when perusing collective action. The contrary view, that the Security Council is free to violate these principles, ignores not only the Charter but also common sense.*

*or as general principles of law or if an [organization] is authorized to become a party to human rights treaty.*<sup>31</sup>

It is obvious that as the United Nations has not ratified and cannot ratify international or regional human rights instruments it is not a party to human rights instruments.<sup>32</sup> Therefore, even if the United Nations has neither ratified nor acceded to these human rights instruments, it will be liable to those human rights principles that become general principles of international law and that can be seen as authoritative interpretation of human rights obligations.<sup>33</sup> So, in addition to the duty of the United Nations to respect human rights in imposing sanctions that arise from the interpretation of the pertinent provisions of the Charter, the Security Council is also bound by basic human rights and it is responsible for any violation arising out of targeted sanctions against states or individuals.<sup>34</sup>

### **1.2.3. Peremptory Norms of International Law**

Another ground for the United Nations to be bound by human rights is peremptory norms of international law. Even if the customary law status of human rights is more controversial, economic embargoes “seem to qualify as customary rules.”<sup>35</sup> Here peremptory norms of international law come into the picture. Some basic human rights norms “have attained the status of non-

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<sup>31</sup> ILA Committee, *Supra* note 14, P. 95.

<sup>32</sup> Iain Cameron, UN Targeted Sanctions, Legal Safeguards and the European Convention on Human Rights, *the Nordic Journal of International Law*, Vol. 72, No., 2, 2003, P.167.

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

<sup>34</sup> Nigel D. White, *Supra* note 20, P. 95.

<sup>35</sup> August Reinisch, *Supra* note 9, PP.859-860.



derogable, peremptory norms in the sense of *jus cogens* obligations.’’<sup>36</sup> The effect of the Security Council resolution (arms embargo on Bosnia) was taken as a violation of the peremptory norms of *jus cogens*.<sup>37</sup> In this regard Judge Lauterpacht said:

*[...], it is not contemplated that the Security Council would ever deliberately adopt a resolution clearly and deliberately flouting a rule of jus cogens or requiring a violation of human rights. But the possibility that a Security Council resolution inadvertently or in an unforeseen manner lead to such a situation cannot be excluded. And that, it appears, is what has happened here. On this basis, the inability of Bosnia-Herzegovina to fight back against the Serbs and effectively to prevent the implementation of the Serbian policy of ethnic cleansing is at least in part directly attributable to the fact that the access to weapons and equipment has been severely limited by the embargo. Viewed in this light, the Security Council resolution can be seen as having in effect called on members of the United Nations, albeit unknowingly and absurdly unwillingly, to become in some degree supporters of the genocidal activity of the Serbs and in this manner and to that extent to act contrary to a rule of jus cogens.*<sup>38</sup>

Even if if this statement is the separate opinion of the judge it tells us some thing about the direct or the indirect effect of the Security Council resolution on human right violations. Therefore, the Security Council is not only duty

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<sup>36</sup> *Ibid.*

<sup>37</sup> International Court of Justice, *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia-Herzegovina V. Yugoslavia)*, *Provisional Measures II*, Order of 13 September 1993, ICJ Reports 1993, P.325, Separate Opinion Lauterpacht, Para. 102.

<sup>38</sup> *Ibid.*

bound to respect these peremptory norms of *jus cogens*, but also “a resolution which [violated] *jus cogens* must then become void and legally ineffective.”<sup>39</sup>

In *Ahmed Ali Yusuf, and Al Barakaat International Foundation V. Council of the European Union, and Commission of the European Communities, supported by United Kingdom of Great Britain and Northern Ireland*, the applicants alleged that the breach of their right to make use of their property, breach of the right of a fair hearing and breach of their right to an effective judicial remedy as a breach of peremptory norms of *jus cogens*. With regard to the right to property, the Court seems to conclude that this right falls under the peremptory norms of *jus cogens*. But according to the Court it is only an arbitrary deprivation of the right to property that can be regarded as contrary to peremptory norms of *jus cogens*.<sup>40</sup>

As far as the right to be heard is concerned, the Court also decided that as the Security Council adopted the Guidelines of the Sanctions Committee for the conduct of its work, it intended to protect the fundamental rights of persons in particular their right to be heard.<sup>41</sup> And also the Court makes it clear that the European Community institutions do not have power of checking and reviewing the acts of the Security Council and the Sanctions Committee.<sup>42</sup>

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<sup>39</sup> *Id.*, Para. 104.

<sup>40</sup> Court of First Instance, *Ahmed Ali Yusuf, and Al Barakaat International Foundation V. Council of the European Union, and Commission of the European Communities, supported by United Kingdom of Great Britain and Northern Ireland*, Judgement, 21 September 2005, Para.293.

<sup>41</sup> *Id.*, Para. 312.

<sup>42</sup> *Id.*, Para. 321.

Concerning the alleged breach of the right to an effective remedy, taking into account the legitimate objectives pursued, the interest of maintaining peace and security, and the setting up of the Sanctions Committee, the Court rejected the alleged breach of the applicants' rights to an effective remedy.<sup>43</sup>

Even if this case is important to show that the Security Council must take into account the peremptory norms of *jus cogens*, the concept of *jus cogens* is poorly argued in the case. If we take the stand of the Court and recognise the aforementioned breaches as a breach of the norm of *jus cogens*, no derogation is permitted from such norms. But the Court provides grounds or conditions under which the limitation of those rights is justified. Whether or not the right to property, fair hearing and judicial remedy fall within the realms of peremptory norms of *jus cogens* is questionable because "it is acknowledged that *jus cogens* forms a core of international rules that must be respected in all circumstances."<sup>44</sup>

In the above paragraphs different grounds under which the Security Council is duty bound to respect human rights when it takes an enforcement action in general and in imposing sanctions in particular under Chapter VII the United Nations Charter have been discussed. However, there are also different lines of counter arguments that may lead to conclude to the contrary. These counter arguments mainly focus on the major tasks and functions of the Security Council, i.e., the maintenance and restoration of international peace and security. As Reinisch states:

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<sup>43</sup> *Id.*, Paras. 344-6.

<sup>44</sup> August Reinisch, *Supra* note 9, P.859.

*The most prominent theory, which ‘liberates’ the Security Council from any legal constraints, is based on the argument that the Council, as the main ‘executive’ organ of the United Nations, was deliberately exempted from legal limits when fulfilling its major task of securing world peace and security. According to this view, that exemption conforms [to] the general tendency which prevailed in drafting the Charter; the predominance of the political over the legal approach. This approach maintains that its peace preserving and peace restoring function can be carried out best when the Council freely decides if, when, against whom, and how to react threats to and breaches of world peace and security. This condition is reinforced by the fact the Security Council is not ‘a law enforcement’ organ.<sup>45</sup>*

However, it should be born in mind that the Charter is both a legal and political document. And also, as we have already seen, the peace maintaining and restoring function of the Security Council has its own limitations. The Security Council being an executive organ of the United Nations, it is duty bound to observe human rights principles. The predominant position taken during the preparatory works of the Charter cannot be taken as a sole reason to discharge the Council from observing the principles of the United Nations.<sup>46</sup> At the San Francisco Conference an amendment was proposed by the delegation of Ecuador stating that ‘[i]n the fulfillment of the duties inherent in its responsibility to maintain international peace and security, the Security Council shall...respect and enforce and apply the principles or rule of existing law was not accepted.’<sup>47</sup> Another counter argument is based on the textual interpretation of the Charter. “This view is mainly based on a literal

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<sup>45</sup> *Id.*, P. 855.

<sup>46</sup> *Id.*, P.856.

<sup>47</sup> *Ibid.*

and systematic interpretation of the Charter, which does not include an express provision requiring the Security Council to respect international law.’’<sup>48</sup> In the absence of a clear provision to that effect it would be unreasonable to conclude so. Because the subsequent practice of the Security Council does not support this line of argument and conclusion, and it also violates the principles of interpretations provided in the Vienna Convention on the Law of Treaties.<sup>49</sup> According to this Convention “[a] treaty [should] be interpreted [...] in accordance with the ordinary meaning to be given to the terms of the treaty, in their context and in the light of its object and purpose.’’<sup>50</sup> In interpreting a treaty, *inter alia*, subsequent practices in the application of the treaty should be taken into account, as a supplementary means of interpretation.<sup>51</sup>

Because of the limitations imposed on the powers and functions of the Security Council under Article 24 (2) of the Charter; and the recognition given to human rights, it is difficult to conclude that the Security Council is not bound by human rights.

Traditionally, acts of aggression, breaches of international peace and security through armed conflict, and armed conflicts that are threat to international peace and security are considered to be the concerns of the Security Council under Article 24 and Chapter VII of the Charter. Emerging trends suggest that

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<sup>48</sup> *Id.*, P.858.

<sup>49</sup> Vienna Convention on the Law of Treaties, concluded at Vienna on 23 May 1969.

<sup>50</sup> *Id.*, Article 31(1).

<sup>51</sup> *Id.*, Articles 31(3) (b) and 32.

phenomena other than armed conflicts are also considered to be threats to international peace and security. According to Nico J. Schrijver:

*Recently, the Security Council also appeared to embark on the path of interpreting the law-if not creating law-by making pronouncements in a general sense, i.e. not in a specific situation of a particular conflict, but for example, on the threat to peace as a result of the large-scale violation of human rights, international terrorism or the spread of what has so dramatically but correctly been called “diseases of mass destruction, such as AIDS.”*<sup>52</sup>

This is the recent interpretation given to the term “threat to peace” in the Charter of the United Nations. Schrijver describes this change as follows:

*The [...] change is the drastically different interpretation of the term “threat to peace”. [...] More attention was soon devoted to “positive peace”, a legal order based on the other global values reflected in Article 1, Paras. 2 to 4. Now there exists a consensus in the United Nations that threats to peace do not only result from wars between and within states, but also from the spread of weapons of mass destruction, international terrorism, transnational organized crimes, infectious diseases, and even-if not yet in the practice of the Security Council – from serious poverty and under development and from serious environmental pollution.*<sup>53</sup>

The same issue was raised in the Resolution of the General Assembly adopted in the 2005 World Summit Outcome:

*We are determined to establish a just and lasting peace all over the world in accordance with the purposes and principles of the Charter.*

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<sup>52</sup> Nico J. Schrijver, *The Future of the Charter of the United Nations*: in A. von Bogdany and R. Wolfrum, (eds.) *Max Planck Year Book of United Nations Law*, Vol. 10, 2006, P. 7.

<sup>53</sup> *Ibid.*

*We rededicate ourselves to support all efforts to uphold [...] international cooperation in solving international problems of an economic, social, cultural or humanitarian character and the fulfilment in good faith of the obligations assumed in accordance with the Charter.*<sup>54</sup>

From these paragraphs it can be understood that nowadays, in addition to armed conflict, violations of human rights including economic, social and cultural rights are also considered as threats to international peace and security. According to this concept, international peace and security can be maintained and restored not only by avoiding armed conflict, but also by solving violations of human rights including economic, social and cultural rights.

The following statement of the former United Nations Secretary-General Kofi Anan clearly shows this new development, i.e., the place given to economic, social and cultural rights violations as threats to international peace and security. Kofi Anan says “I am also concerned that we have tended to focus so much on hard threats, forgetting the soft threats, which can be equally disruptive such as the fight against poverty, the HIV epidemic, environmental degradation, inequality and the desperation that some people live under.”<sup>55</sup> Therefore, if human rights issues are considered as threats to international

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<sup>54</sup> General Assembly Resolution 60/1, 2005 World Summit Outcome, Para. 5, at <[http://nestor.rug.nl/webapps/portal/frameset.jsp?tab\\_id=149\\_1&url=/bin/common/course.pl?course\\_id=33528](http://nestor.rug.nl/webapps/portal/frameset.jsp?tab_id=149_1&url=/bin/common/course.pl?course_id=33528)>, (Consulted 04 April 2008)

<sup>55</sup> William Felice, *Respecting, protecting and fulfilling economic and social rights: a UN Security Council?*, Paper presented at the annual meeting of the International Studies Association, Le Centre Sheraton Hotel, Montreal, Quebec, at [www.du.edu/korbel/hrhw/workingpapers/2004/19-felice-2004.pdf](http://www.du.edu/korbel/hrhw/workingpapers/2004/19-felice-2004.pdf) (Consulted 04 April 2014)

peace and security and become the concern of the Security Council, it is logical and legally pausable to conclude that the Security Council is bound by human rights including economic, social and cultural rights.

## **2. Targeted Sanctions as Violations of Economic, Social and Cultural Rights of Targeted Individuals and their Families**

Targeted sanctions do not only aim at targeted individuals, but they are also some times targeted at the immediate families of the targeted individuals. The legality of targeting these immediate family members of the targeted individuals will be discussed. In this section how targeted sanctions violate economic, social and cultural rights of the targeted individuals and available remedies will be discussed.

### **2.1 Targeted Family Members**

Many resolutions of the Security Council in addition to targeting individuals, who are the targets of the sanction, they also target family members of such individuals. Financial sanctions and travel restrictions imposed on the officers of the Haitian military and police were also imposed on their immediate families (Resolution 917 /1994). Resolution 1177/1999 imposed financial sanctions on designated senior officials of UNITA and adult members of their immediate families designated pursuant to Resolution 1127/1997. Resolution 1127/1997 also imposed travel ban on the same list of officials and adult member of the family. In Resolution 1132/1997 the Council imposed travel restriction on members of the military junta of Sierra Leone and their families. The same travel restriction was imposed on designated individuals associated with armed rebel groups and on their families.



Here, one question will be raised: why do these family members of the targeted individuals become victims of the sanctions regimes of the Security Council? Are they targeted because they themselves were involved in the alleged activities, or because of their family tie with the targeted individuals? The legality of the measures taken by the Security Council depends on the answers given to these questions. If these family members themselves were engaged in the alleged activities, financial sanctions and travel restrictions imposed on them can be justified. Financial sanctions imposed on the assets and the property of the family members may also be justified if they are used by the targeted individual in achieving the alleged activities. “A confiscation of property used in crime, even when this belongs to a third party [family members], is not a denial/deprivation of property [...]”<sup>56</sup> In other words the question is , “is this property being frozen because it is suspected that the main target could otherwise easily circumvent the sanctions, or is this property being frozen to punish the family members for being a family?”<sup>57</sup> However, if they have been targeted simply because of their family relationship with the targeted individuals, that would amount to collective punishment.

Even if the family members themselves are not involved in the alleged activities, if their property is used by the targeted individuals, the measure taken by the Security Council cannot be regarded as a collective punishment and illegal. The same is true with regard to travel restrictions. If the family

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<sup>56</sup>Iain Cameron, *Supra* note 32, P. 189.

<sup>57</sup>*Ibid.*

members themselves are engaged in the alleged activities, then the sanctions targeted against them would be justified. However, if the opposite is true, the measures violate rights of these family members and amount to guilt by association.

The aforementioned resolutions of the Security Council seem to impose a blanket sanction as opposed to the targeted one. The resolutions give the Sanctions Committee the power to list the targeted individuals and their family members. It is not clear whether the Committee will look into issues raised by this writer, or simply impose the sanctions because of their family ties. One rationale may be speculated: what if the family members are in no way involved? Is the sanction imposed against these family members to pressurize the suspect into greater cooperation? This may be justified from the point of view of security reasons. But it is difficult to invoke the same justification from the point of view of the human rights of family members. The following discussion on the violations of substantive rights of targeted individuals is also applicable for targeted family members' substantive human rights.

## **2.2 Substantive Rights**

As it has been pointed out targeted sanctions give rise to the violation of economic, social and cultural rights. Human rights are interrelated; the violation of economic right may result in the violation of social and cultural rights. For instance, the enjoyment of social rights requires some one to have access to adequate food, clothing and housing, and the right of families to

assistance.<sup>58</sup> For the enjoyment of these social rights one needs to have access and the right to some economic rights.<sup>59</sup> These economic rights are the right to property, the right to work, and the right to social security.<sup>60</sup> In the following sections the author will discuss how targeted sanctions can affect these interrelated economic, social and cultural rights.

### 2.2.1. The Right to Property

Especially in the case of targeted financial sanctions the most important right that will be violated and which is also the cause for the violation of other economic, social and cultural rights, is the right to property. As the right to property is an economic right which will be highly affected by targeted financial sanctions, the first point of discussion focuses on this right.

The right to property gives different rights to the owner/possessor. The right to *usus, fructus and abusus* are rights of an owner recognized by the law of property. A possessor has the right of *usus* and *fructus*. Targeted financial sanction in one way or another violates these rights of the owner/possessor.

*Targeted financial sanctions include “ [...] measures known as “blocking” or “freezing” of assets of the targeted state, group, or individual. For all intents and purposes, blocking is equivalent to freezing, as both entail a change in the legal status of targeted entities. While title to blocked or frozen assets remains with the*

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<sup>58</sup>Asbjorn Eide ,Economic, Social and Cultural Rights as Human Rights, in Asbjørn Eide, Catarina Krause, and Allan Rosas(eds.), *Economic, Social, and Cultural Rights: A Textbook*. Martinus Nijhoff Publishers/Brill Academic Publi, 1995, p. 20.

<sup>59</sup> *Ibid.*

<sup>60</sup> *Id.*, p. 21.

*targeted person or entity, the exercise of powers and privileges normally associated with ownership is protected [...] Blocking or freezing is specifically understood to mean the prohibition of all transfers, transactions, or other dealings with all real, personal, tangible, or intangible property, as well as the blocking of direct or indirect interest or interests in property, whether present, future, or contingent.*<sup>61</sup>

What should be understood is that targeted financial sanction, especially blocking or freezing of assets, does not mean confiscation. But even if the property or the asset frozen is not confiscated, as the right of the individual over the assets or the property is denied, we can say there is a limitation on the right to property. “Freezing” or “seizure” is temporarily prohibiting the transfer, destruction, conversion, disposition, or movement of property or temporarily assuming custody or control of property on the basis of an order issued by a court or other competent authority.<sup>62</sup> The rationale behind freezing of assets and bank accounts may be to prevent the financing of terrorism.<sup>63</sup> But it is “difficult to see how long term freezing of all of the person’s assets can be justified as ‘necessary in democratic society.’”<sup>64</sup>

Freezing is totally different from confiscation. Confiscation refers to a penalty or a measure taken by a court of law as a result of a criminal offense;

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<sup>61</sup> Natalie Reid, Sue E. Eckert, Jarat Chopra, and Thomas J. Bierstekert, Targeting Financial Sanctions: Harmonizing National Legislation and Regulation, Practices: in David Cortright and George A. Lopez (eds.), *Smart Sanctions, Targeting State Craft*, Roman and Littlefield Publishers, Inc., Lanham, Boulder, New York, Oxford, 2002, P.74.

<sup>62</sup> Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime and the Funding of Terrorism, Warsaw, 2005, Chapter I Art. 1(g).

<sup>63</sup> Iain Cameron, *Supra* note 32, P. 181.

<sup>64</sup> *Id.*, P.189.

and it will give rise to the deprivation of all the rights on the property.<sup>65</sup> So, as far as the severity of the limitation of the right to property is concerned, confiscation seems to be the sever one. Freezing of assets is a provisional measure. However, freezing may have also the same effect as confiscation on the right of the targeted individual. This is because the asset can be frozen for unlimited period of time, and the effect will a denial of property.<sup>66</sup>

In the jurisprudence of the European Court of Human Rights three cumulative criteria should be fulfilled to limit a right: there should be law promulgated by a competent authority, the limitation should have a legitimate aim, and the limitation should be ‘necessary in a democratic society’. If we take the case of freezing of assets by the Security Council, at a regional (the European Union), or national level, there is no competent national, regional or international authority to promulgate law. And the purpose behind this limitation, *inter alia*, is the war on terror, which can be taken as a legitimate aim. What should be decided on a case by case basis and which is of course the controversial criterion is the third one. This criterion calls for the so called principle of proportionality. Whether or not the limitation is proportional to the anticipated legitimate aim is the issue. In this regard Cameron says:

*[...] what sort of proportionality test to be applied? Proportionality in ECtHR (and European Court of Justice, ECJ) case law means a test of both [...] reasonable relationship between the measure and aim to be achieved. If the issue is simply to balance the threat to international peace and security in the abstract with the infringement of the civil*

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<sup>65</sup> Council of Europe Convention, *Supra* note 62, Chapter I Art. I(d).

<sup>66</sup> Iain Cameron, *Supra* note 32, P. 189.

*right of property a temporary freezing entails, then the scales can be assumed to come down on the side of maintaining international peace and security. This is probably the most important purpose of the UN, and courts will be, and should be, cautious of going against the determination of the Security Council.*<sup>67</sup>

So, the principle of proportionality and other related issues can be decided by the Court if and only if all material facts are examined by it. As it has been discussed the Court of First Instance does not review substantively the decision of the Council of the European Union.<sup>68</sup> If the Court cannot review the decision substantively it can hardly decide on the issue of proportionality. Cases of targeted financial sanctions have not yet been brought before the European Court of Human Rights. Should a case ever be brought before it, because of lack of substantive information it will not be able to decide on this issue. Therefore, the legitimacy of limitations on the right to property cannot be ascertained by a court of law. One can imagine what would happen to a case brought before national courts. Because of security reasons national courts would also not have the opportunity to review the case substantively and decide on the issue of proportionality. In the case of the European Court of Human Rights the margin of appreciation is given to the member state. This wider margin of appreciation cannot be tested against the standard of the

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<sup>67</sup> *Id.*, P. 190.

<sup>68</sup> It has to be noted that according to the Lisbon Treaty of 1 December 2009 the European Court of First Instance has been replaced by the European General Court. This treaty amends the structure of the European Court of Justice and creates a judicial body composed of the Court of Justice, the General Court, and the specialized courts. As most of the cases in this article were brought before the Court of First Instance, this author will use the term “ the Court of First Instance”’ thorough out this article.

Court if in the first place it lacks the opportunity to review the case substantively.

### **2.2.2. The Right to Health, Education and Work**

Travel restrictions and visa bans are imposed as targeted sanctions in addition to financial sanctions. Travel restrictions and visa bans may give rise to the violation of some economic, social and cultural rights. Travel restrictions and visa bans may also directly or indirectly affect cultural, scientific, or sports activities and festivities. These travel restrictions may also violate the right to education if one has to attend his education abroad. “Visa bans may also deny elites privileges that they covet such as sending their children abroad to educate.”<sup>69</sup>

Targeted financial sanctions could also affect the financing of the education of the family members, medicine or medical treatments. In addition, “[a]viation sanctions result in a loss of revenue for the affected airline company, which is often state owned, and may cause unemployment and a loss of income for those whose business depends on the targeted airline”<sup>70</sup>. All these are clear violations of economic, social and cultural rights. By the same analogy, when financial sanctions are imposed on the targeted individual’s assets and business, indirectly this may affect the right to work of persons employed by the targeted individual. It is obvious that if the assets and business of the targeted individual are frozen, this may cause

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<sup>69</sup> David Cortright and George A. Lopez, *Sanctions and the Search for Security Challenge to the UN Action*, Lynne Reiner Publisher, London, 2002, P.136.

<sup>70</sup> *Id.*, P.135.

unemployment and loss of income to the targeted individuals and workers employed under them.

It should be remembered that there is an attempt to exempt some transactions and travel restrictions for the sake of humanitarian and religious purposes. This will be discussed in the following subsection.

### **2.2.3 Humanitarian Exemptions**

One of the aims of imposing targeted sanctions is to avoid/reduce the unnecessary suffering of the innocent population. However, targeted sanctions should not also at the same time cause unnecessary suffering on the targeted individuals and their dependents. The concept of unnecessary suffering is used in the context of international humanitarian law to strike the balance between submission of the enemy and humanity. The International Court of Justice defines unnecessary suffering as “a harm greater than that avoidable to achieve legitimate military objectives.”<sup>71</sup> By borrowing the concept of unnecessary suffering from international humanitarian law it is possible to argue that the sanction imposed on targeted individuals should not cause a greater harm than that avoidable to achieve the intended objectives. In the comprehensive sanction of Iraq an attempt was made to exempt some transactions for humanitarian purposes. Because of the human right of targeted individuals the same should also be done insofar as targeted sanction is concerned.

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<sup>71</sup> *The Legality of the Threat or Use of Nuclear Weapons*, ICJ Rep.1996, Para.78.



The Security Council in resolutions 1267 and 1373 and 1390 said nothing with regard to humanitarian exemption. It was Resolution 1542 /2002 for the first time expressly provides provisions for humanitarian exemptions. This Resolution exempts some transactions from the targeted sanction. Among other things, the Resolution exempts funds, financial assets or economic resources that are necessary for basic expenses, including payments for foodstuffs, rent or mortgage, medicine and medical treatment, taxes, insurance premiums, and public utility charges, or exclusively for payment of reasonable professional fees and reimbursement of incurred expenses associated with the provision of legal services, or fees or services charges for routine holding or maintenance of frozen funds or other financial assets or economic resources.<sup>72</sup>

States are duty bound to notify exemptions to the Sanctions Committee established pursuant to Resolution 1267/2002. The exemption will be granted by the state if the Committee has not decided negatively within 48 hours.<sup>73</sup> Extra ordinary expenses are exempted provided that such determination has been notified by the state of nationality or residence to the Committee and has been approved by the Committee.<sup>74</sup>

The Resolution does not provide a guideline on the basis of which the Committee may grant or refuse the exemption. It seems that the discretion of granting and refusing exemptions is exclusively given to the Committee.

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<sup>72</sup> Security Council Resolution 1452/2002, Article 1 (a) at [www.un.org/docs/scres/2002/sc2002.htm](http://www.un.org/docs/scres/2002/sc2002.htm) (Consulted 04 April 2014)

<sup>73</sup> *Ibid.*

<sup>74</sup> *Id.*, Art. 1(b).

Granting or denial of exemption also seems to be affected by the political decision of the Committee, which cannot be reviewed and challenged by an independent and impartial organ. If the Committee decides negatively, it is unlikely that the state of nationality or residence of the targeted individual would go to the extent of granting such exemption. In doing so, the concerned state may end up with violating the Charter of the United Nations (contrary to Articles 25 and 103 of the Charter). Therefore, the fate of the targeted individual falls in the hands of his/her state of nationality or residence and the Sanctions Committee. In the absence of an independent and impartial organ to review the decisions of the Sanctions Committee, adopting a resolution by itself cannot be regarded as a measure in protecting the right of targeted individual.

In addition to these limitations, even if the exemption is granted many practical problems are seen in relation to the amount of money. For instance, a good amount of money may not satisfy the need of rich people even to finance their and their families' normal living expenses.<sup>75</sup> The absence of an objective standard to determine the amount of money needed to finance the aforementioned expenses of the targeted person and his/her families may make things complicated. If the exemption cannot finance the basic needs of the targeted individual and his/her families, mere exemption would be meaningless. As it has been discussed the right to property (an economic right) is a basic right which is the basis for the realization of other economic, social and cultural rights. Therefore, whenever exemption is granted the utmost care should be taken in determining whether or not the exempted

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<sup>75</sup>Iain Cameron, *Supra* note 32, P.177.

amount of money would finance the basic needs of the targeted individual and his/her family members.

### **3. Remedies for Targeted Sanctions that Cause Violations of Economic, Social and Cultural Rights**

This section considers if there is any possibility to claim remedies for those whose economic, social and cultural rights are violated following targeted sanctions by the Security Council (the Sanctions Committee), or violations of these rights arising out of wrongful (improper) listing of regional organizations like the European Union, and by the state of nationality or residence of the targeted persons.

#### **3.1. The United Nations System**

When it comes to the remedies available for the targeted individual against the Security Council, as has been pointed out, victims of targeted sanctions do not have a means of challenging the acts of the Council (the Sanctions Committee) in the United Nations system. The principal judicial organ of the United Nations, the International Court of Justice, is not expressly empowered in the Charter or in its Statute to review the acts of the Security Council. By virtue of Article 34 of the Statute of the International Court of Justice only states can be parties in its contentious jurisdiction. So, the United Nations cannot be a party to a dispute and, therefore, neither can it bring an action nor an action can be brought against it. Even the Court has never clearly expressed that either it has or has no jurisdiction to review the acts of the Security Council. The International Court of Justice does not directly

address these questions and it has impliedly reviewed some cases.<sup>76</sup> However, even if the Court has jurisdiction to review the acts of the Security Council, as individuals can not appear before it as parties they would not have availed themselves of its jurisdiction.

With regard to the jurisdiction of the state of nationality or residence of the targeted individual, it does not have jurisdiction either. This is because of the functional immunity of the United Nations. Some international organizations including the United Nations are immune from the jurisdiction of national courts.<sup>77</sup> This is provided in the Convention of the Principles and Immunities of the United Nations. Article II, Section 2 of the Convention reads:

*The United Nations [the Security Council], its property and assets wherever located and by whosoever held, shall enjoy immunity from every form of legal process except insofar as in any particular case it has expressly waived its immunity. It is, however, understood that no waiver of immunity shall extend to any measure of execution.*<sup>78</sup>

However, it should be remembered that immunity by itself does not waive the liability of the United Nations.<sup>79</sup> In this regard White argues that “even if immunity is still applicable and there is no waiver of immunity by the executive head, the organization [the United Nations] remains bound by its obligations to provide adequate alternative procedures for settling disputes.”<sup>80</sup>

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<sup>76</sup> August Reinisch, *Supra* note 9, P.865.

<sup>77</sup> Nigel D. White, *Supra* note 20, P. 95.

<sup>78</sup> Convention on the Privileges and Immunities of the United Nations, 1946.

<sup>79</sup> Nigel D. White, *Supra* note 20, P. 105.

<sup>80</sup> *Ibid.*

The International Court of Justice addressed the same issue in the following manner:

*[... The] Court wishes to point out that the question of immunity from legal process is distinct from the issue of compensation for any damages incurred as a result of acts performed by the United Nations or by its agents acting in their official capacity.*

*The United Nations may be required to bear responsibility for the damage arising from such acts. However, as is clear from Article VIII, Section 29 of the General Convention, any such claims against the United Nations shall not be dealt with by national courts but shall be settled in accordance with the appropriate modes of settlement that the the United Nations shall make provisions for pursuant to Section 29.<sup>81</sup>*

But if we closely look into Article VIII, Section 29 of the Convention it is difficult to conclude that the section is applicable and pertinent to the issue at hand. The section reads:

*The United Nations shall make provisions for appropriate modes of settlement of:*

- (a) disputes arising out of contracts disputes involving any official of the United Nations or other disputes of a private law character to which the United Nations is a party;*

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<sup>81</sup> *Differences Relating to Immunity from Legal Process of a Special Rapporteur of the Commission of Human Rights*, ICJ.

Rep. 1999, Para.66. Here the International Court of Justice refers to Article VIII, Section 29 of the *Convention on the Privileges and Immunities of the United Nations*, 13 February 1946.

*(b) disputes involving any official of the United Nations who by reason of his official position enjoys immunity, if immunity has not been waived by the Secretary General.*

As we can understand from the reading of this quote, the section is applicable to disputes of a private law character or disputes involving officials of the United Nations. Claims arising out of targeted sanctions are neither disputes of a private law character nor disputes involving officials of the United Nations. As the claims of targeted individuals against the United Nations will be an international claim, the targeted individual lacks competence to bring the claim. So, targeted individuals are out of the ambit of this section. The competence to bring an international claim is for states as they are subjects of international law. In this regard the International Court of Justice in its advisory opinion stated that:

*Competence to bring an international claim is, for those possessing it, the capacity to resort to the customary methods recognized by international law for the establishment, the presentation and settlement of claims....This capacity certainly belongs to the state ; a state can bring an international claim against another state [ international organization, mutatis mutandis] such a claim takes the form of a claim between two political entities, equal in law, similar in form and both the direct subjects of international law...<sup>82</sup>*

Even if victims (targeted individuals) lack the competence to bring an international claim against the United Nations (the Security Council), they can avail themselves of the protection of their state of nationality or residence. In inter-state relations it is common for states to give this diplomatic

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<sup>82</sup> *Reparation for the injuries Suffered in the Service of the United Nations*, ICJ Rep.1949 P.174.

protection for their nationals or residents.<sup>83</sup> Though diplomatic protection is given by a state to its national or residents and it can bring an international claim against another state, *mutatis mutandis*, as states and international organizations are subjects of international law, this claim can also be brought against an international organization including the United Nations.

In the absence of other means of compensation,

*Arbitration might be a fall back option where no other legal recourse is available. In cases where international organizations enjoy immunity from suit before national courts, they are required to agree to alternative dispute settlement of their 'private law dispute' to prevent a denial of justice. A strong policy argument can be made that this requirement holds true even if an issue cannot be identified as a dispute of a private law character. There is no justification for recognizing human rights, including access to courts, without providing any viable remedy against an entity such as the United Nations that is quite capable of violating these rights.*<sup>84</sup>

Therefore, even if currently we do not have a means of compensating victims of targeted sanctions for the violations of their economic, social and cultural rights, the United Nations as the guardian of human rights is expected to design some schemes of compensating these victims.

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<sup>83</sup> *Ibid.* The Court incidentally discusses the issue of diplomatic protections by states in discussing the issue as to whether international organizations (the United Nations) can bring international claim against a state in

respect of the damage caused to the victim or to persons entitled through him.

<sup>84</sup> August Reinisch, *Supra* note 9, P. 867.

### 3.2 Regional Court: The European Court of Human Rights

Though it is not possible to bring cases against the United Nations (the Security Council), it is possible to bring a court action against member states of regional human rights instruments, and possibly against regional organizations for violations of economic, social and cultural rights following targeted sanctions. It is common for individual complaints to bring cases against their states of nationality or residence before regional human right courts like the European Court of Human Rights. The European Court of Human Rights seems to exercise jurisdiction over states that violate human rights in implementing the resolutions of the Security Council. However,

*[...] the European Court of Human Rights is still unlikely to allow claims instituted against an organization's member states, either individually or collectively, for human rights violations attributable to the organization, although certain recent developments may ultimately lead to a fundamental change of attitude in this respect.*<sup>85</sup>

In *Matthews V. United Kingdom* the European Court of Human Rights decided in favour of human rights violations on the part of United Kingdom stemming from the European Commission (hereinafter EC) act.<sup>86</sup> Though the Court can not directly challenge the acts of the EC as it is not a party to the European Convention on Human Rights, it said that “the Convention does not exclude the transfer of competence to international organizations provided that convention rights continue to be secured. Member states’ responsibility

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<sup>85</sup> *Id.*, P.868.

<sup>86</sup> *Ibid.*



therefore continues even after such a transfer.’’<sup>87</sup> Here though the Court does not directly challenge the acts of the EC, we can conclude that indirectly it reviewed the acts of the EC.

In implementing the listings of the Security Council (the Sanctions Committee), the Council of the European Union has adopted a number of regulations. All regulations of the Council are adopted on the basis of the listings of the Security Council (the Sanctions Committee). The European Union regulations are updated to incorporate and adjust changes in the Security Council’s list, and these regulations are domestically applied in the member states and take precedence over national law.<sup>88</sup>

It has been contested that the European Union does not have power to adopt these regulations and violate the rights of targeted individuals. Regulation (EC) No. 337/2000 was adopted by the European Union to implement the Security Council’s Resolution 1267 and Regulation (EC) No. 467/2001 was added to implement the Security Council’s Resolution 1333.<sup>89</sup> The European Union also adopted Regulation No. 2580/2001 and others to establish a list managed by European Union.<sup>90</sup>

Unlike the delisting procedure of the Security Council’s Sanctions Committee, in the European Union system enlisted persons or entities have

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<sup>87</sup> The European Court of Human Rights, *Matthews Vs. the United Kingdom*, Judgment, 18 February 1999, Para.32.

<sup>88</sup> David Cortright and George A. Lopez (eds.), *Supra* note 61, P.48.

<sup>89</sup> Provisional draft report on UN Security Council and European Union black lists, Para.20, at <<http://www.libertysecurity.org/article1716.html>> (Consulted 20 April 2008)

<sup>90</sup> *Ibid.*

the possibility of challenging the Council's decision before the European Court of First Instance and the European Court of Justice.<sup>91</sup> In this regard it

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<sup>91</sup> The case of Yassin Abdullah Kadi and Al Barakaat International Foundation v. Council of the European Union and Commission of the European Communities (joined cases C-402/05 P and C-415/05 P; hereinafter "the Kadi judgment") concerned the freezing of the applicants' assets pursuant to European Community regulations adopted in connection with the implementation of Security Council resolutions 1267 (1999), 1333 (2000) and 1390 (2002), which, among other things, required all UN member States to take measures to freeze the funds and other financial resources of the individuals and entities identified by the Security Council's Sanctions Committee as being associated with Osama bin Laden, al-Qaeda or the Taliban. In that case the applicants fell within that category and their assets had thus been frozen – a measure that for them constituted a breach of their fundamental right to respect for property as protected by the Treaty instituting the European Community ("the EC Treaty"). They contended that the EC regulations had been adopted *ultra vires*.

On 21 September 2005 the Court of First Instance (which on 1 December 2009 became known as the "General Court") rejected those complaints and confirmed the lawfulness of the regulations, finding mainly that Article 103 of the Charter had the effect of placing Security Council resolutions above all other international obligations (except for those covered by *jus cogens*), including those arising from the EC treaty. It concluded that it was not entitled to review Security Council resolutions, even on an incidental basis, to ascertain whether they respected fundamental rights.

Mr Kadi appealed to the CJEC (which on 1 December 2009 became known as the Court of Justice of the European Union). The appeal was examined by a Grand Chamber jointly with another case. In its judgment of 3 September 2008 the CJEC found that, in view of the internal and autonomous nature of the Community legal order, it had jurisdiction to review the lawfulness of a Community regulation adopted within the ambit of that order even if its purpose was to implement a Security Council resolution. It thus held that, even though it was not for the Community judicature to examine the lawfulness of Security Council resolutions, it was entitled to review Community acts or acts of member States designed to give effect to such resolutions, and that this would not entail any challenge to the primacy of that resolution in international law.

The CJEC concluded that the Community judicature had to ensure the review, in principle the full review, of the lawfulness of all Community acts in the light of the fundamental rights forming an integral part of the general principles of Community law, including review of Community measures which, like the contested regulation, were designed to give effect to resolutions of the Security Council. The judgment contained the following relevant passages:

In this connection it is to be borne in mind that the Community is based on the rule of law, inasmuch as neither its Member States nor its institutions can avoid review of the conformity of their acts with the basic constitutional charter, the EC Treaty, which established a complete system of legal remedies and procedures designed to enable the Court of Justice to review the legality of acts of the institutions (Case 294/83 *Les Verts v Parliament* [1986] ECR 1339, paragraph 23). (Taken from Miša Zgonec-Rožej, Introductory Note to the European Court of

can be said that the European Union system is by far better than the Security Council's Sanctions Committee. At least the political decision of the Council of the European Union is open to be challenged by a court of law. In this respect, the rights to be heard and judicial remedy seem to be protected, which is not of course in the Security Council's system.

Here it is important to discuss *the Yusuf and Kadi case*. The Court of First Instance does not seem it would review the regulations of the Council of the European Union as these regulations are adopted based on the resolutions of the Security Council. The Court said:

*In particular, if the Court were to annul the contested regulation, as the applicants claim it should, although the regulation seems to be imposed by international law, on the ground that act infringe their fundamental rights which are protected by the Community legal order, such annulment would indirectly mean that the resolutions of the Security Council concerned themselves infringe those fundamental rights. In other words, the applicants ask the Court to declare by implication that the provision of international law at issue infringes the fundamental rights of individuals, as protected by the Community legal order.*<sup>92</sup>

The Court by invoking the powers and functions of the Security Council in maintaining international peace and security under Chapter VII and the duty

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Human Rights: *Nada vs. Switzerland*, International Legal Materials, Vol. 52, No.1, 2013, p. 290)

<sup>92</sup> Court of First Instance, *Ahmed Ali Yusuf, and Al Barakaat International Foundation V. Council of the European Union, and Commission of the European Communities*, supported by United Kingdom of Great Britain and Northern Ireland, Judgment, 21 September 2005, Para.293.

of member states under Article 103 of the Charter, concluded that it does not have jurisdiction to review the legality of the acts of the Security Council (the Sanctions Committee).<sup>93</sup> However, the Court seems to conclude that if the resolutions of the Security Council violate peremptory norms of *jus cogens*, it can have the power of indirect judicial review.<sup>94</sup> According to the Court, even if the applicants have the rights to be heard, the immunity of the Security Council is justified by public interests in the maintenance of international peace and security.<sup>95</sup>

Therefore, by invoking these and other reasons, the Court refuses to adjudicate on the application for the annulment of the regulation of the Council. How can security reasons be invoked at the expense of the fundamental rights of the applicants? One can clearly see how the right to be heard of the applicants both at the United Nations and at the European level is denied.

The Court seems to consider the acts and regulations of the European Community not as a separate and independent act of the Union, but as an act of the Security Council. That is why it invoked the duty of member states of the United Nations under Article 25 and the functions and the duty of the Security Council under Chapter VII of the Charter. Here the Court of First Instance follows a different jurisprudence from the European Court of Human Rights.

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<sup>93</sup> *Id.*, Para.270, 272-5.

<sup>94</sup> *Id.*, Para. 277,281-2.

<sup>95</sup> *Id.*, Para. 343-4.

The European Court of Human Rights in its *Bosphorus* judgement hints the possibility of judicial review. In the language of the Court, state's action in taking measure to discharge its obligation under international organizations is justified if the organization protects fundamental rights and measures taken are equivalent to what the European Convention of Human Rights provides.<sup>96</sup> From this judgement one can conclude that the jurisprudence of the European Court of Human Rights protects the right to be heard of individuals listed by the Council of the European Union. The European Court of First Instance, in its reasoning except invoking the peremptory norms of *jus cogens*, does not go far as the European Court of Human Rights.

The jurisprudence of the European Court of Human Rights and the European Court of First Instance in handling claims of delisting in implementing the resolutions of the Security Council (listings of the Sanctions Committee) has been discussed. But what if the European Union itself draws up a list of individuals based on the resolutions of the Security Council? Can individuals challenge this as the act of the Council of the European Union, not as the act of the Security Council? As has been discussed the Court of First Instance in the *Yusuf and Kadi* case considers the annulment of the Community's regulations adopted in implementing the listings drawn up by the Security Council (the Sanctions Committee) as indirectly annulling the resolutions of the Security Council.

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<sup>96</sup> European Court of Human Rights, *Supra* at Note 21.

Unlike Resolution 1267, Resolution 1373 gives the power of drawing up lists of individuals to member states. “In the context of the European Union [also], the lists were established by the Council of the European Union.”<sup>97</sup> Following the lists drawn up by the Council of the European Union, cases were brought before the Court of First Instance. In the cases brought before the Court, even if the Court is not as such supposed to review the acts of the Security Council (the Sanctions Committee), it failed to review cases substantively.<sup>98</sup> The decision of the Council of the European Union

*[...] was annulled as a consequence of procedural flaws. Yet [...] the CFI [the Court of First Instance] did not undertake a substantive review of the decision- that is, a review of whether it was correct that the applicants had been listed or of whether there was in fact no sufficient basis for placing them on the list. The Council subsequently improved its procedure in line with requirements as set out by the Court. [...] The CFI judgements clearly exposed the procedural flaws in the decision making process, and they send a message as to what is expected in this process, However, the most difficult issue relating to a substantive review of the decision taken was left untouched, even at EU level.*<sup>99</sup>

Though reviewing procedurally the decisions of the Council of the European Union can be taken as an achievement by itself, the Court has gone only half way in protecting the right of listed individuals. If the Court cannot review substantively the decisions of the Council of European Union, one cannot conclude that the right of individuals is protected from the arbitrary or not

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<sup>97</sup> August Reinisch, *Supra* note 9, P. 802.

<sup>98</sup> *Id.*, P.798.

<sup>99</sup> *Id.*, P.803.

well-founded decisions of the Council. The rationale behind the failure to review substantively may be security reasons, or it may be considered that courts are not the right organs to review the substance of the decision.<sup>100</sup> However, this issue should also be seen from the angle of the rights of listed individuals. As the question of reviewing the resolutions of the Security Council (listings done by the Sanctions Committee) cannot be raised here, if the Court reviews substantively the decisions of the Council of Europe, it will not amount to interfering in the activities of the Security Council (the Sanctions Committee).

### **3.3 Domestic Courts**

If claims of remedy/compensation are brought before regional human right courts like the European Court of Human Rights, it is presumed that domestic remedies have already been exhausted. However, available and accessible domestic remedies might/not be exhausted. If an individual has a claim that his/her economic, social and cultural rights have been violated by his/her state of nationality or residence in discharging its regional or international obligations, it is clear that he can challenge such acts of the state before domestic courts. For example, in the *Youssef Nada Ebada* (a listed individual) vs. the Office of the Attorney General of Switzerland, the Federal Criminal

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<sup>100</sup> *Id.*, P.801.

Tribunal in Bellinzona awarded Mr. Nada 5,951 Swiss francs.<sup>101</sup> Ali Ghaleb Himmat also was awarded a judgment for a similar complaint.<sup>102</sup>

#### 4. Concluding Remarks

Though it is not expressly provided in the Charter of the United Nations, the Security Council is bound by human rights including economic, social and cultural rights. Even if there are arguments to the contrary, purposes and principles of the United Nations, practices of the Security Council in conducting its duties and functions, one way or the other, show that the Security Council is bound by human rights.

According to the European Court of Human Rights in the *Bosphorus* judgment, state action in taking measure to discharge its obligation under international organizations is justified if the relevant organization protects fundamental rights and the measures taken are equivalent to what the European Convention on Human Rights provides. One of the purposes and objectives of the United Nations Charter is the promotion of human rights. International human right instruments like the International Covenant on Economic, Social and Cultural Rights, the Universal Declaration of Human Rights and others that protect economic, social and cultural rights of targeted individuals and targeted family members, are adopted by the organs of the United Nations. Therefore, members of the Security Council cannot invoke their obligation in the United Nations for economic, social and cultural rights violations of their targeted nationals or residents if their measures are not

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<sup>101</sup> The Report of the Analytical Support and Sanctions Monitoring Team, *Supra* note 8.

<sup>102</sup> *Ibid.*



“proportional and equivalent” and in line with Article 2(1) of the International Covenant on Economic, Social and Cultural Rights. Therefore, in addition to the liability of the Security Council, member states of the United Nations or regional organizations like the European Union can be liable for the violation of economic, social and cultural rights of targeted nationals or residents.

Unlike comprehensive sanctions, targeted sanctions against individuals are imposed by the process of listing and delisting. There is no independent and impartial organ at the United Nations level that reviews and challenges the political decision of the Sanctions Committee. Listing processes done at regional level by the Council of the European Community can be challenged before the Court of First Instance and the European Court of Justice. Even if cases are brought before these courts, the courts do not substantively review the decisions of the Council. They merely try to review procedurally the listings drawn up by the Council.

Because of its functional immunity listings drawn by the Security Council (the Sanctions Committee) cannot be challenged at regional and national levels. However, the European Court of Human Rights, though it does not expressly claim jurisdiction, it tries to review measures of member states taken in discharging their obligations under the Charter of the United Nations. According to this Court, there is a violation of human rights (economic, social and cultural rights) if the protection given by the international organization is not proportional to the right given under the European Convention on Human Rights. Cases of targeted sanctions have never been brought before the European Court of Human Rights. If cases are brought before it, it is expected

that the Court, unlike the Court of First Instance, will review substantively listings done by the member states. So, in that respect a better protection can be expected from the European Court of Human Rights than the Court of First Instance.

Though this end may be achieved by imposing targeted sanctions, it is also important to think about the economic, social and cultural rights of the targeted individuals and their dependents (families). Financial sanctions highly affect the economic, social and cultural rights of these individuals. Travel restrictions also, directly or indirectly, contribute to the violation of economic, social and cultural rights.

There is an attempt by the Security Council (the Sanctions Committee) to exempt some transactions from the financial sanctions and the travel restrictions. The Sanctions Committee has been given a wide discretion either to grant or deny such exemptions. What makes things worse is that the decision of the Committee is final. Like the listing and delisting processes, the decision of the Sanctions Committee cannot be reviewed and challenged before an independent and impartial body. Even if the exemptions to finance some humanitarian and basic needs are granted, it is complained that the exempted amount of money is not enough to finance the needs.

Another problem as far as listing targeted individuals concerned is the lack of distinction between targeted individuals and their (immediate) family members. Resolutions of the Security Council targeting individuals at the same time they also target their (immediate) family members. It is not clear whether these (immediate) family members are targeted because of their

family relationship with the person targeted or they themselves are engaged in the alleged activities. From the point of view of security reasons, the act of the Security Council can be justified. But it remains questionable if the same justification can be given when we see the problem from the angle of the human rights of family members of targeted individuals.